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The Federal-Aid Highway Construction Process: Procedures, Cases, and Plaintiff Strategies

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on the business needs and whether the cycle computation adequately provides for those needs. The variations and refinements suggested above²²⁵ attempt to illustrate such "facts," but by no means do they exhaust the field. The more sophisticated a taxpayer and his records, the better able he will be to take advantage of these variations and refinements and thus possibly present a more detailed and realistic analysis than the *Bardahl* case originally required.²²⁶ In addition to the uniform application of the cycle computation by the courts, the courts have also tended to apply a uniform definition of "working capital" except in a few cases. However, as discussed earlier, working capital for accounting purposes is not necessarily identical to working capital in relation to the ability to pay dividends.²²⁷ It would be advantageous for a taxpayer to point out this distinction to the court.

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The Federal-Aid Highway Construction Process: Procedures, Cases, and Plaintiff Strategies

The demand for modern highways has risen sharply. To meet this surging need, Congress in 1956 enacted the Federal-Aid Highway Act.¹ In so doing the nation embarked upon a massive twenty-year program to construct an interstate highway system linking the major urban areas from coast to coast.² A formidable procedure was established to ad-

225. See Parts III-IV *supra*.

226. An analysis of working capital needs which is too complicated or sophisticated might confuse the court and as a result hurt the proponent of such an analysis. See *Battelstein Inv. Co. v. United States*, 442 F.2d 87 (5th Cir. 1971).

227. See Part V *supra*.

1. Act of June 29, 1956, ch. 462, 70 Stat. 374.

2. The following description of the federal-aid highway program expresses its magnitude and effect:

The pavement area of the system, assembled in one huge parking lot, would be 20 miles square and could accommodate two-thirds of all motor vehicles in the United States. New right-of-way needed amounts to 1½ million acres. Total excavations will move enough material to bury Connecticut knee-deep in dirt. Sand, gravel, and crushed stone for the construction would build a wall 50 feet wide and 9 feet high completely around the world. The concrete used would build six sidewalks to the moon; the tar and asphalt would build driveways for 35 million homes. The steel will take 30 million tons of iron ore, 18 million tons of coal, and 6½ million tons of limestone. Lumber and

minister the complex scheme by which the federal government reimburses the states for highway planning and construction. Although this important process was initially closed to effective public participation, recently issued regulations, new federal statutes, and renewed public interest have opened the federal-aid highway program to public scrutiny.

The wisdom of building roads merely because substantial federal funding is available has recently come under strong attack.³ Now that the social and environmental effects of large-scale highway building are becoming known, more citizens are becoming involved in the planning process.⁴ This comment will discuss: (1) the development of federal highway legislation; (2) the procedural requirements of the federal interstate highway program, including the current case law involving significant challenges to that process; and (3) the problems and potential strategies available to advocate groups in future litigation.

timber requirements would take all the trees from a 400-square-mile forest. Enough culvert and drain pipe is needed to equal the combined water and sewer systems in six cities the size of Chicago.

BUREAU OF PUBLIC ROADS, U.S. DEP'T OF COMMERCE, *AMERICA'S LIFELINES: FEDERAL AID FOR HIGHWAYS 11* (1962), quoted in G. SMERK, *URBAN TRANSPORTATION: THE FEDERAL ROLE 131* (1965).

3. The prevalent assumption that highways and privately owned automobiles present the best system for future transit needs has been severely criticized by planners. John E. Hirten, Assistant to the Secretary of the Department of Transportation, has stated,

What's needed is a "new perception of transportation" which will place goals and objectives for mobility in their proper perspective. The need and desire for mobility and economic benefits as one value must be weighed against the value inherent in social, environmental, ecological, and energy considerations. In order to weigh all these factors in the decisionmaking process, a new approach must be taken in planning and developing transportation facilities and solutions.

Hirten, *Needed—A New Perception in Transportation*, 39 J. AM. INST. PLAN. 278 (1973). See also T. STONE, *BEYOND THE AUTOMOBILE: RESHAPING THE TRANSPORTATION ENVIRONMENT* (1971). The anti-freeway revolt is well documented in magazine and newspaper articles. See Aman, *Urban Highways: The Problems of Route Location and a Proposed Solution*, 47 J. URBAN L. 817, 817 n.1 (1970).

4. A public opinion survey conducted by the Opinion Research Corporation of Princeton, New Jersey revealed several illuminating findings about highways: (1) the public is poorly informed on the subject of highway financing because only one in four persons knows that federal-aid highways are mainly funded by the tax on gasoline; (2) 57% endorse the idea of limiting the use of cars in the downtown areas of cities; (3) 62% choose the automobile, and 33% select public transit for their most frequent trips; (4) 80% characterize their opinion of the U.S. highway system as very favorable or fairly favorable; (5) people have a poor idea of how much each driver pays for federal-aid highways each year; and (6) there is an even division on the question of whether highways have a positive or negative effect on the environment. *Hearings on S. 3589 & S. 3590 Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 92d Cong., 2d Sess., ser. 92-H37, at 682 (1972).

I. DEVELOPMENT OF THE FEDERAL HIGHWAY PROGRAM

The framers of the Constitution recognized the need for a coordinated and efficient transportation system. Their interest was to preserve the free flow of the mails between the states and to normalize communications during the post-Revolutionary War period. They empowered Congress "to establish Post Offices and post Roads."⁵ Although overland travel was difficult, the goal of free interstate movement was clearly acknowledged. Throughout the Nineteenth Century the federal government also aided the transcontinental railroads in a quest to provide rapid and inexpensive transit for the developing western lands.⁶

The involvement of the federal government in roadbuilding began in 1916 when Congress established the Bureau of Roads within the Department of Agriculture to assist in the construction of rural post roads.⁷ This legislation set up the reimbursement framework which remains intact in the federal-aid highway system today. The federal government, through the Department of Agriculture, would refund state expenditures for the planning and construction of approved highways as long as the completed roadway met established federal standards.⁸ Under the 1916 legislation, state highway departments submitted projects of "substantial character" for federal approval, after which up to fifty percent of the project cost could be returned to the state.⁹ The states were under an obligation to maintain the federal-aid highways¹⁰ and to refrain from charging tolls for their use.¹¹ An amendment in 1921 directed the Secretary of Agriculture to give preferential treatment to interstate highways.¹² This directive foreshadowed the ultimate federal emphasis on the interstate system.

By 1944 the program had been considerably expanded. Con-

5. U.S. CONST. art. I, § 8, cl. 7.

6. See generally C. GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890, at 268-71 (1960); R. HUNT, LAW AND LOCOMOTIVES 87-88 (1958); G. KOLKO, RAILROADS AND REGULATION 1877-1916, at 15 (1965).

7. Act of July 11, 1916, ch. 241, 39 Stat. 355.

8. *Id.* at 357.

9. *Id.* Congress initially appropriated five million dollars for the program in 1916. *Id.* at 356. In addition, the allowable reimbursement was limited to ten thousand dollars per mile. *Id.* at 358. This stands in stark contrast to modern roadbuilding costs.

10. *Id.* at 358.

11. *Id.* at 356. This provision has been continued and is codified in 23 U.S.C. § 301 (1970).

12. "That in approving projects to receive Federal aid under the provisions of this Act the Secretary of Agriculture shall give preference to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character." Act of Nov. 9, 1921, ch. 119, § 6, 42 Stat. 212.

gress appropriated one and one-half billion dollars for highway construction during a three-year post-war period.¹³ Emphasis was turned to the creation of a forty thousand mile highway system linking the major urban areas in the nation.¹⁴ In 1956 Congress passed new federal highway aid legislation which was intended to implement the 1916 act and all subsequent amendments.¹⁵ This bill committed substantial federal funds to the nation's highways and increased the federal reimbursement to ninety percent.¹⁶ Again the completion of the interstate highway system became the goal of the program, but this time it was to be financed through the Highway Trust Fund.¹⁷

The final administrative change in the federal roadbuilding effort occurred in 1966 when the Department of Transportation was formed.¹⁸ This newly created agency was established to coordinate the development of all types of transportation,¹⁹ and the Federal Highway Administrator was brought within its organizational structure.²⁰

II. PROCEDURE

The federal interstate highway system presents the observer with a peculiar picture of administrative cooperation. The highways are planned, engineered, constructed, and maintained by the states but financed primarily by the federal government. An elaborate procedure has grown up around the system by which the individual state highway agencies obtain reimbursement for highway building activities. This process entails communication in two directions: application from the states to the Federal Highway Administration (FHWA) and response from the federal agency back to the states. The actors in this system

13. Act of Dec. 20, 1944, ch. 626, 58 Stat. 838.

14. *Id.* at 842. This figure has been increased to 42,500 miles. 23 U.S.C. § 103(e)(3) (1970). In addition, the time estimate for the completion of the interstate system was originally set at sixteen years (1956-1972). Now most observers project completion sometime after 1980.

