FEDERAL-AID HIGHWAY CONSTRUCTION AND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

I. INTRODUCTION

The National Environmental Policy Act of 1969[1] became effective on January 1, 1970. It has been characterized by its chief proponent as "the most important and far-reaching environmental and conservation measure ever enacted by the Congress,"[2] while it has been described by an opponent as a measure doing "absolutely nothing to control pollution."[3] In order to determine which of these characterizations more nearly represents NEPA's impact to date, one must first know something about how its sponsors intended it to function.[4]

NEPA did not represent a novel legislative idea. It was the fruit of efforts begun as early as 1959 and renewed in 1965 and again in 1967.[5] Its drafters relied heavily upon earlier but unsuccessful attempts to create a statutory framework within which federal agency action affecting the environment could be coordinated and supervised.[6] In relying on earlier bills NEPA's sponsors adopted the approach found in previous Senate recommendations for arresting the deterioration of the environment. Seen from the congressional perspective the problem was fundamentally an administrative one.

NEPA addressed this administrative problem on two levels: the policy level of executive authority and the supervisory level of federal agency decision-making. With respect to the policy level of federal action, NEPA makes provision for an Environmental Quality Report, to be delivered to Congress annually by the President,[7] the purpose of which is to draw together in one place the "hundreds of reports which deal with some small aspects of environmental management."[8] Furthermore, NEPA authorizes a Council on Environmental Quality[9] in the Executive Office of the

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1 42 U.S.C. §§ 4331-4347 (1970) [hereinafter NEPA.]

2 115 Cong. Rec. 40416 (1969) (remarks of Senator Henry Jackson of Washington). For the legislative history of NEPA see 115 Cong. Rec. 3698-713; 19008-13; 26569-91; 29050-89; 39701-04; 40415-27; 40923-28 (1969); Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969) [hereinafter 1969 Hearings]; H.R. Rep. No. 378, 91st Cong., 1st Sess. (1969); S. Rep. No. 296, 91st Cong., 1st Sess. (1969) [hereinafter Sen. Rep. No. 296]; Conference Rep. No. 765, 91st Cong., 1st Sess. (1969).

3 115 Cong. Rec. 40927 (1969) (remarks of Representative William Harsha of Ohio).

4 See generally Donovan, The Federal Government and Environmental Control: Administrative Reform on the Executive Level, 12 B.C. Ind. & Com. L. Rev. 541 (1971); Peterson, An Analysis of Title I of the National Environmental Policy Act of 1969, 1 Envir. Law Reptr. 50035 (1971).

5 In 1959 the legislation was S. 2549, 86th Cong., 1st Sess. (1959), Proposed Resources and Conservation Act of 1960, 105 Cong. Rec. 15978-15983 (1959) and Hearings on S. 2549 Before the Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess. (1960). In 1965 the proposed bill was S. 2282, 89th Cong., 1st Sess. (1965), Ecological Research and Surveys, 111 Cong. Rec. 16619-16620 (1965), and Hearings on S. 2282 Before the Senate Comm. on Interior and Insular Affairs, 89th Cong., 2d Sess. (1966). The legislation proposed in 1967 was S. 2805, 90th Cong., 1st Sess. (1967), Cong. Rec. 36849-36859 (1967).

6 Particularly important in shaping NEPA was S. 2805, introduced by Senators Henry Jackson of Washington and Thomas Kuchel of California in the 90th Cong., 1st Sess., note 5 supra. For summaries of NEPA' indebtedness to its predecessors see 115 Cong. Rec. 19011 (1969) and S. Rep. No. 296, at 10-12.

7 42 U.S.C. § 4341 (1970).

8 S. Rep. No. 296, at 10.

9 Hereinafter the CEQ.

President.[10] The CEQ is intended to provide, among other things, an "effective process of policy review" on matters affecting the environment "by establishing a forum in the Office of the President for the consideration of alternative solutions to all environmental problems."[11]

With respect to the supervisory level of federal agency decision-making, NEPA imposes on all federal agencies and officials a statutory "responsibility to consider the consequences of their actions on the environment."[12] The Senate Committee on Interior and Insular Affairs found that the enabling legislation of most agencies gives no mandate or even policy guidance for considering the environmental impact of agency action.[13] In some agencies congressional authorization circumscribes an official's latitude to depart from economic demands in consideration of environmental values,[14] while in other agencies interpretation of the authorizing legislation has precluded any deference to environmental concerns.[15] Thus to ensure proper discharge of agency responsibility toward the environment, NEPA "incorporates certain 'action-forcing' provisions and procedures. . . ."[16] Of particular importance for the ensuing discussion are the policies and procedures of sections 101 and 102.[17]

The part of NEPA which has provoked the most commentary and provided the

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[10] 42 U.S.C. §§ 4342-4346 (1960). In debate over the provision for a group similar to the CEQ, contained in H.R. 12549, 91st Cong., 1st Sess. (1969), Representative David Obey of Wisconsin argued against delegating CEQ responsibilities to an alternative, cabinet level council, on the ground that governmental departments are by nature preoccupied with the programs within their own jurisdiction and only secondarily interested in the impact of these programs in other areas. Thus a council of cabinet members would give inadequate consideration to environmental issues. 115 Cong. Rec. 26581 (1969). Similar doubts about the efficacy of an interagency council were expressed by members of the Senate Committee on Interior and Insular Affairs. See S. Rep. No. 296, at 15-16.

[11] 115 Cong. Rec. 3699 (1969) (remarks of Senator Henry Jackson of Washington). Congressional supporters of NEPA felt that consolidation of policy review was necessary because of the extensive fragmentation of federal responsibility for environmental management, dispersed among eleven executive departments and sixteen independent agencies. Id.

[12] S. Rep. No. 296, at 14.

[13] Id. at 9.

[14] Id. at 14.

[15] Id. at 9.

[16] 115 Cong. Rec. 19010 (1969). The imposition of responsibility directly on federal agencies finds unintended justification in the testimony of opponents to the enactment of NEPA. Witnesses testifying against S. 1075, 91st Cong., 1st Sess. (1969), in its original form felt legislative action was premature and should await review of environmental management problems by the executive branch. See 1969 Hearings 6, 12, 14. The Secretary of Health, Education and Welfare, for example, felt that "the flexibility of a Council set up administratively" would be preferable to the CEQ. 1969 Hearings 11. He urged that no new statutory authority be enacted until all agency activities had been carefully reviewed. The Secretary did not venture to say how long legislation might be deferred pending such a review. 1969 Hearings 12.

[17] 42 U.S.C. §§ 4331, 4332 (1970) [hereinafter §§ 101 and 102, respectively, in accordance with the form of citation most often employed in judicial opinions]. Section 101 provides in relevant part as follows:

> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
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> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —
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> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

basis for most of the litigation under the Act is section 102(2) (C), specifically its directive that "a detailed statement ... on ... environmental impact" accompany every proposal for a major federal action significantly affecting the environment. Although the requirement of an impact statement emerged virtually unheralded in the course of legislative action on NEPA,[18] governmental failure to satisfy this requirement over the past two years has been the cause of considerable litigation challenging federal-aid highway construction.[19] The chief value of an impact statement to court

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(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

....

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

....

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Section 102 provides in relevant part as follows:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

....

(C) 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.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public, ... and shall accompany the proposal through the existing agency review processes;

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18 As originally introduced, § 101 (h) of S. 1075, 91st Cong., 1st Sess. (1969), merely authorized the Secretary of Interior "to encourage ... public or private agencies to consult with ... [him] on the impact of the proposed projects on the natural environment." 115 Cong. Rec. 3701 (1969). When returned to the Senate floor on July 10, 1969, § 102 (c)(i) of S. 1075 required only a "finding by the responsible official" that "the environmental impact of the proposed action ha[d] been studied and considered." 115 Cong. Rec. 19008 (1969).

