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# The National Environmental Policy Act and the Federal Highway Program: Merging Administrative Traffic

William K. Reilly\*

On January 1, 1970, the President declared:

It is particularly fitting that my first official act in this new decade is to approve the National Environmental Policy Act [NEPA]. The past year has seen the creation of a President's Cabinet Committee on Environmental Quality, and we have devoted many hours to the pressing problems of pollution control, airport location, wilderness preservation, highway construction and population trends.

By my participation in these efforts I have become further convinced that the 1970's absolutely must be the years when America pays its debt to the past by reclaiming the purity of its air, its waters and our living environment. It is literally now or never.<sup>1</sup>

The Act<sup>2</sup> is very much an embodiment of new concerns of the late 1960's. A new mode of thinking about environmental problems is suggested by phrases such as "understanding ecological systems," "recycling of depletable resources," and "balanced population and resource use." The recent past had encompassed important statutory achievements in the field of air and water pollution control,<sup>3</sup> but the thrust of previous environmental legislation was effect-oriented. The focus of the laws was upon minimum quality of

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\* The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of the Council on Environmental Quality.

1. Statement by the President, Press Release, Office of the White House, San Clemente, California (Jan. 1, 1970).

2. 42 U.S.C. §§ 4331-47 (Supp. V, 1970).

3. The most notable were: the Clean Air Act of 1965, 42 U.S.C. §§ 1857-1857I (Supp. V, 1970), and the Water Quality Act of 1965, 33 U.S.C. §§ 466-466n (Supp. V, 1970).

emissions and effluents, not on prior processes of decision-making. With the passage of NEPA, environmental legislation for the first time took note of the interrelatedness of everything with everything else. The Act is a milestone in the movement from program to policy oriented environmental legislation.

The conceptual organization of the Act is three-fold. First, there is a declaration of national policy and a prescription of environmental goals which the federal government is henceforth to pursue in fairly specific ways. Second, federal agencies are to report in detail on their observance of these goals in arriving at major decisions with significant environmental effects. Third, environmental concerns are to be permanently institutionalized in the Executive Office of the President through the establishment of a Council on Environmental Quality.

This article is primarily concerned with the effect of environmental impact statements as they relate to the administration of the federal highway program.<sup>4</sup> As of this writing procedures for implementing Section 102(2)(C)<sup>5</sup> have very recently been developed within the Department of Transportation (DOT), but no mechanism for preparing the statements has yet been established within the Federal Highway Administration (FHWA). As a result, much of what appears is inevitably tentative. The rationale for a preliminary examination of the impact of NEPA upon the federal-aid highway program is to attempt to clarify the purposes and functions of Section 102

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4. The statements are provided for by the following section of the Act:

The Congress authorizes and directs that, to the fullest extent possible: . . .

(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 ir retrievable 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 as provided by section 552 of Title 5 [United States Code] and shall accompany the proposal through the existing agency review processes. . . .

42 U.S.C. § 4332(2)(C) (Supp. V, 1970).

5. *Id.*

(2)(C) as it relates to highways, to delineate those criteria for environmental analysis and reporting which the Act contemplates, and to identify some problems and possibilities in the application of Section 102(2)(C) to a program which is implemented primarily by state and local governments.

A number of obvious questions arise in attempting to relate the new Act to highway planning and administration. Has the substantive environmental jurisdiction of the FHWA been enlarged? Must environmental considerations be accorded greater and more detailed significance by state and local agencies as a condition of eligibility for federal assistance? Must all or even most of the 8,000 highway projects annually assisted by the FHWA be the subject of individual environmental statements, consultation, review and Secretarial findings? Must the central concept of the FHWA—operational delegation to state and local government—be compromised in favor of a new corps of federal environmental analysts and report writers carefully monitoring each new highway project? What may be expected when a statement is filed on a proposed highway project which discloses significant adverse effects on the environment?

*The Question of Enlarged Federal Agency Authority in the  
Field of the Environment*

*Environmental Provisions of Federal Highway Legislation*

A trend toward the elaboration of broader environmental concerns in the laws governing the federal highway program has been evident during the 1960's. Legislation predating NEPA requires that state highway departments certify that the "impact on the environment" has been considered in every application for federal assistance on projects affecting urban areas.<sup>6</sup> Public hearings are required to take testimony upon "social, economic and environmental effects."<sup>7</sup> The Secretary of Transportation cannot approve transportation projects, including highways, which involve the taking of lands from public parks, recreation areas, wildlife and waterfowl refuges, and historic sites (public or private), of national, state, or local significance, unless "(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such . . . [areas] resulting from such use."<sup>8</sup> Highway projects in metropolitan areas of 50,000 or more population must be based on a "continuing

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6. 23 U.S.C. § 128(a) (Supp. V, 1970).