15. Act of June 29, 1956, ch. 462, 70 Stat. 374.

16. 23 U.S.C. § 120(c) (1970).

17. *Id.* § 101(b) states that "it is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways . . . is essential to the national interest and is one of the most important objectives of this Act." Section 105(c) of that title further provides for preference to be given to projects of an interstate character. Act of June 29, 1956, ch. 462, tit. II, § 209, 70 Stat. 397, created the Highway Trust Fund to be sustained by taxes on road users. The best known of these taxes is the four cents per gallon tax on gasoline sales. Other sources of revenue are taxes on rubber tubes and tires, heavy vehicles, automobiles parts and accessories, and a manufacturers tax on trucks, buses, and trailers.

18. Act of Oct. 15, 1966, Pub. L. No. 89-670, 80 Stat. 931.

19. *Id.* at 933.

20. *Id.* at 932.

are easily identifiable. The states are represented by officials in their respective highway departments. The federal government, on the other hand, delegates administrative power through an extensive pyramid of agents. Atop this structure is the Secretary of the Department of Transportation who vests the Federal Highway Administrator with the power to oversee the federal-aid program. Subordinate to the Federal Highway Administrator are twelve regional officers who seek to insure uniform practices by the state highway departments. Finally, there is one division office located in each state, the District of Columbia, and Puerto Rico.²¹ The function of supervising state action and enforcing compliance with federal statutes, regulations, and memoranda is exercised by the division offices. The division engineer is the principal FHWA representative in each state, and consequently most routine decisionmaking is done by him.²² There is a further subdivision of federal presence into districts and their component areas. The similarity of professional outlook and the close working relationship between the division engineer and state highway department officials has prompted criticism from those who opposed unbridled highway construction. It is argued that important decisions bearing on environmental and social considerations have been made by isolated administrators working with preconceived notions of what is best for the public.²³ Furthermore, when these decisions are litigated, there is often much confusion about the exact requirements of federal law. Judges have been far from uniform in their interpretation of the federal statutes and regulations which prescribe the procedural and substantive requirements of the federal-aid highway construction process.²⁴ Judicial misinterpretation of the statutory mandates is often caused by unknowledgeable counsel who fail adequately to understand and brief the more general

21. 26 Fed. Reg. 12536-39 (1961).

22. FHWA Administrative Memorandum 1-10.2 (Aug. 21, 1969). Federal Highway Administrator Francis C. Turner stated that of the 5,515 Federal-aid highway project approvals made in the first half of 1970, only 154 required Washington office action. Ninety-seven percent of the decisions are made in division offices. *Red Tape—Inquiring into Delays and Excessive Paperwork in Administration of Public Works Programs Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works*, 92d Cong., 1st Sess. 7 (1971) [hereinafter cited as *Red Tape*].

23. Besides the lack of restraints on the discretion of highway officials, institutional self-interest threatens a balanced transportation policy. Tabor R. Stone writes, "This resistance [to alternative transportation modes] is reinforced by that of various state highway departments, whose personnel see their livelihood threatened by any systematic movement that would discourage the continuous production and maintenance of an extensive highway network." T. STONE, *supra* note 3, at 122.

24. Peterson & Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ENV. L. REP. 50001, 50017-18 (1972).

procedural framework for their cases. Fortunately, there has been a substantial amount of highway construction litigation in recent years which has clarified the legal duties of both state and federal officials under federal highway statutes and regulations.

The following narrative describes the procedure by which states are partially reimbursed for planning and constructing roads that are part of the interstate highway system. To simplify matters, the federal-aid highway program can be viewed in five progressive stages: (1) program approval; (2) route location approval; (3) design approval; (4) plans, specification and estimate approval; and (5) construction approval. Each step in this process is preceded by various state and federal actions which are required by federal statute, administrative regulation, and FHWA memoranda.²⁵ Federal repayment for completed work accrues only when the specified prerequisites are met.

A. Program Approval

When Congress authorizes funds for federal-aid highway projects, the Federal Highway Administrator must apportion these monies to the states according to a predetermined formula.²⁶ After a state's share has been determined, it is further divided for use in each category of the federal-aid highway program in that state.²⁷ The state itself decides which particular projects will be proposed for reimbursement. From its own studies measuring present road capacity and future highway demand, the state highway department will establish developmental priorities for road systems. A program of proposed projects is then drawn up which lists every project for which funding will be requested. This program must be submitted to the FHWA for an approval which serves as a condition precedent to future reimbursement.²⁸

25. Many federal requirements appear as directives, memoranda, or regulations. Properly promulgated regulations undoubtedly carry with them the force of law. Directives and memoranda present problems for litigators. *Id.* at 50001-02 n.7. The authority to make policies and procedures is delegated to the Federal Highway Administrator, but 23 C.F.R. § 1.32(a) (1973) specifically declares that such action does not carry with it the legal effect of a regulation. The Comptroller General, on the other hand, has ruled that these policies and procedures do have legal status, 43 COMP. GEN. 31 (1964). The precise legal authority of the various memoranda issued by the Federal Highway Administrator remains unsettled.

26. 23 U.S.C. § 104 (1970). The discussion of this process in Peterson & Kennan, *supra* note 24, at 50003-06, is especially illuminating.

27. This means that the state highway department will know the amount it has to spend on its federally supported primary, secondary, and interstate systems.

28. 23 U.S.C. § 103(f) (1970); FHWA Policy and Procedure Memorandum 20-1, para. 2(a) (April 15, 1958).

Prior to this administrative action, several prerequisites must be fulfilled.

First, in urban areas with a population of more than fifty thousand, each project must be shown to be part of a "continuing comprehensive transportation planning process."²⁹ This requirement, added in 1962, seeks to encourage the application of long range planning principles to transportation programs. In *D.C. Federation of Civic Associations v. Volpe*³⁰ the Court of Appeals for the District of Columbia held that the Secretary, in making this determination, must not rely solely on a single, existing plan but must consider the continuous comprehensive planning process for the area in question.³¹

Second, the state has the duty to coordinate its highway planning activities with its designated A-95 review clearinghouse to assure that notice of each project will be circulated to all interested agencies.³²

Third, it must be determined whether the proposed projects entail work on highways located on the federal-aid system.³³ If a road is not presently situated on the federal-aid system, application must be made to the FHWA to establish that designation.³⁴ The question of what constitutes a federal-aid highway is frequently litigated. Although a road is approved as part of the state's program and located on the federal-aid system, it may fail to become a federal-aid project governed by federal law. Highways constructed entirely with state funds and under the exclusive supervision of state officials are clearly exempt from most of the federal highway construction regulations.³⁵ However, partial federal funding of a highway construction project subjects it to all of the legal requirements of a federal-aid highway. The major question before the courts is when in the highway building process are federal requirements applicable. In *La Raza Unida v. Volpe*³⁶ the court stated that a highway project becomes part of the federal-aid high-

29. 23 U.S.C. § 134 (1970).

30. 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

31. *Id.* at 1239-40.

32. Office of Budget and Management, Circular A-95, *reprinted in* HOUSING & DEV. REP. 110:0701 (1974).

33. The federal statute prohibits program approval of any project not on the federal-aid system. 23 U.S.C. § 105(a) (1970) specifically states that "the Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system."

34. 23 C.F.R. § 1.6 (1973). *See also* FHWA Policy and Procedure Memorandum 10-1 (May 28, 1965).

35. *Civic Improvement Comm'n v. Volpe*, 459 F.2d 957, 958 (4th Cir. 1972) (*per curiam*).