19 The Bureau of Public Roads was singled out for special attention during debate on NEPA. "Sections 102 and 103 ... contain language designed by the Senate Committee on Interior Affairs to apply strong pressures on those agencies that have an impact on the environment – the Bureau of Public Roads, for example...." 115 Cong. Rec. 40425 (1969) (remarks by Senator Edmund Muskie of Maine). Congress had already taken action in this area with amendments to §§ 128 and 138 of the Federal-Aid Highway Act in 1968 and 1970. 23 U.S.C. §§ 101 et seq. (1972). The Bureau of Public Roads was dissolved under the reorganization of the Federal Highway Administration, pursuant to Order 1-1, December 12, 1970. The Federal Highway Administration itself was established April 1, 1967 as an agency within the Department of Transportation. Peterson & Kennan, The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation, 2 Envir. Law Reptr. 50001 n.3 (1972) [hereinafter Peterson & Kennan]. The Department of Transportation was created in 1966 by the Department of Transportation Act. 49 U.S.C. § 1651 et seq. (1970).

enforcement of NEPA is that it ensures the compilation of a record to serve as the basis for later judicial review of administrative action.

This Note will evaluate the success of NEPA, especially that of sections 101 and 102(2) (C), in bringing environmental awareness into the planning and decision-making of the Federal Highway Administration.[20] The discussion considers first the effect of NEPA upon citizens' suits brought to review federal agency actions; second, those features of federal-aid highway construction and FHWA procedures which present special obstacles to the implementation of NEPA; and third, the problems confronted to date in litigation attempting to enforce the requirement of an impact statement.

II. NEPA AND THE PROBLEMS OF CITIZENS' SUITS

A. Standing to Sue

Until recently the requirement for standing had been exclusively that of economic injury.[21] The enabling laws of the defendant agency had to provide for protection against economic injury before a party could gain standing to review the agency's action.[22] In 1965 the Second Circuit appeared to break with precedent and to enlarge beyond economic injury the class of legal wrongs entitling a complainant to standing. In *Scenic Hudson Preservation Conference v. Federal Power Commission*,[23] conservationist groups were among those appealing from an order in the district court denying standing to challenge orders of the FPC. In reversing the district court the Second Circuit said: "The 'case' or 'controversy' requirement of Article III, § 2 of the Constitution does not require that an 'aggrieved' or 'adversely affected' party have a personal economic interest."[24] Since the Federal Power Act[25] sefeguards noneconomic as well as economic interests,[26] the court held that the Act gave complainants an enforceable right to defend their "special interests."[27]

Decisions subsequent to *Scenic Hudson* have upheld a petitioner's standing to sue on the basis of noneconomic interests protected by related federal statutes.[28] One of the most influential of these cases is *Association of Data Processing Service*

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20 Hereinafter the FHWA.

21 See Comment, The National Environmental Policy Act's Influence on Standing, Judicial Review, and Retroactivity, 7 Land & Water L. Rev. 115, 116 (1972); Comment, Preservation of the Environment through the Doctrines Governing Judicial Review of Administrative Agencies, 15 St. Louis U. L. J. 429, 431 (1971).

22 The Administrative Procedure Act [hereinafter the APA] governs judicial review of administrative decisions. It provides that a party "suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970).

23 354 F.2d 608 (2d Cir. 1965) [hereinafter *Scenic Hudson*].

24 Id. at 615, citing the language of the APA, 5 U.S.C. § 702 (1964).

25 16 U.S.C. § 825*l* (b) (1970).

26 354 F.2d at 615.

27 Id. at 616. It should be noted that the court found the conservation group had a sufficient economic interest in some seventeen miles of trailways to give them standing. Id.

28 See Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), involving the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq. (1964), Fish and Wildlife Coordination Act of 1934, 16 U.S.S. § 662 (a) (1969), and Department of Transportation Act of 1966, 49 U.S.C. § 1653 (f) (1969) [hereinafter the DTA]; United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), involving the Communications Act of 1934, 47 U.S.C. § § 309 (d), (e) (1964); Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967), involving the Federal-Aid Highway Act, 23 U.S.C. § 101 et seq. (1964). See also Hanks & Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969, 24 Rutgers L. Rev. 230 (1970); Comment, Preservation of the Environment through the Doctrines Governing Judicial Review of Administrative Agencies, note 21 supra.

Organizations v. Camp,[29] a competitor's suit challenging an administrative ruling by the Comptroller of Currency. Speaking for the majority, Justice Douglas found that section 4 of the Bank Service Corporation Act of 1962[30] "arguably brings a competitor within the zone of interests protected by it."[31] Citing *Scenic Hudson*, the Court added that the interest sought to be protected by an aggrieved petitioner "may reflect 'aesthetic, conservational, and recreational' as well as economic values.... Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."[32] Shortly after the Supreme Court's ruling in the *Data Processing* case, the Second Circuit gave its decision in another citizens' suit, *Citizens Committee for the Hudson Valley v. Volpe*.[33] Here the petitioners sought to enjoin the United States Army Corps of Engineers from issuing a permit to the New York highway department for dredging and filling a part of the Hudson River. Because the public interest in environmental resources was a legally protected one,[34] the court found that the plaintiffs suffered harm within the meaning of at least three relevant statutes.[35] The plaintiff Citizens Committee and Sierra Club had made no claim of "any direct personal or economic harm" but merely asserted the public's interest in the resources and beauty of the threatened area.[36]

With the Second Circuit's holdings in *Scenic Hudson* and *Citizens Committee* and the Supreme Court's decision in *Data Processing*, it would appear that citizens' groups should encounter no problems over standing in seeking injunctions against federal-aid highway construction damaging to the environment. Beyond question, the policy directives of section 101 of NEPA create a legally protected "zone of interests."[37] Actions by the Department of Transportation[38] or the FHWA that thwart the environmental goals of these policy directives are subject to challenge by the public.

More recently, however, the Supreme Court has pointed out that "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury."[39] Thus in *Sierra Club v. Morton*,[40] where the plaintiff failed to allege personal injury to any of its members, the Court denied standing. The Court rejected the contention, derived from *Scenic Hudson*, that "those who by their activities and conduct have exhibited a special interest in such [environmental] areas, must be held to be included in the class of 'aggrieved' parties" protected by the relevant statutes.[41]

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29 397 U.S. 150 (1970). [hereinafter *Data Processing*].

30 12 U.S.C. § 1864 (1970).

31 397 U.S. at 156.

32 Id. at 153-54. Again it should be noted that petitioners had an economic stake in maintaining their competitive position. Also of note here is the companion case to *Data Processing*, Barlow v. Collins, 397 U.S. 159 (1970), involving the Food and Drug Act of 1965, 7 U.S.C. §§ 1444 (d) (10), (13) (1970). In the Food and Drug Act the Court found a congressional intention that the interests of tenant farmers be protected by the Secretary of Agriculture. 397 U.S. at 164. Since the complainant farmers had "the personal stake and interest that impart the concrete adverseness required by Article III," they were accorded standing. 397 U.S. at 164. However, as with *Scenic Hudson* and *Data Processing*, the petitioners here had a legitimate economic claim.

33 425 F.2d 97, cert. denied, 400 U.S. 949 (1970) [hereinafter *Citizens Committee*].

34 Id. at 105.

35 Id. at 104. One of the statutes was the DTA. 49 U.S.C. § 1653 (f). See text following note 114 infra.

36 Id. at 103.

37 307 U.S. at 156.

38 Hereinafter the DOT.

39 Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

40 405 U.S. 727 (1972) [hereinafter *Sierra Club*].

41 Id. at 739 n.14. The argument seems to imply that willingness to shoulder the burden and expense of litigation provides the equivalent to a personal stake in the outcome, such that the plaintiff may be relied upon to give the case its necessary adversary context.