7. Bureau of Public Roads Policy and Procedure Memorandum 20-8, 23 C.F.R. ch. I, pt. 1, app. A (1970).

8. 23 U.S.C. § 138 (Supp. V, 1970). This provision is identical to Section 4(f) of the Department of Transportation Act. 49 U.S.C. § 1653(4)(f) (Supp. V, 1970).

comprehensive transportation process" and the development of transportation systems "embracing the various modes" is declared to be "in the national interest."<sup>9</sup>

Given this formidable array of environmental authority, what does NEPA add? To the extent that one views the major environmental objection to highways as an overemphasis upon one transport subsystem to the neglect of others, the answer is probably little or nothing. Statutory fillips to "balanced transportation systems" or to balanced "population and resource use" are harmless puffing in the circumstances of hugely differential federal appropriations for the various modes. Properly addressed, NEPA's requirement for analysis of alternatives to proposed legislation, plans, programs, and projects should entail an exploration of the suitability of other modes of transportation to accommodate similar objectives with less environmental disruption. Practically, however, a mass transit or commuter-rail alternative to an urban freeway is infeasible in the absence of comparable available funding. Sobering evidence of the extent of past federal concern for "balance" among the various modes is contained in the following record of budget outlays:

Type of Transportation	Fiscal Year				
	1955	1960	1965	1970	1971
Highway	*636	2978	4069	4642	4588
Aviation	122	508	756	1252	1636
Urban mass transit	0	0	11	158	280
Railroad	2	3	3	21	23

\*millions of dollars

Source: Charles L. Schultze, *Setting National Priorities, The 1971 Budget*, The Brookings Institution, 1970, Washington, D.C. at 109.

Nevertheless, the Act should add a further non-fiscal instrument of many uses to the transportation planner and to those who would review his work.

First, the environmental prescriptions set out in Section 101<sup>10</sup> of NEPA are more inclusive than any of those in existing laws applicable to the highway program. Authority is conferred sufficient to sustain a broad reading of environmental requirements and to justify the disapproval of projects harmful to diverse "environmental" resources. The federal government is now directed: (1) to administer its programs in a way which will "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"; and (2) to "achieve a balance between popu-

9. 23 U.S.C. § 134 (Supp. V, 1970).

10. 42 U.S.C. § 4331 (Supp. V, 1970).

lation and resource use which will permit high standards of living and a wide sharing of life's amenities."<sup>11</sup>

Second, the "action forcing mechanism" of Section 102 is broader than correctives contained in existing transportation laws. Taken together, Sections 101 and 102 should function to reinforce each other, the one prescriptive, the other corrective. Current laws applicable to highway planning and development do not require specific, detailed measures for assessing the impact of a proposed new highway upon areas other than those listed in Section 4(f) of the Department of Transportation Act.<sup>12</sup> A coastal shoreline, a valuable stand of trees or forest, a scenic river front, or a pleasing hillside or mountain receive no special attention in existing transportation law.<sup>13</sup> Technically, even prospective public recreation lands held by the Nature Conservancy are excluded from special consideration and findings.<sup>14</sup>

Moreover, there is no clear requirement that the findings provided for in Section 4 be made public, nor is it even necessary that findings under this section be committed to writing.<sup>15</sup> An outgrowth of the 1965 White House Conference on Natural Beauty, Section 4(f) was especially addressed to the practice of taking parklands for freeways. Growing awareness of the heavy toll highways were taking of historic buildings led to the addition of historic sites to the specially protected areas.

Since January 1, 1970, the FHWA has proceeded under the statutory directive to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the en-

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11. *Id.*

12. 49 U.S.C. § 1653(f) (Supp. V, 1970).

13. Section 2(b)(2) of the Department of Transportation Act does articulate a policy which is broader than Section 4(f), directing a "special effort to preserve the natural beauty of the countryside." *Id.* § 1609. However, a review of any special efforts as are exerted would be difficult in the absence of anything more than the bare directive.

14. Netherton, *Transportation Planning and the Environment*, 1970 URBAN L. ANN. 1. Netherton also lists important lands of the Audubon Society, the Boy Scouts, the National Grange and 4-H Clubs as apparently not within the scope of amended Section 4(f).

15. If the findings are committed to writing they almost certainly cannot be denied to the public under the Freedom of Information Act, 5 U.S.C. § 552 (Supp. V, 1970). But *Citizens to Preserve Overton Park v. Volpe*, 390 F. Supp. 1789, 1194 (W.D. Tenn. 1970), and *D.C. Fed'n of Civic Ass'ns v. Volpe*, Civil No. 2821-69 (D.D.C., Aug. 3, 1970) both hold that the statute does not require the Secretary to publicly articulate or commit to writing any finding pursuant to the Section. In the *D.C. Federation* decision concerning the controversial Three Sisters Bridge, the judge declared that "the section requires the Secretary to make at least a mental finding." *Id.* at 22. The "lack of any meaningful administrative record within the Department of Transportation evidencing the fact that proper consideration had been given to the requirements of this section" was cited by Judge Sirica as "[t]he major problem confronting this Court in making its determination of whether there has been adequate compliance with Sec. 138." *Id.* at 24.

vironmental design arts in planning and in decisionmaking which may have an impact on man's environment."<sup>16</sup> The law also imposes a new obligation upon all federal agencies "to identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities may be given appropriate consideration in decisionmaking along with economic and technical considerations."<sup>17</sup>