36. 337 F. Supp. 221 (N.D. Cal. 1971).

way system upon location approval and that the various statutes and regulations apply after that time even though a state subsequently does not request actual federal funding.³⁷ The Fifth Circuit in *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*³⁸ took a similar approach. It stated that a highway became a federal project when the Secretary of Transportation authorized federal participation. The court concluded that the highway would remain subject to federal standards even if the state undertook the entire funding of the project.³⁹ Thus some courts have found the applicability of federal highway requirements to depend not upon federal funding but upon state action which initiates the federal-aid highway process.

Fourth, the state highway department must provide assurances to the FHWA that "employment in connection with proposed projects will be provided without regard to race, color, creed or national origin."⁴⁰ This requirement is easy to satisfy on paper but difficult to police in the field.

Fifth, highway projects which propose to use public parklands or historic sites must be justified on two grounds. It is necessary to show that there exists "no feasible and prudent alternative" to the use of the land and that the project will be planned to minimize the harm resulting from the use.⁴¹ This requirement establishes, as a national policy, the preservation of these lands.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*⁴² the Supreme Court concluded that if an interstate highway were to be built through Overton Park in Memphis, Tennessee, the Secretary must first determine that, as a matter of sound engineering, it would not be feasible to

37. *Id.* at 227.

38. 446 F.2d 1013 (5th Cir. 1971).

39. *Id.* at 1027.

40. 23 U.S.C. § 140(a) (1970). Furthermore, if it is considered necessary, the Secretary of the Department of Transportation may

require certification by any State desiring to avail itself of the benefits of this chapter that there are in existence and available on a regional, statewide, or local basis, apprenticeship, skill improvement or other upgrading programs, registered with the Department of Labor or the appropriate State agency, if any, which provide equal opportunity without regard to race, color, creed or national origin.

Id.

41. *Id.* § 138. This section was added in 1968 to make the wording in title 23 identical to that of section 1653(f) in title 49. Title 49 governs all programs and projects subject to the jurisdiction of the Secretary of Transportation.

42. 401 U.S. 402 (1971).

build the highway along any other route.⁴³ In order to escape the prohibitions of section 4(f) of the Department of Transportation Act, the Secretary must also decide that the cost of community disruption resulting from the use of alternative routes must be extraordinarily great or that highly unusual factors exist which demand the use of the parklands for the project.⁴⁴ The Court stressed that the protection of parklands was of paramount importance. Consequently, the decision left the Secretary no room for a wide-ranging balancing of interests.⁴⁵ This decision subjected the Secretary's decision to judicial review. The reviewing court must find that the Secretary's determination was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴⁶ In essence, the court must evaluate the decision to determine whether there was a clear error of judgment in its formulation.⁴⁷

Other cases have expanded the *Overton Park* decision. In *Arlington Coalition on Transportation v. Volpe*⁴⁸ the Fourth Circuit held that in determining what parkland is "significant," and thus within the coverage of the statute, only the value of the land as a park may be considered. Its worth as a highway is not relevant in this evaluation.⁴⁹ A finding by local officials that a small municipal park was more important as a potential highway than as a park did not deprive the park of its "local significance" and thus its protection under the statute.⁵⁰

The definition of what constitutes a "use" of parkland under the statute has also been broadly interpreted by the courts. A park was deemed to be used when a highway was planned to encircle it although none of its land was actually taken.⁵¹ Similarly, parkland was con-

43. *Id.* at 411.

44. *Id.* at 413.

45. *Id.* at 411.

46. *Id.* at 416.

47. The Court's authority and jurisdiction to make this determination are derived from the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970). The Court decided in *Overton Park* that section 706(2)(A) provided the appropriate standard against which to evaluate the Secretary's decision. 401 U.S. at 416. Section 706(2)(A) provides: "The reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" Although the Court found no requirement that written findings of fact accompany the Secretary's decision, Department of Transportation Order 5610.1 now requires such findings whenever the Secretary approves the use of parklands for a highway. 401 U.S. at 417.

48. 458 F.2d 1323 (4th Cir. 1972).

49. *Id.* at 1336.

50. *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1026-27 (5th Cir. 1971).

51. *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972).

sidered to be used when a highway was designed to follow a border of the park.⁵²

The Secretary must make his determination under section 4(f) before program approval is granted. A Department of Transportation Order requires the Secretary to submit written findings along with his decision.⁵³

Finally, the selection of projects to be included in a state's program must be made "by the appropriate local officials and the State highway department in cooperation with each other."⁵⁴ The federal-aid highway statute makes these factors prerequisites for program approval. At this stage in the aid process the public has no direct access to the federal or state agencies which will make important and sometimes irrevocable decisions.⁵⁵

B. Route Location Approval

After federal approval of the list of projects in the state's program has been obtained, the state must then seek route location approval.⁵⁶ The program approval authorizes preliminary engineering and the right-of-way acquisition estimates necessary for alternative location studies which are to follow. The state highway department then explores the various possible locations to determine which presents the most feasible route. In order to comply with federal requirements, the state must prepare estimates illustrating the number of individuals, families, and firms that would be displaced by each suggested placement of the highway and the availability of adequate replacement housing for each alternative.⁵⁷ This information and all supporting data must be available at the subsequent location public hearing. The Uniform Relocation Assistance and Real Property Acquisition Policies Act

52. *Conservation Soc'y v. Secretary of Transp.*, 362 F. Supp. 627, 639 (D. Vt. 1973).

53. See note 47 *supra*.

54. 23 U.S.C. § 105(d) (1970).

55. A FHWA regulation, 23 C.F.R. § 795 (1973), has been promulgated recently which directs state highway departments to develop action plans "[t]o assure that adequate consideration is given to possible social, economic, and environmental effects of proposed highway projects" *Id.* These action plans, which must be approved by the governor of the state and the FHWA regional administrator, are designed to provide specialized impact information during the early stages of highway development. This information must be made available to the public. The action plan requirement will be reviewed intermittently. Non-compliance with the action plan may subject the state highway department to punitive sanctions.

56. See 23 U.S.C. § 128(a) (1970); 23 C.F.R. § 1.8 (1973).

57. FHWA Instructional Memorandum 80-1, para. 14(b) (Dec. 10, 1970). Relocation activities at this stage of the project are described as conceptual stage activities.

of 1970 (URA)⁵⁸ requires that a state participating in the federal-aid highway program give "satisfactory assurances" that:

- (1) . . . "fair and reasonable relocation" payments for moving expenses and for "replacement housing" will be provided to persons who must relocate;
- (2) . . . "relocation assistance programs" will be provided for such displaced persons; and
- (3) . . . "within a reasonable period of time prior to displacement there will be available" adequate replacement housing.⁵⁹

In *La Rasa Unida v. Volpe* and *Lathan v. Volpe*, the courts held that compliance with this segment of the federal relocation statute must occur no later than location approval.⁶⁰

Next, the state highway department must evaluate the potential environmental impact of the proposed highway project and disseminate its findings in the form of a draft impact statement.⁶¹ This report must include the specific items listed in the FHWA policy memoranda.⁶²

58. 42 U.S.C. §§ 4601-55 (1970).

59. *Keith v. Volpe*, 352 F. Supp. 1324, 1341 (C.D. Cal. 1972); see 42 U.S.C. § 4630 (1970). This practice is called giving statewide assurances. FHWA Instructional Memorandum 80-1, paras. 7(a)(1)-(3) (Dec. 10, 1970).

60. *Lathan v. Volpe*, 455 F.2d 1111, 1119 (9th Cir. 1971); *La Raza Unida v. Volpe*, 337 F. Supp. 221, 229 (N.D. Cal. 1971). The Ninth Circuit held in *Lathan* that the congressional purposes behind the URA required that detailed relocation assurances be prepared not later than the location stage. 455 F.2d at 1119.

61. See FHWA Policy and Procedure Memorandum 90-1, para. 5(a) (Aug. 24, 1971). In paragraph 3(c) of that memorandum the environmental impact statement is defined as

a written statement containing an assessment of the anticipated significant beneficial or detrimental effects which the agency decision may have upon the quality of the human environment for the purposes of: (1) assuring that careful attention is given to environmental matters, (2) providing a vehicle for implementing all applicable environmental requirements, and (3) to insure that the environmental impact is taken into account in the agency decision.