The Court distinguished *Sierra Club* from a line of previous cases in which the plaintiff had established personal economic injury. Only where personal injury first confers standing to initiate review does a petitioner have standing to assert a public right.[42] In *Data Processing* the plaintiffs had *individual* standing on the basis of *economic* injury which permitted them to assert the rights of the class of data processors which they represented. The inquiry in *Sierra Club* was addressed to "what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared."[43] *Data Processing* thus failed to raise the question posed in *Sierra Club*. Apart from the necessity for such persons to allege personal injury, the Court held that a mere "organizational interest in the problem" or some "special interest" was insufficient to render a party "adversely affected" or "aggrieved."[44]

The Court's holding in *Sierra Club* can be attributed in part to what it interprets as a growing element of subjectivity in injuries alleged by environmentalist groups. The Court argued that if a mere "special interest" of the sort alleged by the Sierra Club were sufficient for standing, "there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived."[45] The Court here has equated personal injury to an individual member with an "objective basis" for standing. A good faith requirement of personal injury should not be difficult to satisfy, since local environmentalist groups almost certainly would have one among their members who could claim an injury in fact. But there is no reason why the same injury alleged by an organization, whether aesthetic, recreational or economic, should be less objective for the requirement of standing. If it is the Court's purpose to discourage frivolous suits from small or short-lived organizations, its reasoning is misguided. Such organizations exist primarily because individual environmentalists can rarely afford to bring suits on their own, not because they find it easier to assert trifling claims through the persona of a corporate plaintiff.

Sierra Club offers no guidelines to indicate what kinds of noneconomic injury would be sufficient for standing. The Court appears to leave the determination of this issue to the discretion of the reviewing court. As might be expected, this discretion has brought varying results. In some courts the economic interest test for personal injury seems to have regained its former status. For example, the district court in *Coalition for the Environment v. Volpe*[46] found that the citizens' coalition had shown neither individual harm nor economic loss sufficient to support a claim.[47] It held that the "allegations in regard to the air and noise pollution, and the traffic congestion, are subjective, conclusory, and unsubstantiated."[48] Indeed, it may be argued that the Supreme Court never departed from the traditional economic interest test. In the

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42 Id. at 736-37 and n.12.

43 Id. at 734.

44 Id. at 739. The Court stated that "[n]owhere in the pleadings or affidavits did the Club state that its members use Mineral King [the threatened wilderness area] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." Id. at 735. Although a brief filed by the Wilderness Society and other amici curiae did assert the Club's recreational use of Mineral King, the Club's own brief explicitly declined to rely on any individualized interest and insisted instead on its standing as a representative of its sizable public, approximately 27,000 in the San Francisco Bay area. (In a lower court decision in the same suit, the Ninth Circuit had noted that the United States Ski Association and the Far West Ski Association, claiming 109,000 "supporters", favored the proposed development, as did the county in which it was to take place, Tulare County. Sierra Club v. Hickel, 433 F.2d 24, 30 (9th Cir.), aff'd. sub nom. Sierra Club v. Morton, 405 U.S. 727 (1972).)

The Court pointed out, however, that its decision did not bar the Sierra Club from seeking to amend its complaint. 405 U.S. at 735-36 n.8. The inescapable conclusion is that recreational use of the area by Sierra Club members, if denied by the development project, would be sufficient injury to give the Club standing to assert the rights of its members.

45 Id. at 739.

46 4 Envir. Reptr. Cases 1509 (E.D. Mo. 1972).

47 Id. at 1512.

48 Id.

leading cases prior to *Sierra Club*, the petitioners had standing on the basis of economic injury independent of any violation of other interests.[49] Consequently, the district court in *San Francisco Tommorrow v. Romney*[50] observed that "[i]n no instance to which we have been referred or which we have found has it been held that one with a mere nonpecuniary interest in the subject matter of a statute, or a ... concern that a statute be enforced, has standing to sue thereunder."[51]

A few courts have not found the *Sierra Club* holding a bar to the standing of citizens' groups. One particularly interesting case for future NEPA injunctions is *Environmental Defense Fund, Inc. v. Corps of Engineers*.[52] In an earlier memorandum opinion in the same suit,[53] the court found that plaintiff organizations had no personal economic interest at stake,[54] but nevertheless held that they had standing to sue.[55] With respect to the two named individual plaintiffs, the court held that the first had demonstrated a personal economic interest and therefore had standing,[56] but deferred its ruling on the standing of the second plaintiff. This latter petitioner had alleged only a sportsman's interest in maintaining a river in its natural state.[57] Upon application to have the injunction lifted, defendants challenged plaintiffs' standing to sue under *Sierra Club*.[58] The court held that all plaintiffs, both named individuals and organizations, had standing to sue on the basis of evidence submitted in support of their allegations that they would be injured by the damming of the river.[59]

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[49] See Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940). The presence of economic injury, of course, renders the Court's statements about injuries other than economic ones dicta. The Second Circuit's language in *Scenic Hudson* may also be construed as dicta for the same reason. See note 27 supra. In the four Supreme Court cases just noted, the relevant statutes were found to protect economic interests.

[50] 342 F. Supp. 77 (N.D. Cal. 1972).

[51] Id. at 81.

[52] 342 F. Supp. 1211 (E.D. Ark. 1972).

[53] 325 F. Supp. 728 (E.D. Ark. 1971). Plaintiffs in this suit challenged an Army Corps decision to dam the free-flowing Cossatot River in Arkansas. The court addressed itself to the standing of both individual and non-profit corporate plaintiffs.

[54] Id. at 734.

[55] Id. at 735-36. Recognizing that the language in *Scenic Hudson* and *Data Processing* was dicta, the court still argued that "the rationale of *Data Processing* and the other Supreme Court decisions, if not the precise holdings, clearly indicates that such plaintiff organizations as those involved in such cases have standing to sue." Id. at 735. Of particular note here is the fact that the court sided with the dissent in Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), aff'd sub nom. Sierra Club v. Morton, 405 U.S. 727 (1972).

[56] 325 F. Supp. at 736.

[57] Id.

[58] 342 F. Supp. at 1216.

[59] Where the standing of a named individual is at issue, Environmental Defense Fund v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark. 1972), suggests that a court may be less willing to consider injury to aesthetic or social interests than where standing of members in a conservationist group is challenged. The policy set forth in section 101 of NEPA does not support such a discriminatory distinction. The statute declares that "it is the continuing policy of the Federal Government, in cooperation with ... *concerned* public and *private organizations*, ... to foster and promote the general welfare, ... and [to] fulfill the social ... requirements of ... Americans." 42 U.S.C. § 4331 (1970) (emphasis added). Section 101 also declares the congressional belief that "*each person* has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331 (c) (1970) (emphasis added).

In Conservation Society of Southern Vermont, Inc. v. Volpe, 343 F. Supp. 761 (D. Vt. 1972), also decided after *Sierra Club*, the district court found that "the individual plaintiffs, ... as well as plaintiff The Conservation Society ..., of which they are members, have the requisite personal interest or stake in the outcome of this litigation ... to maintain it." Id. at 763. The court did not specify what "personal interest or stake in the outcome" had been alleged, nor what evidence had been introduced in support of the allegations. This finding was dictum, however, since defendants had waived objection to the standing of these particular plaintiffs.

The cases decided subsequent to *Sierra Club* indicate that its effect on the standing of citizens' groups to challenge agency action is not fully ascertainable at this point. Although courts appear divided on whether or not economic injury is still a prerequisite to standing, there is nothing in *Sierra Club* that can be construed to require a showing of economic injury. The distinction which most concerned the Court was that between the "special interest" of an organization qua organization and the direct injury to its individual members.[60] Nowhere does the Court indicate that injury of an aesthetic or recreational nature is insufficient to confer standing where the relevant statute protects against such injury.[61] The Sierra Club, however, did not claim standing under NEPA, but relied entirely on the APA.

B. NEPA and Judicial Review of Agency Action

The APA provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review,"[62] except where judicial review is precluded by statute or "agency action is committed to agency discretion by law."[63] Neither the Department of Transportation Act of 1966[64] nor the Federal-Aid Highway Act[65] precludes judicial review of decisions reached by the DOT. Neither statute commits these decisions to agency discretion . The DTA specifically provides for review,[66] while sections 701 and 704 of the APA authorize judicial review of actions taken pursuant to the FAHA.[67]

The APA also provides that a court may "hold unlawful and set aside agency action, finding and conclusions" if they are found to be "arbitrary, capricious, [or] an abuse of discretion," or "without observance of procedure required by law."[68] Since the only interests protected by section 102 of NEPA are those represented by the policies of section 101, the most a court could do under section 704 of the APA is issue a temporary injunction pending compliance with the procedural requirements of section 102. However, section 701 of the APA appears to authorize a court to enjoin highway construction permanently if, on the basis of disclosures in a detailed impact statement, an FHWA decision to procede with a highway project ignored the policies of section 101.[69]

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60 See text accompanying note 44 supra.

61 See note 44 supra.

62 5 U.S.C. § 704 (1970).

63 Id. § 701. An "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief,, or the equivalent or denial thereof, or failure to act." Id. § 551 (13).

64 49 U.S.C. § 1651 et seq. (1970).

65 23 U.S.C. § 101 et seq. (1970) [hereinafter the FAHA].

66 49 U.S.C. § 1653 (c) (1970).

67 5 U.S.C. §§ 701, 704 (1970). See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). The Supreme Court has held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

68 5 U.S.C. §§ 706 (2)(A), (D) (1970). There are four additional grounds upon which the APA authorizes agency action to be set aside, § § 706 (2)(B), (C), (E), (F). In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), the Supreme Court analyzed the applicability of the APA to a federal-aid highway project routed through a Memphis park. The relevant statutes were § 4 (f) of the DTA, 49 U.S.C. § 1653 (f) (1970), and § 18 (a) of the FAHA, 23 U.S.C. § 138 (1970). The suit was begun before NEPA was enacted. However, these statutes, virtually identical in wording, have procedural guarantees for considering environmental values analogous in legal effect to those of section 102 of NEPA. There appears to be no reason why the Court's reasoning here would not apply to a claim seeking to invalidate an FHWA decision on authority of § § 706 (2)(B), (C), (E) or (F) of the APA. Thus only two of the six grounds upon which agency action may be set aside, § § 706 (2)(A), (D), would be available under NEPA.

69 This subject is taken up in more detail in the text following note 141 infra.

No case has been reported in which a court has permanently enjoined a highway project because the decision to undertake it was arbitrary or capricious. Nevertheless, it appears fully within a court's discretion to do so. The statutory language and legislative history of NEPA both support such discretion. The House-Senate conference committee altered the statutory language so that the phrase "to the fullest extent possible" modifies both the policy and procedure clauses of section 102. In the earlier Senate approved version, only the directives under the procedure clause were to be implemented "to the fullest extent possible."[70] The change strongly implies a congressional intent that compliance with the procedural requirements alone is not sufficient to discharge an agency from its duty to implement the policies of section 101.

III. ADMINISTRATION OF THE FEDERAL-AID HIGHWAY PROGRAM

A. Federal Funding and Administrative Procedures

Federal-aid highway programs are funded by the federal Highway Trust Fund[71] and state highway trust funds. These funds are maintained by federal and state taxes on motor oil, gasoline, automotive products and highway use, and by state vehicle licenses and registration fees.[72] Congress periodically authorizes the Secretary of Transportation to disperse Highway Trust funds among the states according to the formula found in section 104 of the FAHA.[73] Section 118 (b) of the FAHA requires that, once appropriated to the states, funds must be used within "two years after the close of the fiscal year for which such sums are authorized" or they lapse. If a state receives federal funds for a highway project and then fails to complete all the work on it within the allotted time, the state loses the use of the remaining funds for any unfinished work. Moreover, once earmarked for a particular project, federal money cannot be transferred to other projects. Therefore states tend to submit many small highway projects for federal approval in order to gain the maximum use of federal money.[74]

The FHWA method of project approval encourages the states to adopt a piecemeal approach to highway construction. Section 105 (a) of the FAHA calls for states to submit plans for program approval to the Secretary of Transportation as soon as possible after apportionment of federal funds for any fiscal year. A "program" may consist of several "projects", any number of which may be approved by the Secretary.[75] The term "project" covers a bewildering variety of highway-related

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70 115 Cong. Rec. 40417 (1969). See the further discussion of this phrase in the text accompanying note 95 and notes 107-108 infra. It is submitted that § 102(1) is a procedural clause as well. See note 144 infra and accompanying text.

71 The Trust Fund was created by the Highway Revenue Act of 1956, ch. 462, tit. II, § 209, 70 Stat. 397.

72 According to federal policy as declared in the Hayden-Cartwright Act of 1934, 23 U.S.C. § 126 (1970), federal aid for highway construction shall be denied to states who divert revenue from automobile and highway related taxes and licenses in excess of pre-1935 amounts. Partly as a result of this policy the constitutions of twenty-eight states have amendments requiring that revenue from gasoline taxes and registration fees be used only for highway purposes. See Salaman, Towards Balanced Urban Transportation: Reform of the State Highway Trust Funds, 4 Urban L. 77, 78, 80 (1972).

73 23 U.S.C. § 104 (1970). The authorization is usually made once every two years. Subsequent section references in the text to the FAHA are to Title 23 of the U.S.C. and hereinafter will not be cited in the footnotes.

74 Peterson & Kennan, note 10 supra, at 50005.

75 In practice the division engineer of the FHWA is the federal official responsible for program approval.

undertakings.[76] Aside from the section 105 (a) requirement that all the projects of a program be part of "an approved Federal-aid system," a program "has no ascertainable unifying feature other than an intention ... to use apportioned federal-aid highway funds."[77] Therefore, approval or disapproval of individual projects has no effect on the program as a whole. But approval of a project under section 105 (a) is essential before a state may begin work, even without the use of federal money, on any project for which it may eventually seek federal reimbursement.[78] The very fact that highway construction is divided into many different projects for the purposes of funding encourages the states to undertake highway construction on a project-by-project basis. The separable nature of a project also works against the implementation of comprehensive and integrated programs. The inevitable result is that federal-aid highway construction is a fragmented process.

These procedures in federal funding and project approval frequently place FHWA officials in compromising positions. Completed portions of highway construction may require departure from federal requirements in current projects. Alternatively, current projects, though satisfactory considered by themselves, may give rise to violations of environmental standards when linked with earlier projects. This is particularly true where recent congressional amendments to federal statutes have mandated consideration of aesthetic, social or environmental values in addition to economic factors.[79] The FHWA official passing on a state application under these circumstances is confronted with the unattractive choice of forcing the state to redesign the highway, thus wasting federal funds already expended or committed to the project, or ignoring environmental considerations. Several highway injunction suits suggest that FHWA officials have chosen to ignore environmental considerations.[80]

B. Federal Regulations and Guidelines for Implementation of NEPA

There are three principal sets of regulations and guidelines by which the FHWA has implemented the directives of NEPA in administering federal-aid highway funds. They are the DOT Policy and Procedure Memorandum 20-8,[81] the CEQ Guidelines,[82] and Policy and Procedure Memorandum 90-1.[83]

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[76] See Peterson & Kennan, note 19 supra, at 50003, for the various definitions of "project".

[77] Id. at 50007.

[78] Id. at 50008. There are two other kinds of approval. The first is the approval of plans, specifications and estimates required by § 106 (a). The second is the approval of "authorization to proceed with work." The latter approval is departmentally imposed. 23 C.F.R. §1.12 (1972); PPM 21-1, ¶2 (April 15, 1958), 2 Envir. Law Reptr. 46507 (1972). See Peterson & Kennan, note 19 supra, at 50006.