The term "human environment" is broadly defined in paragraph 3(f) as, "the aggregate of all external conditions and influences (aesthetic, ecological, biological, cultural, social, economic, historical, etc.) that affect the life of a human." This memorandum has been issued by the FHWA to guide the states and division engineers in the proper execution of national environmental policy. It draws its authority from four sources; (1) the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970); (2) the Department of Transportation Act § 4(f), 49 U.S.C. § 1653(f) (1970); (3) the Historic Preservation Act of 1966 § 106, 16 U.S.C. § 470(f) (1970); and (4) the Clean Air Act of 1970 § 309, 42 U.S.C. § 1857(h)(7) (1970). Seventeen copies of the draft impact statement must be sent to the FHWA division engineer in the state for distribution. FHWA Policy and Procedure Memorandum 90-1, para. 6(d) (Aug. 24, 1971).

62. FHWA Policy and Procedure Memorandum 90-1, app. E (Aug. 24, 1971). This memorandum provides also for the exemption of "urgently needed" highway sections from the requirement of preparing the environmental impact statement. A request for exemption by the state highway department must be approved by the FHWA, the Office of the Secretary of Transportation, and the Council on Environmental Quality. *Id.* para. 5(g).

The FHWA has established rules to determine whether a particular highway section must receive environmental scrutiny.⁶³ Where a highway would (1) cause actual or anticipated opposition to its construction, or (2) significantly affect historic or conservation land, regardless of public ownership, or (3) be classified as a major action likely to significantly affect the quality of the human environment, draft and final environmental statements are required.⁶⁴

Much federal-aid highway litigation at the location stage focuses on the impact statement requirement. Section 102(2)(c) of the National Environmental Policy Act of 1969⁶⁵ "authorizes and directs that, to the fullest extent possible," every agency of the federal government shall:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁶⁶

63. *Id.* app. F. This memorandum uses the term "highway section" and not "project" to describe the length of highway subject to an environmental review. Paragraph 6 of this Memorandum states:

The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. Peacemealing [*sic*] proposed highway improvements in separate environmental statements should be avoided. If possible, the highway section should be of substantial length that would normally be included in a multi-year highway improvement program.

64. *Id.* app. F(1). In paragraph four of this appendix the description of the "negative declaration" is given. No impact statement must be submitted for highway sections in this classification. A section not considered to be a major action and/or not significantly affecting the quality of the human environment is to receive a negative declaration. Whereas a draft environmental impact statement must undergo substantial federal and state scrutiny, the negative declaration is exempted from this analysis. It need only be available for public inspection at the location hearing. *Id.* para. 6(n). Based on new information, a highway department or the FHWA may rescind the negative declaration and have an impact statement prepared. *Id.* para. 6(o). But the ultimate decision on the adequacy of the negative declaration lies in the hands of the FHWA division engineer. *Id.* para. 6(n). This stands in stark contrast to the high level review every draft environmental impact statement must undergo. *Id.* para. 6(d).

65. 42 U.S.C. § 4332(2)(c) (1970).

66. *Id.*

The importance of this statutory mandate has been emphasized many times by the courts. In a leading NEPA case, *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*,⁶⁷ the Court of Appeals for the District of Columbia held that "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department."⁶⁸ Furthermore the court noted that "[T]he Section 102 duties are not inherently flexible; [t]hey must be complied with to the fullest extent, unless there is a clear conflict of statutory authority."⁶⁹ Although *Calvert Cliffs'* concerned an AEC project and not a federal-aid highway, the *Calvert Cliffs'* analysis of NEPA has been widely applied by courts in highway litigation.⁷⁰

In almost all cases, federal-aid highway construction projects constitute "major Federal actions significantly affecting the quality of the human environment" within the meaning and coverage of NEPA.⁷¹ In *Scherr v. Volpe*⁷² the Seventh Circuit examined FHWA Policy and Procedure Memorandum 90-1⁷³ to help it determine the relevant criteria for finding major federal action in the construction of highways. It concluded that a major federal action included even the upgrading of an existing highway when such construction significantly affected the environment.⁷⁴ Moreover, the decision of administrative officials that a particular project was not a major federal action was held subject to broad judicial review.⁷⁵

The Environmental Impact Statement (EIS) required by NEPA must be objective, inclusive, and based on extensive research. *Brooks v. Volpe*⁷⁶ condemned a highway project EIS that was based on generalities and "heavy-handed self-justifications."⁷⁷ The EIS must have a sufficient research base and must be comprehensive enough to provide a useful record for judicial review.⁷⁸ Potential air and noise pol-

67. 449 F.2d 1109 (D.C. Cir. 1971).

68. *Id.* at 1112.

69. *Id.* at 1115; see *Environmental Defense Fund v. Corps of Eng'rs*, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

70. *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972); *Scherr v. Volpe*, 466 F.2d 1027, 1031 (7th Cir. 1972); *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1024-25 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); *Brooks v. Volpe*, 350 F. Supp. 269, 277-79 (W.D. Wash. 1972).

71. 42 U.S.C. § 4332(2)(c) (1970).

72. 466 F.2d 1027 (7th Cir. 1972).

73. FHWA Policy and Procedure Memorandum 90-1 (Aug. 24, 1971).

74. 466 F.2d at 1032-33.

75. *Id.* at 1032.

76. 350 F. Supp. 269 (W.D. Wash. 1972).

77. *Id.* at 278.

78. *Id.* at 277.

lution from a new highway should also be considered in the EIS.⁷⁹

Two of the most contested aspects of the NEPA section 102(2)(c) requirements concern (1) the extent of federal participation necessary in the initial drafting of the EIS and (2) the determination of whether individual impact statements can cover relatively small segments of highway, thus avoiding regional environmental considerations.

As to the participation question, courts have generally required federal agencies to take an active role in the EIS process in projects under their supervision.⁸⁰ In *Conservation Society v. Secretary of Transportation*⁸¹ the court held that the Federal Highway Authority (FHWA) had abdicated its responsibility under NEPA by substituting the EIS of the Vermont Highway Department for its own.⁸² The court stated that both NEPA and Memorandum 90-1 were violated by FHWA reliance on the state EIS, and it concluded that an EIS drawn by a state highway department will certainly be self-serving.⁸³ The FHWA could not adequately perform its decisionmaking role under NEPA without actually participating in the researching and drafting of the EIS. State participation in EIS drafting will be allowed as long as there is no state dominance of the procedure.

Other cases have implied that less federal participation is required.⁸⁴ In *Fair v. Volpe*⁸⁵ the court found FHWA participation in a research study, presumably preliminary to the actual drafting of the EIS, sufficient to satisfy the NEPA requirements. In fact, for the vast

79. *Keith v. Volpe*, 352 F. Supp. 1324, 1334 (C.D. Cal. 1972).

80. *See Greene County Planning Bd. v. Federal Power Comm'n*, 455 F.2d 412, 420 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). The FPC regulations requiring applicants seeking power plant licenses to prepare environmental impact statements were invalidated as improper delegations of agency power. The court accused the FPC of abandoning its responsibilities under NEPA and required the FPC staff to draw up the final impact statement without outside assistance. *Id.* at 420, 422.

81. 362 F. Supp. 627 (D. Vt. 1973).

82. *Id.* at 632.

83. *Id.* at 631. At least one court has gone farther than the *Conservation Society* decision. In *Committee to Stop Route 7 v. Volpe*, 346 F. Supp. 731 (D. Conn. 1972), the court viewed FHWA Policy and Procedure Memorandum 90-1 as an improper delegation of responsibilities mandated by NEPA and consequently struck down the memorandum. The court reasoned that a department could not provide an impartial analysis of a project's impact. *Contra*, *Citizens Environmental Council v. Volpe*, 364 F. Supp. 286 (D. Kan. 1973); *National Forest Preservation Group v. Volpe*, 352 F. Supp. 123 (D. Mont. 1972). These two decisions uphold the memorandum as a reasonable delegation of power.

84. *See National Forest Preservation Group v. Volpe*, 352 F. Supp. 123 (D. Mont. 1972); *Iowa Citizens For Environmental Quality v. Volpe*, 4 Env. Rep. Cases 1755 (S.D. Iowa 1972).

85. 5 Env. Rep. Cases 1205, 1207-08 (N.D. Ga. 1973).

majority of highway projects, state highway departments alone have drafted the impact statements.

The piecemealing question goes to the heart of the NEPA mandate. The ability of the NEPA section 102(2)(c) statement to provide a meaningful environmental impact analysis of a chosen highway section and its alternatives is significantly impaired when highway officials are permitted to draft individual impact statements for many small segments of a large highway project.⁸⁶ Critical examinations of the environmental effect of the placement of a roadway must occur on a larger geographic scale to give full meaning to the spirit and purpose of NEPA.

In a recent case, *Conservation Society v. Secretary of Transportation*,⁸⁷ the United States District Court for the District of Vermont reached the above conclusion. The court required the FHWA to draft and consider an EIS for the entire I-7 corridor, transversing three states, before construction could begin on the contested Bennington to Manchester segment of the road.⁸⁸ Defendants had only prepared statements on an individual basis for those segments of I-7 to be constructed in the near future. The obvious problem with this approach is that approval of subsequently constructed highway segments often becomes obligatory when the EIS for those projects is drafted and considered. Meaningful evaluation of environmental consequences becomes moot since the failure to build the proposed segment would render the previously constructed roadway inefficient or useless.⁸⁹ The more segments of the highway completed, the more this becomes apparent.⁹⁰

The *Conservation Society* decision is virtually unique in this area. Most NEPA cases have not discussed the piecemealing question, and it can be surmised that few courts in the past would have adopted the *Conservation Society* rationale had the question arisen.

86. See generally *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1022-24 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972); *Sierra Club v. Volpe*, 351 F. Supp. 1002, 1006-09 (N.D. Cal. 1972); *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167, 1170 (S.D. Iowa 1972).

87. 362 F. Supp. 627 (D. Vt. 1973).

88. *Id.* at 638.

89. *Id.* at 637.

90. The piecemealing problem exists as to other statutory requirements of the federal-aid highway procedure. For example, similar arguments can be made as to the scope of the public hearings required under 23 U.S.C. § 128(a) (1970) and FHWA Policy and Procedure Memorandum 20-8 (Jan. 14, 1969). As with impact statements, the practice has been to hold public hearings for relatively short segments of proposed highways rather than for the entire highway as a complete entity.

In *Movement Against Destruction v. Volpe*,⁹¹ another recent case, the court held that NEPA did not require the preparation of an EIS for the entire network of constructed and proposed federal-aid highways in the Baltimore area.⁹² This holding was based upon the finding that the area-wide road network involved several distinct highways and that Department of Transportation decisions had been made for individual highway projects rather than for the entire system.⁹³ The court stated, however, that impact statements prepared for those individual projects should reflect the projects' environmental impact in relation to the entire configuration.⁹⁴

The *Movement Against Destruction* case does not go as far as *Conservation Society* and does not determine what proportion of a single highway corridor must be considered in any one environmental impact statement. The effectiveness of NEPA in the highway construction area will be determined in part by the position that the courts will adopt on the piecemealing question in future cases.⁹⁵ However, an important portion of FHWA Policy and Procedure Memorandum 90-1 directs that environmental impact statements must be prepared for "highway sections" and not for "projects."⁹⁶ This administrative ruling would seemingly bar segmented environmental analysis of highways and guide judicial evaluation of future piecemealing efforts.

The draft impact statement, as written in the location approval stage, is then widely distributed to federal, state, and local agencies for review and comment. Finally the draft impact statement is made available for public inspection.⁹⁷ But public comment is sought only after the decision to build a highway has been made and after federal and state agency review has occurred. Citizens cannot participate in the determination of whether a highway or another mode of transportation is best suited to the needs of the area. Furthermore, the reviewing agencies pass on the impact of the project without first obtaining

91. 361 F. Supp. 1360 (D. Md. 1973).

92. *Id.* at 1402.

93. *Id.* at 1381.

94. *Id.* at 1385.

95. For a discussion of the question of substantive review of highways under NEPA see authorities cited in note 176 and accompanying text *infra*.

96. See note 63 *supra*.

97. FHWA Policy and Procedure Memorandum 90-1, para. 6(c) (Aug. 24, 1971) requires that the draft environmental impact statement be made available to the public no later than the first required notice of the location public hearing (30 to 40 days, see FHWA Policy and Procedure Memorandum 20-8, paras. 7-8 (Jan. 14, 1969)), or notice of the opportunity to request a public hearing.

public comments. In this way the public is excluded from the highway planning process.

At the location stage the state must also contact any railroad or utility in the path of a proposed highway site to discuss future relocation of facilities. Federal reimbursement funds are available for ninety percent of this cost.⁹⁸

Federal statutes now require that a location or corridor public hearing be held⁹⁹ and FHWA has issued detailed regulations directing the conduct of both the corridor and design public hearings.¹⁰⁰ State highway departments may satisfy this requirement either by holding a hearing or by publicizing the opportunity to request one. Nearly all federal highway construction projects necessitate operation of this section of the federal transportation law. Strict notice requirements are imposed upon the highway departments to insure public awareness of the project.¹⁰¹ At the location hearing, the relocation assistance program must be discussed;¹⁰² information about alternative highway locations must be made available;¹⁰³ the draft must be explained;¹⁰⁴ and responsible state highway officials must be present to conduct the

98. 23 U.S.C. § 123 (1970).

99. *Id.* § 128. See also *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 701 (2d Cir. 1972); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1242 (D.C. Cir. 1971).

100. 23 C.F.R. §§ 790.3(a)-(b) (1973). Subsection (a) defines the corridor public hearing as a hearing that,

(1) Is held before the route location is approved and before the State highway department is committed to a specific proposal, except as provided in § 790.5(g).

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a Federal-aid highway; and

(3) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative highway locations and the social, economic, and environmental effects of those alternative locations.

101. *Id.* § 790.7(a). Subsection (a)(2) further requires that notice of the hearing be mailed to "appropriate news media, the State's resource, recreation, and planning agencies, and appropriate representatives of the Departments of Interior and Housing and Urban Development." Copies are also to be sent "to other Federal agencies, and local public officials, public advisory groups and agencies who have requested notice of hearing and other groups or agencies who, by nature of their function, interest, or responsibility the highway department knows or believes might be interested in or affected by the proposal." This subsection also directs the highway department to create a list of such interested parties to which notice could be sent automatically. Expenses incurred by the public hearing may be reimbursed by the federal government. *Id.* § 790.11.

102. *Id.* § 790.7(b)(7). See also *Keith v. Volpe*, 352 F. Supp. 1324, 1340 (C.D. Cal. 1972).

103. 23 C.F.R. § 790.7(b)(3) (1973).

104. FHWA Policy and Procedure Memorandum 90-1, para. 6(e) (Aug. 24, 1971).

meeting and answer questions.¹⁰⁵ Citizen participation and response must be reflected in the study reports submitted by the state to the FHWA. In this way local viewpoints are brought to the attention of federal decisionmakers.¹⁰⁶ Additionally, in *Keith v. Volpe*,¹⁰⁷ the court held that the potential air and noise pollution impact of the proposed highway must be considered at the location hearing. The court in *Arlington Coalition on Transportation v. Volpe*¹⁰⁸ ruled that in certain cases proposed area-wide rapid transit systems should be discussed at the corridor hearing and that the projected highway construction be evaluated in light of mass transit possibilities.¹⁰⁹ These decisions reflect the fact that judges are demanding that public hearings consider a wide range of subjects in order to present a realistic picture of available alternatives.

Theoretically, public comment and any agency reaction received must be incorporated into a revision of the location selection and environmental analysis. After making its route selection, the state must formally request location approval, certify that public location hearings have been held, deliver public hearing transcripts and certificates and submit a thorough study report concerning the highway section.¹¹⁰ A recent FHWA regulation has added the requirement that a detailed survey of the noise impact of the various proposed route locations be included in the location study report¹¹¹ and federal-aid highways must now conform to standards which limit noise levels.¹¹² These documents must accompany the state's request for location approval that

105. 23 C.F.R. § 790.7(b)(4) (1973).

106. *Id.* § 790.8(b)(2)(ii). Federal Highway Administrator F.C. Turner has admitted that in 15% of all projects, a major change resulted from the public hearing; *Red Tape* 86.

107. 352 F. Supp. 1324, 1339 (C.D. Cal. 1972).

108. 458 F.2d 1323 (4th Cir. 1972).

109. *Id.* at 1337.

110. 23 C.F.R. §§ 790.9(e)(1)(i)-(iv) (1973). Subsection (b) provides a detailed framework for the preparation of the study report. See also note 63 *supra*.