[79] See discussion of the amendments to § 128 and § 138, note 19 supra.

[80] These suits involve both NEPA and other federal statutes, notably § 4 (f) of the DTA and § 138 of the FAHA. See the discussion of cases in the text accompanying notes 114-117 infra.

[81] 23 C.F.R. § 1.38, App. A (1972) [hereinafter PPM 20-8]. PPM 20-8 was issued January 14, 1969.

[82] 36 Fed.Reg. 7724 (1971). The CEQ Guidelines were issued April 23, 1971.

[83] Policy and Procedure Memorandum 90-1 [hereinafter PPM 90-1] was not published in the Federal Register or the Code of Federal Regulations. It has been printed in 2 Envir. Law Reptr. 46106 (1972). The Memorandum was issued August 24, 1971.

1. PPM 20-8

Although not issued under authorization of NEPA,[84] PPM 20-8 was in force when the FHWA approved many of the projects for which injunctions are now being sought. Therefore courts are required to consider PPM 20-8 in their decisions.[85] The Memorandum directs state highway agencies to afford opportunities to the public for two hearings on a proposed federal-aid project: the first on the location (or "corridor") of the highway and the second on the highway's design. Where hearings have been held, the state must submit transcripts of them with its request for federal approval of location and design. Whether or not hearings are held, state requests for approval must be accompanied by study reports. These reports must contain, among other things, descriptions of the alternatives considered, a discussion of the social, economic and environmental effects anticipated from the alternatives, and the reasons supporting the recommended choice of location or design.[86] In addition the study reports must present a "summary and analysis of the views received concerning the proposed undertaking."[87] Design approval will not be given until location approval has been secured, and both approvals presume completion of these study reports.[88]

2. CEQ Guidelines

The authorization for the CEQ Guidelines issues from section 102(2) (C) of NEPA.[89] Although the Guidelines have no legal status,[90] the courts have frequently referred to these Guidelines in establishing legislative intention and in construing certain passages in NEPA.[91] Therefore it will be useful to summarize relevant parts of the Guidelines.

First, with reference to the phrase "to the fullest extent possible" in section 102, the Guidelines state:

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84 PPM 20-8 was issued pursuant to §§ 128 and 315 of the FAHA and §§ 1651 (a), 1651 (b)(2) and 1657 (e)(1) of the DTA. For the purposes of this Note the most important of these statutes is the first. Section 128 requires state highway authorities to afford opportunities for hearings on federal-aid highways projects affecting populated areas, and on inter-state system projects affecting rural property owners. The holding of hearings is thus left to the discretion of the state highway department in the absence of public request for them. Whether or not hearings are held, for both types of projects the responsible state agency must certify to the Secretary of Transportation (in practice, the FHWA division engineer) that it has considered the economic, social and environmental effects of the project.

85 PPM 20-8 applies "to all Federal-aid highway projects." 23 C.F.R. § 1.38, App. A ¶ 3 a (1972). It applies as well to "preliminary engineering or acquisition of right of way related to an undertaking to construct a portion of a Federal-aid highway project," so that "subsequent phases of the work are eligible for Federal-aid funding only if the nonparticipating work . . . was done in accordance with this PPM." Id. ¶ 3 b. It would appear that "project" as used here means "highway section". See Peterson & Kennan, note 19 supra, at 50003 n.13.

86 23 C.F.R. § 1.38, App. A ¶ 10 b (1) (1972).

87 Id. ¶ 10 b (3).

88 This two-stage approval has been interpreted as additional to the project approval prerequisite to federal reimbursement. Peterson & Kennan, note 19 supra, at 50012.

89 Authorization is also contained in Exec. Order No. 11514 of March 4, 1970. 3 C.F.R. 526 (1972).

90 They are not regulations and therefore not binding on any federal agency. For the legal status of Policy and Procedure Memoranda of the DOT and FHWA, see Peterson & Kennan, note 19 supra, at 50002 n.7. Because they must be used by all agencies to which NEPA applies, the Guidelines are more general than any of the PPM 20-8 or PPM 90-1 regulations.

91 "Such an administrative interpretation can not be ignored except for the strongest reasons, particularly where, as here, such an interpretation involves a construction of a statute by the men charged with the responsibility of putting that statute into effect." Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728, 744 (E.D. Ark. 1971). See also Greene County Planning Board v. FPC, 455 F.2d 412, 421 (2d Cir.), cert. denied, 41 U.S.L.W. 3184 (U.S. 1972) (No. 1597); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167, 1171 (S.D. Iowa 1972).

> The phrase ... is meant to make clear that each agency of the Federal Government shall comply with the requirements unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.[92]

Second, inasmuch as section 102(2) (C) requires an impact statement for "major Federal actions significantly affecting the ... environment," a degree of agency discretion is implied in deciding whether or not a proposed action comes within the scope of the statute. The Guidelines direct that "if there is a potential that the environment may be significantly affected, the statement is to be prepared."[93] Finally, section 102 does not make any reference to revaluation of projects or programs begun before January 1, 1970, although section 101 (a) recognizes "the critical importance of restoring ... environmental quality." Given the continuing nature of federal-aid highway construction, the following Guidelines' statement is particularly important:

> To the *maximum extent practicable* the section 102(2) (C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970.[94]

There is an appreciable difference between the standards of the Guidelines phrase "maximum ... practicable" and of the section 102 phrase "fullest ... possible." The less demanding standard of the Guidelines language implies that NEPA procedures need not be applied to continuing or "further" actions with as much rigor as to actions begun after January 1, 1970.[95]

3. PPM 90-1

PPM 90-1 was authorized by section 102(2) (C) of NEPA as well as three other statutes.[96] The Memorandum makes significant improvements in the procedures and definitions contained in PPM 20-8. The most important of these improvements is the substitution of a "highway section" for the earlier concept of a "project". The Memorandum directs that a highway section "be as long as practicable to permit consideration of environmental matters on a broad scope." The Memorandum further charges the state highway agencies:

> Piecemealing 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 multiyear highway improvement program.[97]

By broadening the scope of a highway unit from project to highway section, PPM 90-1 greatly facilitates comprehensive evaluation of environmental factors contemplated by NEPA.

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92 36 Fed. Reg. 7724, ¶ 4 (1971).

93 Id. ¶ 5 (b).

94 36 Fed. Reg. 7727, ¶ 11 (1972) (emphasis added).

95 This interpretation was adopted by the district court in Environmental Law Fund, Inc. v. Volpe, 340 F. Supp. 1328 (N.D. Cal. 1972). Originally the CEQ's Interim Guidelines applied the stricter standard of "fullest extent possible" to ongoing actions. 35 Fed. Reg. 7392, ¶ 11 (1970).

96 The other statutes are § 4 (f) of the DTA, § 106 of the Historic Preservation Act of 1966, 16 U.S.C. § 470f (1970), and § 309 of the Clean Air Act of 1970, 42 U.S.C. § 1857h-7 (1970).

97 2 Envir. Law Reptr. 46107, ¶ 6. The Memorandum defines a "highway section" as "a substantial length of highway between logical termini ... as normally included in a single location study." Id. ¶ 3 a.

In spite of its constructive measures for implementing NEPA,[98] PPM 90-1 has some serious shortcomings. These shortcomings have arisen partly because it had to be adapted to some of the provisions of the earlier PPM 20-8 which had regulated previous state agency action,[99] and to the latitude allowed state highway officials in a Draft Instructional Memorandum of November 24, 1970.[100] Consequently PPM 90-1 grants unwarranted discretion to FHWA officials in deciding whether or not to implement NEPA. For one thing it appears to delegate more authority to state highway officials than is authorized by NEPA. Although careful to make relevant agency action subject to joint approval by federal and state officials,[101] the Memorandum always places responsibility for initiating environmental evaluation with the state official. In contravention of section 102(2) (C), paragraph 6(i) of the Memorandum provides that the highway agency with primary responsibility for developing a proposal — usually the state highway department — "shall prepare a final environmental . . . statement."

A more important abdication of FHWA responsibility, however, is the qualified exemption from compliance with NEPA procedures granted for highway sections which received design approval under PPM 20-8 before February 1, 1971. A section classified as a "major action" must be reassessed by the state highway department to determine whether "the highway plans were developed in a [sic] such a manner as to minimize adverse environmental consequences."[102] Taking into account both this reassessment and other designated considerations, the FHWA division engineer may exercise his own judgment in deciding "if . . . implementation of [NEPA] to the fullest extent possible requires preparation and processing of an environmental statement."[103] Most of the considerations listed by the Memorandum are indicia of how far the highway has

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98 PPM 90-1 adopts two other procedures stemming from NEPA which should be noted here. First, it supplements the § 102(2) (C) requirement for an impact statement by recommending the use of a draft, or preliminary environmental statement, in addition to a final one. Id. ¶ 6. This procedure was suggested by the CEQ Guidelines for agencies which decline "to favor an alternative [action] until public hearings have been held on a proposed action." 36 Fed. Reg. 7725, ¶ 6 (vii)(d) (1972). Second, PPM 90-1 provides for a "negative declaration". This is "a written document in support of a determination that . . . the anticipated [environmental] effects . . . will not be significant." 2 Envir. Law Reptr. 46107, ¶ 3 d (1972). Appendix F of the Memorandum supplies a list of criteria by which to determine whether or not a federal action requires an impact statement.

The Appendix notes a possible loophole in § 102(2) (C) of NEPA. It divides the threshold decision into two parts: a finding that the action is major and a finding that it has a significant effect on the environment. Presumably an action which has a significant effect on the environment would not require an impact statement if it were not also a major action. H.R. 8984, 92d Cong., 1st Sess. (1971), introduced June 8, 1971, by Representative Edward Koch (New York) would amend § 102(2) (C), deleting the word "major". Action on the bill is pending.

99 For example, PPM 20-8 permits an FHWA division engineer to "authorize right-of-way acquisition, . . . or authorize construction" after the "State highway department has *requested* highway design approval." 23 C.F.R. § 1.38, App. A ¶ 10 d (2) (1972). This contravenes the policy set forth earlier in PPM 20-8, whereby "subsequent phases of the work are eligible for Federal-aid funding only if the nonparticipating work after the effective date of this PPM was done in accordance with this PPM." Id. ¶ 3 b. Under the provision of ¶ 10 d (2) a highway section could be well advanced toward completion before a design approval hearing were held. This would prevent full consideration of the highway's environmental effects and create a situation where implementation of NEPA would be retroactive.

100 The Draft Instructional Memorandum [hereinafter the DIM] states that its procedures do not apply "to projects that received or receive design approval before February 1, 1971." Quoted in Peterson & Kennan, Note 19 supra, at 50016. (Apparently this DIM has never been published.) As discussed in the text accompanying notes 102-103 infra. PPM 90-1 qualifies this exemption from compliance with NEPA. See note 111 infra.

101 See, for example, 2 Envir. Law Reptr. 46108, ¶ 6 b (1972).

102 2 Envir. Law Reptr. 46107, ¶ 5 c (1972).

103 Id.

progressed toward completion.[104] The FHWA division engineer is tacitly advised to favor completion of the highway over consideration of its environmental impact. The discretionary power thus vested in FHWA officials by PPM 90-1 manifestly runs counter to the policy directives of NEPA.

Design approval secured according to the requirements of PPM 20-8 grants the highway section preliminary eligibility for federal funds without adherence to the more demanding requirements of an environmental impact statement. Therefore it is understandable that many state highway agencies submitted requests for design approval prior to the February 1, 1971, deadline. According to one source, "an extraordinary number of design approvals were given or documented during January, 1971."[105] As the following discussion indicates, the federal courts are now being asked to decide whether FHWA engineers were properly empowered to waive NEPA's requirement of an impact statement in granting these design approvals.

IV. LITIGATION AND THE ENVIRONMENTAL IMPACT STATEMENT

Before beginning an analysis of judicial treatment of NEPA it may be useful to summarize briefly what has been said thus far. Judicial review of FHWA decisions will be governed by the APA, which authorizes review of agency action where the interest asserted by the petitioner is arguably within the scope of interests protected by a relevant statute. Through the procedural directives of section 102, NEPA clearly protects the environmental values articulated in section 101. Following the Supreme Court's holding in *Sierra Club*, a petitioner must show personal injury flowing from an agency action before he has standing to seek an injunction. However, it should be remembered that the holding in *Sierra Club* applies to a complaint which did not allege violation of any interests protected by NEPA.

Since NEPA has necessarily been cast in general terms and has been in force only three years, the courts are still in the process of interpreting the Act's language and delimiting its scope. Therefore, the first problem of judicial review in NEPA suits is statutory construction. Second, FHWA administrative policies and procedures concerning agency discretion and approval of highway sections have obstructed implementation of NEPA and created special problems in court enforcement of it. Finally, these same procedures and policies have exacerbated the existing difficulties which the piecemeal nature of federal-aid highway construction presents to the application of NEPA.

A. The Courts' Interpretation of NEPA

The leading case interpreting section 102(2) (C) of NEPA is *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission.*[106] The

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104 They are: "the status of design; right-of-way acquisition including demolition of improvements within the right-of-way; number of families already rehoused and those yet to be rehoused; construction scheduling; benefits to accrue from the proposed highway improvement; significant impacts; and measures to minimize any adverse impacts of the highway." Presumably the FHWA engineer who found advanced progress in these areas would not require an impact statement, for in themselves most of these factors suggest concern for the state of the highway's progress, not its impact on the environment.

105 Peterson & Kennan, note 19 supra, at 50017. For a discussion of the DIM and an account of the circumstances surrounding it, see Peterson & Kennan, at 50016-17.

106 449 F.2d 1109 (D.C. Cir. 1971) [hereinafter *Calvert Cliffs'*]. See generally Note, Federal and State Responsibilities in the Environmental Control of Nuclear Power Plants, 2 N.Y.U. Rev. L. & Soc. Change 20 (Spring 1972).

court held that the phrase "to the fullest extent possible" in section 102 "does not make NEPA's procedural requirements somehow 'discretionary'."[107] Noting the distinction between the section 101 phrase "to use all practicable means" and the section 102 phrase, the court said that the "procedural duties, the duties to give full *consideration* to environmental protection, are subject to a much more strict standard of compliance."[108] This language imposes an active duty on the federal agency: "it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation."[109]

In accord with *Calvert Cliffs'* on the subject of discretionary federal responsibility for an impact statement, the court in *Greene County Planning Board v. Federal Power Commission* held that section 102(2) (C) "explicitly requires the [federal] agency's own detailed statement to 'accompany the proposal through the existing agency review process.'"[110] Neither of these two cases, of course, involved federal-aid highway injunctions, but they would provide unequivocal precedent for any suit challenging an FHWA decision based on PPM 90-1 and the delegation of federal responsibility sanctioned therein.[111]

B. Jurisdiction

Suits brought to halt federal-aid highway construction are federal questions under the Federal Rules of Civil Procedure,[112] providing the amount in question exceeds $10,000. Where no federal money is involved in a highway project, federal courts have no jurisdiction to enforce NEPA against state highway departments. Consequently, state highway departments have resorted to various ruses in order to exempt controversial highway sections from federal funding so that they may escape federal jurisdiction and compliance with NEPA.