111. 23 C.F.R. § 772.7(b)(3) (1973). The purpose of the newly promulgated regulation is:

To provide noise standards and procedures for use by State highway agencies and the Federal Highway Administrator (FHWA) in the planning and design of highways approved pursuant to title 23, United States Code, and to assure that measures are taken in the overall public interest to achieve highway noise levels that are compatible with different land uses, with due consideration also given to other social, economic and environmental effects.

Id. § 772.1.

112. *Id.* § 772.6(a). Section 772.3(b) adds that a state may be exempted from complying with the noise standards for a particular project if it can show that any one of three broadly defined conditions exists. It is recommended in section 772.7(b)(8) that any requests for exceptions should be identified and included in the location study report. Exceptions apparently are available only through the design approval stage.

is transmitted to the local division engineer. Public notices must be given of the selection.¹¹³ Next, the final EIS, embodying any modification incurred during the period of review and comment, must be forwarded to the Regional Federal Highway Administrator for high level approval.¹¹⁴ Location approval may not be granted by the division engineer until the regional official accepts the final impact statement and the Office of Environment and Urban Systems of the Department of Transportation concurs with that action.¹¹⁵ In addition, the public and the Council on Environmental Quality must be given thirty days to inspect the final impact statement.¹¹⁶ When all of these prerequisites have been fulfilled, the division engineer acts upon the state's application. If the selected location is acceptable to the division engineer, the state highway department will then seek design approval for the roadway.

C. Design Approval

Upon granting location approval, the federal division engineer authorizes the commencement of design engineering for the project and the appraisal of right-of-way property. In some instances, full or partial right-of-way condemnation may be permitted prior to the design public hearing.¹¹⁷ A period of design study must follow in which the specific location and the major design features are determined. Concurrently, a final relocation plan for displaced residents is prepared.

As with location approval, design selection requires that an opportunity for a public hearing be given to insure citizen participation in the decisionmaking process.¹¹⁸ The public is provided adequate notice of the hearing, and subsequently the hearings are conducted under established guidelines.¹¹⁹ The purpose of this hearing is to expose the

113. *Id.* § 790.10.

114. FHWA Policy and Procedure Memorandum 90-1, para. 6(j) (Aug. 24, 1971). Actually the regional office then sends the final EIS to the FHWA's Office of Environmental Policy. This national office transmits the document to the Office of Environment and Urban Systems of the Department of Transportation for further concurrence and then finally to the Council on Environmental Quality for recording. *Id.* para. 6(k).

115. *Id.* para. 6(k).

116. *Id.* para. 6(k)(2)(b).

117. The general rule concerning right-of-way acquisition is that it cannot take place until after the design public hearing. 23 C.F.R. § 790.9(f) (1973) provides for taking prior to the hearing in the unusual circumstances set forth in section 790.2(c).

118. *Id.* §§ 790.3(b)(1)-(3).

119. *Id.* § 790.7. Subsection (a)(4) requires that the notice announcing the design hearing must indicate "that tentative schedules for right-of-way acquisition and construction will be discussed [at the meeting]."

specific highway location and design features to public scrutiny.¹²⁰ Taking into account the comments made at the public design hearing, the state selects a final design proposal for submission to the FHWA division office. Accompanying this proposal is a formal request for design approval, a certification of hearings, a transcript of that proceeding and a thorough design study report including an updated noise analysis.¹²¹ At this time FHWA regulations require that the chosen design configuration or a narrative description be published in a newspaper to assure its fullest public exposure.¹²² A state will often include written project assurances on relocation assistance and its final relocation plan with its request for design approval so that right-of-way acquisition may begin promptly.¹²³

Upon obtaining design approval, the state must prepare a right-of-way acquisition plan for review by the division engineer. Once this is granted, real property may be taken for the project with relocation assistance made available to the relocatees. If any utility facilities or railroad property lies in the path of the selected highway right-of-way, provision must be made for their relocation and clearance of the future roadbed. The state highway department must reach a relocation agreement with the obstructing utility and submit a written copy to the FHWA division engineer for authorization to proceed.¹²⁴ Federal funds may be used to partially reimburse states for the cost of utility relocation.¹²⁵ With this federal approval, actual railroad and utility relocation may commence.

As the time of actual highway construction approaches, the state

120. No longer is highway design considered merely a technical question removed from public interest and scrutiny. F.C. Turner testified to the nature of popular concern over design decisions. He stated:

[T]hey have a large number of points of interest in connection with the design. Basically, is it going to be elevated or depressed? If it is elevated, is it going to be on fill or is it going to be on structure? Am I going to be able to get across it to my neighbors on the other side here? How far do I have to go to get around? How far will the children have to go to get across to play with their friends on the other side? Will there be a pedestrian crossing, and thousands of other questions that relate to the design?

Red Tape 85-86.

121. 23 C.F.R. § 772.7(b)(4) (1973).

122. *Id.* § 790.10.

123. FHWA Instructional Memorandum 80-1-71, paras. 15(a)-(b) (Oct. 11, 1972).

124. FHWA Policy and Procedure Memorandum 30-4, paras. 7(c), 7(o)(1) (Dec. 10, 1970). The agreement must be supported by "plans, specifications where required, and estimates of the work agreed upon, which shall be sufficiently informative and complete to provide the State and division engineer with a clear showing of work required in accordance with paragraphs 7(h) and (i) of this memorandum." *Id.* para. 7(b).

125. *Id.* para. 3.

must secure a minimum wage rate determination for the United States Department of Labor.¹²⁶ This requirement was imposed by the Davis-Bacon Act¹²⁷ to insure that workers on federally assisted highway building projects received wages comparable to those earned in similar construction in the immediate locality. Once minimum wage levels are determined, they "shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project."¹²⁸ The establishment of the prevailing wage rate is often computed on an area-wide basis in advance of any particular highway project.

D. Plans, Specification and Estimate Approval

Next, the state highway department must prepare detailed construction plans, job specifications, and cost estimates (PS&E) relating to the federal-aid project.¹²⁹ Approval of the PS&E officially commits the federal funding.¹³⁰ This state presentation allows specific evaluation by the division engineer of the details underlying the project. Once more, the granting of federal approval is conditioned upon compliance with several statutory, regulatory, and memoranda requirements. First, it must be shown that local road officials were consulted by the state highway department for the cooperative preparation of the PS&E.¹³¹ Secondly, items included in the project estimates for construction engineering may not exceed ten percent of the total cost.¹³² Thirdly, the PS&E must provide a facility:

- (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish

126. 23 U.S.C. § 113 (1970). A 1968 amendment extended this coverage to all federal-aid highways and not solely to the Interstate System.

127. 40 U.S.C. § 276(a) (1970). 23 C.F.R. § 1.24 (1973) also deals with the subject of labor employed on highway projects. Section 1.24(a) forbids the use of convict labor on any project.

128. 23 U.S.C. § 113(b) (1970).

129. *Id.* § 106(a).

130. *Id.* Peterson and Kennan assert that PS&E approval is often a multi-staged, informal procedure hardly resembling the statutory framework. Peterson & Kennan, *supra* note 24. Administratively created "authorization to proceed with work" serves to delay the point of federal contractual obligation and is found in 23 C.F.R. § 1.12 (1973).

131. 23 U.S.C. § 106(b).

132. *Id.* § 106(c). This appears to be an attempt to keep down preliminary non-construction costs. Section 106(d) also allows the FHWA to require, at its discretion, that the PS&E "be accompanied by a value engineering or other cost reduction analysis."

the foregoing objectives and to conform to the particular needs of each locality.¹³³

In *D.C. Federation of Civic Associations v. Volpe*¹³⁴ the court held that the Secretary's approval must be based on sufficient evidence and adequate research and, furthermore, that this determination should also include an investigation of possible air pollution hazards.¹³⁵ Fourthly, the geometric and construction standards used by the state in designing projects on the interstate system must be determined adequate for carrying the expected traffic load over a twenty-year period.¹³⁶ Finally, the state must certify that it has complied with all hearing requirements.¹³⁷ When the state highway department applies for PS&E approval, it also must request an authorization to proceed on projects entailing actual construction work.¹³⁸ This latter obligation has been administratively imposed and does not appear in any federal statute. At this point solicitation of bids is imminent.