In *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*,[113] the plaintiffs brought suit under NEPA and section 4 (f) of the DTA.[114] Section 4 (f) provides that public park lands shall not be used for federal-aid highways unless there is "no feasible and prudent alternative" and the program "includes all possible planning to minimize harm" to park land. The route of the contested highway construction ran through a park in San Antonio. The state had secured approval from the FHWA for federal funding of two stretches, one on either side of the park. In order to avoid compliance with section 4 (f) and a preliminary injunction to stop work, the state attempted to withdraw the federal funds from the project and re-allocate them. The Fifth Circuit refused to allow federal jurisdiction and the supremacy of federal law to be usurped by "a mere change in bookkeeping or by shifting funds from one project to another."[115] The court ordered the state to comply with section 4 (f) and NEPA.

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107 449 F.2d at 1114.

108 Id. at 1128.

109 Id. at 1119.

110 455 F.2d 412, 421 (2d Cir.), cert. denied, 41 U.S.L.W. 3184 (U.S. 1972) (No. 1597).

111 The DIM of November 24, 1970, gave categorical exemption from NEPA to projects which received design approval before February 1, 1971. See note 100 supra.) In response to the D.C. Circuit's decision in *Calvert Cliffs'* the FHWA modified this exemption when it issued PPM 90-1. Peterson & Kennan, note 19 supra, at 50016 n.84. The D.C. Circuit struck down an AEC regulation, 10 C.F.R. § 50, App. D (1971), that relieved the Commission's hearing boards from any obligation to consider environmental issues at hearings officially noticed before March 4, 1971. *Calvert Cliffs'*, 449 F.2d at 1119.

112 28 U.S.C. § 1331 (a) (1970).

113 446 F.2d 1013 (5th Cir.), cert. denied, 400 U.S. 961 (1970) [hereinafter *San Antonio*].

114 49 U.S.C. § 1653 (f) (1970).

115 446 F.2d at 1027.

A similar arguement was pressed by the state defendants in *Arlington Coalition on Transportation v. Volpe.*[116] Plaintiffs in this case brought suit under NEPA, section 4 (f) of the DTA and sections 128 (a) and 138 of the FAHA,[117] contesting the use of park lands and the failure to issue an impact statement. The state argued that it could carry out condemnation and eviction proceedings on the right of way by authority of state law and that no federal question was presented. The court rejected this argument and asserted its jurisdiction.[118]

Other recent cases confirm the federal courts' refusal to allow fragmentation of highway projects in order to avoid compliance with federal statutes. In *Indian Lookout Alliance v. Volpe*,[119] the state argued that an impact statement was not required for a three-mile stretch of a fourteen-mile highway since design approval had been granted on March 25, 1969. The state had complied with the FHWA guidelines for implementing NEPA under the DIM of November 24, 1970.[120] Citing *San Antonio*, the court rejected the state's contentions and held for the petitioners.[121] In doing so it stressed the environmental effects of the three-mile stretch when integrated with the other segments. "In view of the limited size of the entire project, . . . and because of the coercive effect the construction of one segment of the highway has on the other, compliance with NEPA requires ... an environmental assessment of the entire project. . . ."[122] A similar result was reached in *Thompson v. Fugate*,[123] where federal location approval of the contested section of a federal-aid highway had been given in January, 1971.[124]

The foregoing cases offer encouraging evidence that the federal courts are determined to enforce NEPA "to the fullest extent possible." The discretion conferred on state and federal authorities by the FHWA's DIM of November 24, 1970, and PPM 90-1, the fragmentation of federal-aid highways sanctioned by FHWA procedures and practiced by state highway departments, and the concurrent attempts by these state agencies to escape federal jurisdiction have thus far failed to frustrate the congressional purpose which informs NEPA.

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116 458 F.2d 1323 (4th Cir.), petition for cert. filed, sub nom. Fugate v. Arlington Coalition on Transp., 41 U.S.L.W. 3126 (U.S. Aug. 7, 1972) (No. 218) [hereinafter *Arlington Coalition*].

117 As indicated in note 68 supra, § 138 is virtually identical to § 4 (f). Section 128 is discussed in note 84 supra.

118 Noteworthy is the court's use of pendent jurisdiction to enforce NEPA.

> Action of a state highway department challenged because furthering a project that under federal law allegedly must be reconsidered, is a matter in controversy arising under the laws of the United States. Federal jurisdiction over such state action is essential to preserve federal question jurisdiction in the application of federal statutes. It is a form of pendent jurisdiction, but based upon necessity rather than convenience and limited to preventing emasculation of a remedy clearly available against the federal respondents." 458 F.2d at 1329.

119 345 F. Supp. 1167 (S.D. Iowa 1972). See note 91 supra.

120 Id. at 1170-71.

121 Id. at 1170.

122 Id.

123 347 F. Supp. 120 (E.D. Va. 1972).

124 The court held: "The highway project with which we are concerned cannot be fractionalized. . . . Any conclusion to the contra [sic] would be to participate in the frustration of Congressional policy. . . ." Id. at 124.

C. Retroactivity[125] and Laches

The most contested issue in NEPA litigation is the point at which continuing projects become exempt from compliance with section 102(2) (C). A few courts have taken a very simplistic view of the matter in holding that design approval before January 1, 1970, is the cut-off point placing federal-aid highways outside NEPA.[126] Most courts, as suggested by the previous discussion, have taken a broader view and gone beyond the date of federal "approval" to consider other factors. These factors generally amount to an index for measuring how near the highway is to completion. Thus the procedure adopted is a kind of equitable balancing of detriment versus benefit on a case-by-case basis.

Stressing the strict standard of compliance articulated in section 102, the court in *Arlington Coalition* adopted as its policy that "doubt about whether the critical stage has been reached must be resolved in favor of applicability [of NEPA]."[127] Design approval had been given on January 21, 1971, but approval of plans, specifications and estimates, of construction contract awards and of the construction itself had not been given. Without attempting to establish a rule for all cases to determine applicability of section 102(2) (C), the court held that the highway had not reached the stage of completion which would place it beyond the requirement of an impact statement.[128] Moreover, the court asserted that to decide the applicability of NEPA by "the date of design approval alone" would constitute an "arbitrary and capricious agency action and an abuse of administrative discretion"[129] in violation of the APA.

In contrast to *Arlington Coalition*, the district court in *Environmental Law Fund v. Volpe*[130] followed the more flexible standard of the CEQ Guidelines' phrase, "[t]o the maximum extent practicable," in determining whether NEPA should apply to ongoing highway programs. It then set forth four principles by which to judge applicability. They were (1) the "participation of the local community in the planning of a project;" (2) the extent to which state officials have "attempted to take environmental factors into account;" (3) the "likely harm to the environment if the project is constructed as planned;" and (4) the "cost to the state of halting construction while it compiles an impact statement."[131] Weighing all factors according to these four principles, the court concluded that an impact statement should not be required.[132]

As noted earlier, where design approval has been secured before February 1, 1971, PPM 90-1 confers discretionary authority upon the FHWA division engineer not to issue an impact statement if review of various specified considerations fails to warrant one. These considerations are primarily indications of project completeness.[133]

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125 The term "retroactivity" is frequently employed in a nonlegal sense to denote the application of NEPA to highway construction begun before January 1, 1970. For a discussion of the way in which courts avoid the constitutional and due process problems of retroactivity through statutory construction, see Note, Retroactive Application of the National Environmental Policy Act of 1969, 69 Mich. L. Rev. 732 (1971). See also Comment, The National Environmental Policy Act's Influence on Standing, Judicial Review, and Retroactivity, note 21 supra.

126 See Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613, 624 (3d Cir. 1971); Brooks v. Volpe, 319 F. Supp. 90 (W.D. Wash. 1970); Bucklein v. Volpe, 2 Envir. Reptr. Cases 1082 (N.D. Cal. 1970).

127 458 F.2d at 1335.

128 Id. at 1332.

129 Id.

130 340 F. Supp. 1328 (N.D. Cal. 1972) [hereinafter *Environmental Law Fund*].

131 Id. at 1334-35.

132 The *Environmental Law Fund* principles have been adopted by the district court in Conservation Society of Southern Vermont v. Volpe, 343 F. Supp. 761 (D. Vt. 1972).