Before the advertisement for construction bids can occur, the federal requirements for relocating displaced persons and firms must be fulfilled. The division engineer has an obligation to verify the fact that "adequate replacement housing is in place and has been made available to relocatees . . ."¹³⁹ prior to his authorization for reimbursable construction. This verification shall be accomplished by "spot check field reviews by the division engineer to the depth necessary to provide sufficient evidence that there has been full compliance with the order."¹⁴⁰ The spot check mechanism is the culmination of the federal effort to assist those who unfortunately are dislocated by federally sponsored programs.

E. Construction Approval

When the PS&E approval, authorization to proceed, and verification of relocation are received, the state may advertise for and receive

133. *Id.* § 109(a). Section 106(a) specifically denominates the standards established in section 109 as a guide for the approval of PS&E's.

134. 459 F.2d 1231, 1241 (D.C. Cir. 1971).

135. *Id.* at 1242.

136. 23 U.S.C. § 109(b) (1970). Section 109 indicates that PS&E approval is to be predicated upon additional requirements. Subsection (g) calls for the promulgation of soil erosion standards while subsections (i) and (j) mandate noise level and air quality consideration.

137. *Id.* §§ 128(a)-(b).

138. 23 C.F.R. § 1.12 (1973).

139. FHWA Policy and Procedure Memorandum 80-1-71, para. 16(a)(1) (Oct. 11, 1972). This memorandum defines adequate and available replacement housing. *Id.* paras. 16(b)-(c).

140. *Id.* para. 16(d).

competitive bids. It will recommend award of the construction contract or rejection of bids to the division engineer who must then concur in the judgment. Ordinarily bids are approved without significant scrutiny. When the contract is approved by the federal agent, it will be returned to the state for administration. Thereafter, construction will take place under the periodic supervision of the division engineer.

F. Other Statutory Prerequisites

Several other statutes bear upon federal-aid highway construction. Although they are not formal prerequisites for the approval of any particular stage, they must be satisfied to comply with federal law. In this sense they might be of interest to groups challenging a federal-aid highway. The Rivers and Harbors Act of 1899¹⁴¹ requires that a permit to be obtained from the Army Corps of Engineers for all dredge and fill operations in navigable waters. Where a request is made for a permit for the construction of a dike or causeway, the Corps must secure the consent of Congress and the approval of the Secretary of Transportation before issuing the permit. When a permit was issued for a dike and causeway for the Hudson River Expressway, the Second Circuit in *Citizens Committee for the Hudson Valley v. Volpe*¹⁴² held that the Corps had breached a non-discretionary duty by failing to secure the consent and approval before acting.¹⁴³

The same federal statute¹⁴⁴ requires a permit to construct a bridge over navigable waters. This permit must be obtained from the Coast Guard Commandant. According to the court in *Monroe County Conservation Council, Inc. v. Volpe*,¹⁴⁵ no approval for federal funding can be granted until the bridge permit is acquired.

The Historic Preservation Act¹⁴⁶ requires that elaborate safeguards be undertaken to protect important historical areas and structures from unnecessary destruction or degradation. It has been held that these requirements must be complied with by highway construction officials to the fullest extent where the highway will impinge upon the protected subjects.¹⁴⁷ It is expected that this new statute will serve as a basis for much highway litigation in the future.

141. 33 U.S.C. §§ 401-26 (1970).

142. 425 F.2d 97 (2d Cir. 1970).

143. *Id.* at 100.

144. 33 U.S.C. § 401 (1970).

145. 472 F.2d 693, 702 (2d Cir. 1972).

146. 16 U.S.C. § 470 (1970).

147. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1249 (D.C. Cir. 1971).

III. JURISDICTIONAL CONSIDERATIONS IN HIGHWAY LITIGATION—STANDING

Standing should no longer present a barrier to environmental litigation in general and highway litigation in particular. The Supreme Court has defined and clarified the criteria for standing in most environmental suits in two recent decisions, *Sierra Club v. Morton*¹⁴⁸ and *United States v. SCRAP*.¹⁴⁹

In *Sierra Club*,¹⁵⁰ the Court reaffirmed earlier decisions which held that the alleged injury or potential injury necessary to obtain standing "may reflect 'aesthetic, conservational, and recreational' as well as economic values."¹⁵¹ The Court added the requirement that such injury must directly affect the plaintiffs. The plaintiffs must allege that the injury is "individualized" to them and that they are adversely affected by such injury.¹⁵² It is insufficient that plaintiffs have "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem"¹⁵³ Plaintiffs must show they have a "direct stake in the outcome" of the litigation.¹⁵⁴

Nevertheless, the Court also stated that an organization, such as the Sierra Club, could sue on behalf of its injured members where the harm met the Court's criteria.¹⁵⁵ Furthermore, once standing is established by the above test, the plaintiff organization "may assert the interests of the general public in support of [its] claims for equitable relief."¹⁵⁶ The fact that the injury in question is widely shared does not defeat standing as long as plaintiffs themselves are in fact injured.

The Court in *Sierra Club* indicated that standing was to be denied the club for its failure to allege in its complaint that its members actually used the Mineral King Recreation Area and that they "would

148. 405 U.S. 727 (1972).

149. 412 U.S. 669 (1973). See generally Annot., 11 A.L.R. Fed. 556 (1972).

150. This case concerned the Sierra Club's attack on proposed plans to allow Walt Disney Enterprises to build a large ski resort in the Mineral King Recreation Area in California. Incidentally, this project would involve a long road through the Sequoia National Forest, though it is questionable whether such road would qualify as a federal-aid highway.

151. 405 U.S. at 738, citing Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970).

152. 405 U.S. at 736.

153. *Id.* at 739.

154. *Id.* at 740.

155. *Id.* at 739.

156. *Id.* at 740 & n.15.

be affected in any of their activities or pasttimes by the Disney development."¹⁵⁷ Such allegations would have been sufficient to satisfy the Court's test.¹⁵⁸

The Court further clarified its standing test in *United States v. SCRAP*.¹⁵⁹ Plaintiffs had attacked the Interstate Commerce Commission's decision to grant temporarily an overall freight rate increase to all of the nation's railroads. Plaintiffs alleged that the rate hike would cause increased use of non-recyclable goods, thus causing accelerated consumption of natural resources, some taken from the Washington, D.C. area where plaintiffs resided. This in turn would cause increased amounts of refuse to be disposed of in the Washington area parks used by the plaintiffs. The Court held that plaintiffs had by these allegations satisfied the standing requirements.¹⁶⁰ Unlike the Sierra Club, plaintiffs claimed that the specific and allegedly illegal action of the Commission would directly harm them in their "use and enjoyment of the natural resources of the Washington area."¹⁶¹

While suggesting that the nature of the alleged wrong was such that virtually every citizen of the nation might have standing to sue, the Court re-emphasized that "standing is not to be denied simply because many people suffer the same injury."¹⁶² As long as plaintiffs can demonstrate the requisite injury, standing will be found by the courts.

The *SCRAP* decision's most important contribution to standing questions in environmental litigation is its holding that the fact that the alleged wrong and the alleged injury are connected by a "more attenuated line of causation" than in cases such as *Sierra Club* is immaterial as long as the connection exists and harm is in fact caused to the plaintiffs.¹⁶³ Furthermore, once the injury is alleged, the degree or quantity of the injury is also immaterial.¹⁶⁴

Both *Sierra Club* and *SCRAP* were suits brought to review federal administrative actions under section 702 of the Administrative Procedure Act.¹⁶⁵ One can argue that the standing criteria established in

157. *Id.* at 735.

158. *Id.* at 736. The Court stated it would be willing to allow the Sierra Club to amend its complaint. *Id.* at 736 n.8. See also *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971).

159. 412 U.S. 669 (1973).

160. *Id.* at 685, 689-90.

161. *Id.* at 686.

162. *Id.* at 687.

163. *Id.* at 688-89.

164. *Id.* at 689 n.14.

165. 5 U.S.C. § 702 (1970).

these decisions are equally applicable to all environmental suits.¹⁶⁶ In any event, these holdings are certainly available to establish the standing of highway litigants and to enable the review of the federal-aid highway decision process as effected by the Department of Transportation and the Federal Highway Authority. All facets of federal-aid highway construction must relate back to one or more federal administrative decisions.