133 See note 104 supra.

An FHWA engineer's decision under PPM 90-1 to exempt a project from the requirement of an impact statement helps create the circumstances which give rise to laches.

As was the case with respect to retroactivity, courts are willing to balance all factors relating to detriment and benefit to the defendants before granting laches. Thus in *Arlington Coalition*, the court found that the costs incurred by altering or abandoning the original route would not "*certainly* outweigh the benefits" of doing so, and declined to invoke laches "because of the public interest status accorded ecology preservation by the Congress."[134] Although the court in *Environmental Law Fund* noted that "plaintiffs' delay in filing the complaint has contributed to the pressure of the present situation,"[135] it held for the defendants on grounds other than laches.[136] In *Lathan v. Volpe* the plaintiffs were found guilty of laches for waiting seven years after an admittedly defective hearing before bringing an action.[137] Thus where a plaintiff's own delay does not prejudice his cause of action, it would appear that a court's concern with effectuating the policies of NEPA provides an adequate counterbalance to the *laissez-faire* procedures of the FHWA.

D. Substantive[138] versus Procedural Rights

To this point the discussion has assumed that the only right protected by NEPA is the right to have the policies of section 101 duly considered by federal administrative agencies, with the protection of that right guaranteed by the procedures of section 102. It has been argued that NEPA creates substantive rights in addition to these procedural safeguards.[139] The essence of this argument is that the policies of section 101 are incorporated into the procedures of section 102 by the phrase "to the fullest extent possible." Federal agency implementation of section 101 policies thus becomes no less obligatory than implementation of section 102 guarantees. Although the term "substantive rights" may be a misnomer, the contention is that federal courts may review agency decisions on the merits.

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134 458 F.2d at 1329-30.

135 340 F. Supp. at 1336-37 n.21.

136 Id. at 1337.

137 455 F.2d 1111, 1122 (9th Cir. 1972). The plaintiffs were estopped from claiming denial of due process with respect to the hearing, but the court nevertheless required an impact statement on other grounds.

138 The term "substantive" was used with conflicting implications during congressional debate. Representative Leonard Farbstein of New York expressed the hope "that [NEPA's] passage will not serve as an excuse for substantive legislative action." 115 Cong. Rec. 40928 (1969). Elsewhere Senator Henry Jackson of Washington referred to NEPA's "substantive provisions" generally. 115 Cong. Rec. 40415 (1969).

139 See Cohen & Warren, Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969, 13 B.C. Ind. & Com. L. Rev. 625 (1972); Note, Judicial Review of Factual Issues Under the National Environmental Policy Act, 51 Ore. L. Rev. 408 (1972). In Environmental Defense Fund, Inc. v. Hoerner Waldorf, a suit against a private concern, the district court concluded that "each of us is constitutionally protected in our [sic] natural and personal state of life and health," but only against state action. 1 Envir. Reptr. Cases 1640, 1641 (D.C. Mont. 1970). Other courts have been unwilling to find in NEPA or the fifth, ninth or fourteenth amendments a legally protected right to a healthful environment. The district court in Environmental Defense Fund, Inc. v. Corps of Engineers held that NEPA "does not purport to vest in the plaintiffs, or anyone else, a 'right' to the type of environment envisioned therein." 325 F. Supp. 749, 755 (E.D. Ark. 1971). See also Bucklein v. Volpe, 2 Envir. Reptr. Cases 1082, 1083 (N.D. Cal. 1970); Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

At least two objections to this argument may be tendered. First, the legislative history of the Act does not support it.[140] Second, creation of substantive rights is unnecessary. The APA already grants federal courts the power to set aside an agency action if it is found to be "arbitrary, capricious, [or] an abuse of discretion."[141] This provides at least a nominal limit to agency discretion. Moreover, the APA also empowers federal courts to set aside agency actions found to be "without observance of procedure required by law."[142] Section 102(1) is itself procedural in nature.[143] An FHWA decision sanctioning an environmentally damaging project would, *ipso facto*, be a violation of section 102(1) procedure. Full compliance with NEPA's policies would then require withholding authorization of federal funds. Therefore it would appear that a federal court has the power under the APA to set aside a decision even though the FHWA has issued a satisfactory impact statement.[144]

The foregoing considerations suggest that a substantive right, or the authority to review agency action on the merits, is unnecessary for full enforcement of NEPA. Thus far no court has been asked to set aside an agency decision for violation of section 102(1) procedure. However, the question will almost certainly be raised in the near future as the federal courts are asked to lift the injunctions which they have issued pending compliance with section 102(2) (C).[145]

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[140] Prior to the final version of NEPA reported by the conference committee, § 101 (b) of S. 1075, 91st Cong., 1st Sess. (1969), read as follows: "The Congress recognizes that each person *has a fundamental and inalienable right* to a healthful environment..." 115 Cong. Rec. 19008 (1969) (emphasis added). The present statutory language reads: "The Congress recognizes that each person *should enjoy* a healthful environment..." 42 U.S.C. § 4331 (c) (emphasis added). Remarks by Senator Henry Jackson of Washington indicate that the change was purposeful. 115 Cong. Rec. 40416 (1969).

[141] 5 U.S.C. § 706 (2)(A) (1970).

[142] Id. § 706 (2)(D).

[143] Section 102(1) reads: "the policies, regulations and public laws of the United States *shall* be interpreted and *administered* in accordance with the policies set forth in this chapter...." 42 U.S.C. § 4332(1) (1970) (emphasis added). The language sets NEPA policies as the standard by which the FAHA and the FHWA regulations are to be administered. It makes compliance obligatory, not discretionary.

[144] At this point the line between substantive and procedural issues may seem to have disappeared, for it could be argued that setting aside approval of a highway project for federal funding is equivalent to substituting a court's judgment for the FHWA's. The difficulty is inherent in judicial review under § 102(2) (C) of NEPA. Thus a court can be said to rule on the merits when it determines that an agency action significantly affects the environment and therefore requires an impact statement. In such a case a court would have to set aside an FHWA judgment to the contrary in order to induce compliance with the procedural safeguards of § 102(2) (C). See Hanly v. Mitchell, ___F.2d ___, 4 Envir. Reptr. Cases 1152, 1155 (2d Cir. 1972).

[145] In Environmental Defense Fund, Inc. v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark. 1972), the court finally permitted construction on the dam to proceed, since it could find no fault in the impact statement serious enough to warrant continued enforcement of the injunction. Id. at 1217-18.

V. CONCLUSION

NEPA is essentially an administrative statute and must function in the context of administrative law. Its sponsors intended that it should effect reform at all levels of federal administrative decision-making. With respect to the FHWA it has been only partly successful. Although PPM 90-1 has improved the procedures regulating approval of federal-aid highway undertakings, it has spawned new problems in the unauthorized discretion appropriated to the FHWA and conferred upon state agencies in the preparation of impact statements. But the provisions of PPM 90-1, and those of the preceding PPM 20-8, are dictated chiefly by practices of state highway departments in seeking federal approval and funding for the highway construction which originates under their jurisdiction. As the foregoing commentary on litigation indicates, much of the resistance to compliance with NEPA issues from state agencies.

The federal courts have consistently met both state and federal resistance with a firm hand to ensure that NEPA's directives achieve the ends Congress intended. The burden of furthering NEPA's effectiveness must now be taken up by the FHWA. Although the FHWA has no authority over state highway construction genuinely divorced from federal aid, the money it has at its disposal from the Highway Trust Fund gives it enormous influence over state highway departments.[146] The FHWA can and should use this influence to induce state agencies to bring their own policies into harmony with NEPA.

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[146] According to a DOT press release of April 1, 1972, the federal-aid highway program disbursed $4.7 billion to the states in 1971 for reimbursement of money spent on highway projects. Quoted in Peterson & Kennan, note 19 supra, at 50001. The federal-aid highway program is the nation's costliest public works program.