Highway litigation plaintiffs should be chosen to include residents of the area through which a planned highway is to pass. It is not necessary that these plaintiffs be actually displaced by the highway. Residents of communities that will be affected by the highway should be sufficient. Civic groups representing members of these communities also will have standing. Individuals and groups whose members use parklands to be affected by a highway will, of course, have standing. The injuries to be alleged can include economic, aesthetic, social, and recreational injuries. To be completely safe from even the most conservative of judges, a landowner who is apt to lose part of his land to the highway should be joined as a party plaintiff. Adequate fore-thought should, in light of the two above-cited cases, avoid all standing difficulties.¹⁶⁷

IV. PLAINTIFF STRATEGIES FOR HIGHWAY LITIGATION

The decisions in federal-aid highway cases to date have been generally in favor of the plaintiffs. While several of these decisions have established important points of law, many of the anti-highway victories

166. See generally Comment, *Supreme Court Decides the Mineral King Case: Sierra Club v. Morton*, 2 ENV. L. REP. 10034 (1972); Comment, *More on Standing: The Supreme Court's Last Word, The Tenth Circuit's Last Stand*, 3 ENV. L. REP. 10096 (1973). However, it must be remembered that, as a matter independent of the standing question, jurisdictional amount requirements must be satisfied when applicable. See 28 U.S.C. §§ 1331-32 (1970). Jurisdictional amount was not a matter of controversy in either *Sierra Club* or the *SCRAP* cases since both were brought under a special jurisdictional statute which does not require a jurisdictional amount. 5 U.S.C. §§ 701-06 (1970). For a recent analysis of the jurisdictional amount requirements in a water pollution damage suit see *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). It should be kept in mind, however, that special jurisdictional statutes will be available for most federal-aid highway litigation.

167. Environmental plaintiffs should also remain aware of laches problems; see *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1329 (4th Cir. 1972); *Lathan v. Volpe*, 455 F.2d 1111, 1122 (9th Cir. 1971); *Keith v. Volpe*, 352 F. Supp. 1324, 1341 (C.D. Cal. 1972); *Elliot v. Volpe*, 328 F. Supp. 831, 841 (D. Mass. 1971). Problems of sovereign immunity as to state party defendants also arise; see *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970); *Elliot v. Volpe*, *supra* at 834.

have proved illusory. More often than not, the preliminary injunctions granted against state and federal agencies were later dissolved when the administrative officials substantially complied with the procedural requirements of the relevant statutes and regulations.¹⁶⁸ It has been difficult, in even the most recent cases, to achieve any sort of substantive review. While the courts have agreed with plaintiffs that the requirements of the various federal statutes and regulations must be met in precise detail, most of the highways in the cases discussed have been or will be completed in the future. Litigation may have slightly altered their location or added certain engineering or environmental safeguards to their design, but the highways will nonetheless be completed.¹⁶⁹

However, anti-highway litigants may be successful in future cases. This will be the result of two factors. First, current decisions indicate that broader procedural and substantive review may soon become possible. Secondly, litigants in future cases will be able to attack highway construction much earlier in the federal-aid process—before substantial investment of resources forecloses meaningful review.

As to the first development, the most successful judicial attacks at the present have been those directed against the taking of parklands under section 4(f) of the Department of Transportation Act.¹⁷⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹⁷¹ the only United States Supreme Court decision in the highway area, strictly construed the statute to impose an ascertainable and enforceable duty on the Secretary of Transportation to regulate the taking of parklands under prescribed standards.¹⁷² The requirements of 4(f) are substantive as well as procedural and the actions of the Secretary can be reviewed against a clear congressional mandate. This is the rare exception in past highway litigation since the plaintiffs were able to avail themselves of a statute, which combines strict procedural mandates with meaningful substantive requirements. However, most proposed highways do not cross extensive parklands.

Otherwise, plaintiffs have had to concentrate on demanding absolute compliance with the terms of the several federal statutes regulating highway construction. This has been, at least, an important delaying and harassing tactic and will continue to remain so. The NEPA

168. *Red Tape* 64-65.

169. *Id.*

170. 49 U.S.C. § 1653(f) (1970).

171. 401 U.S. 402 (1971).

172. *Id.* at 411-16.

EIS¹⁷³ and the section 128¹⁷⁴ public hearings demand extensive research and thorough drafting and preparation on the part of federal and state officials. The fact that these officials are forced by litigation to consider the immensity of the task before them may cause them to carefully weigh public opinion before authorizing federal-aid highways. The Rivers and Harbors Act,¹⁷⁵ with its requirement of congressional consent, and the Relocation Statute, requiring major state efforts, also act as highway deterrents in a similar manner.

Nevertheless, until recently most courts had considered their job finished when the procedural requirements were met. The vast quantities of environmental, social, and economic data provided by impact statements and public hearings were found necessary for informed decision-making by highway officials but were not weighed by the court in an ultimate determination of the merits of the project.

There is, however, some recent authority to the effect that section 101 of NEPA provides substantive rights and that courts may evaluate administrative decisions based on a project EIS to determine if the benefits of a particular project may reasonably be said to outweigh its costs.¹⁷⁶ If not, the project could be permanently enjoined. Although these decisions do not involve highway projects, their reasoning may be applied to this area, especially as the secondary effects of highway construction become understood. It is uncertain whether NEPA will eventually secure substantive rights to highway plaintiffs. However, it is becoming increasingly clear that NEPA will demand a broader procedural perspective from highway officials. As previously noted, the *Conservation Society*¹⁷⁷ decision required an EIS for an entire highway corridor rather than for a small segment as had previously been the practice. The court suggested that the entire federal-aid highway scheme might be incompatible with the NEPA mandate since the monies in the highway trust funds can be expended only for highways.¹⁷⁸ This clashes directly with the NEPA requirement that all alternatives to the construction of the highway, including mass transportation and the nonconstruction of the highway, be evaluated.

173. 42 U.S.C. § 4332(2)(c) (1970).

174. 23 U.S.C. § 128(a) (1970).

175. 33 U.S.C. §§ 401-26 (1970).

176. See *Conservation Council v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973); *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289, 297-301 (8th Cir. 1972); *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

177. 362 F. Supp. 627 (D. Vt. 1973).

178. *Id.* at 637.

Consideration of a highway as a whole, as discussed previously,¹⁷⁹ gives highway officials a more meaningful opportunity to evaluate the impact of and need for a given highway. Similar anti-piecemealing requirements have been imposed on determinations under section 4(f), and may be applied to the public hearing requirements.¹⁸⁰ Plaintiffs should stress these broadened procedural requirements in their cases. Beyond causing delay and increased effort on the part of defendants, this strategy may produce vast amounts of data which can be used in support of substantive arguments.¹⁸¹

The success of future highway litigation will depend, secondly, on how early in the highway development process plaintiffs begin their attack. Many of the highways scrutinized in past cases had undergone extensive planning and occasionally some construction before a lawsuit was brought. This was often unavoidable since the planning and appropriations for these highways were concluded prior to the passage of several statutes upon which plaintiff had relied. While on-going project questions were often resolved in plaintiffs' favor,¹⁸² plaintiffs nevertheless had lacked the statutory tools to bring appropriate litigation at an early time. As stressed in the previous discussion of NEPA requirements, once substantial resources have been invested in any highway project, courts are hesitant to take any action which might ultimately render these expenditures wasted or useless. Indeed, there has been a widespread fear among environmental litigants that strict judicial enforcement of NEPA against on-going projects might produce a congressional backlash that would support amendments substantially weakening NEPA's requirements or curtailing judicial review.

Future highway litigants should, however, be able to avoid this pitfall. By bringing suit as soon as possible after location approval is granted, plaintiffs will be in a position to demand of any new highway project (1) extensive research into the environmental, social, and economic impact of the proposed highway, (2) compliance with all applicable federal statutes and regulations, (3) the broad investigation

179. See text accompanying notes 94-95 *supra*.

180. See *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1022 (5th Cir. 1971).

181. A delay caused by enforced procedural compliance could disturb the projected expenditure of available federal funds, thus making possible lawsuits a potent threat.

182. The questions of the application of new legislation to on-going highway projects begun before the effective dates of the new statutes are discussed in the following cases: *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2d Cir. 1972); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972); *Pennsylvania Environmental Council v. Bartlett*, 454 F.2d 613 (3d Cir. 1971); *Elliot v. Volpe*, 328 F. Supp. 831 (D. Mass. 1971).