The application of the policy prescriptions of NEPA, in addition to an agency's basic statutory directives, to the conduct of federal agency activity was recently confirmed by the United States Court of Appeals for the Fifth Circuit in the case of *Zabel v. Tabb*.<sup>18</sup> In that case the Army Corps of Engineers had refused to grant a dredge and fill permit where no impact upon navigation was involved. Plaintiffs had conceded a finding by the Bureau of Sports Fisheries and Wildlife that the dredging and filling would have a harmful effect on the ecology and marine life on the bottom of the bay, but had contended that the Secretary of the Army had no authority to refuse to issue the permit on other than navigational grounds. In upholding the Corps, the court declared:

Although this Congressional Command [NEPA] was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today. The national policy is set forth in plain terms in Section 101 . . . .<sup>19</sup>

#### *Legislative History of Sections 101 and 102 of NEPA*

An examination of the origin of Section 102 sheds light on the complementary role it was intended to play *vis-a-vis* Section 101. S. 1075, as originally introduced by Senator Henry M. Jackson, did not provide for the preparation of environmental statements. Its purposes were to declare national policy, authorize an expansion of environmental research and establish a Council of Environmental Quality Advisors. In testimony on S. 1075 Professor Lynton Caldwell expressed some misgivings about the adequacy of a declaration of policy without "something that is firm, clear and operational," an "action-forcing mechanism."<sup>20</sup> Professor Caldwell testified:

[I]t seems to me that a statement of policy by the Congress should at least consider measures to require the Federal agencies,

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16. 42 U.S.C. § 102(2)(A) (Supp. V, 1970).

17. *Id.* § 102(2)(B).

18. Civil No. 27,555 (5th Cir., July 16, 1970).

19. *Id.*

20. *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Interior and Insular Affairs Comm.*, 91st Cong., 1st Sess. 116 (1969).

in submitting proposals, to contain within the proposals an evaluation of the effect of these proposals upon the state of the environment.

. . . It would not be enough, it seems to me, when we speak of policy, to think that a mere statement of desirable outcomes would be sufficient to give us the foundation that we need for a vigorous program of what I would call national defense against environmental degradation. We need something that is firm, clear, and operational.<sup>21</sup>

Senator Jackson welcomed the Caldwell proposal and acknowledged his own concern that the Act go beyond "lofty declarations."<sup>22</sup> Jackson then turned his attention to the problem of developing a means of statutorily broadening the mandate of all federal agencies to include the "action-forcing" environmental mandate.

You see the problem that we are faced with. If we try to go through all of the agencies that are now existing with certain responsibilities pursuant to law in which there is no environmental policy or standard laid out, we could be engaged in a recodification of the Federal statutes for a long, long time.

But maybe there is a way out of this through a directive and a delegation to the Bureau of the Budget of authority which they could in turn exercise [with] prudence and discretion in requiring that the environmental policies and standards be adhered to in connection with the responsibilities of the Federal Establishment.<sup>23</sup>

Professor Caldwell concluded his colloquy with Senator Jackson by adverting to the possibility of giving some consideration in the legislation to the role of the states, which "are very close to many of these issues but really cannot act effectively in the absence of a general national policy."<sup>24</sup>

Senator Jackson then directed the committee staff to draft language which would effect an all-inclusive extension of federal agency mandates in the field of the environment. Theoretically, Section 101, standing alone, extends all agencies' environmental authority. But it was feared that practically, without a means of testing the implementation of its directives in each agency, the new policy might be ignored.

In the House, Representative Wayne N. Aspinall had proposed an amendment of contrary import, stating that "Nothing in this Act shall increase, decrease or change any responsibility or authority of any Federal official or

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21. *Id.*

22. *Id.*

23. *Id.* at 117.

24. *Id.* at 122.



agency created by other provision of law.”<sup>25</sup> This was clearly incompatible with the purposes of Section 102 as envisioned by Senator Jackson and reported by the Senate Interior Committee. The Aspinall amendment clearly would have left little more than lofty declarations and a council in the bill. Environmental statements prepared in compliance with an Act containing such a qualification would have had to be evaluated according to variable standards, depending on the extent to which existing law governing an agency’s activities provided environmental directives and responsibilities. The work of going through “agency by agency” to effect changes in governing statutes would remain for future Congresses.

The Aspinall amendment was rejected in conference. In its place the House conferees proposed to qualify subparagraphs (A) through (H) of clause (2) of Section 102 with the phrase “to the fullest extent possible.”<sup>26</sup> The Senate bill had applied this qualification only to clause (1) of Section 102.<sup>27</sup>

The House Conference Report explained the change as follows:

[T]he House conferees are of the view that the new language does not in any way limit the congressional authorization and directive of the Federal Government set out in subparagraphs (A) through (H) of clause (2) of Section 102. The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in subparagraphs (A) through (H) unless the existing law applicable to such agency’s operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency, compliance is required. Thus, it is the intent of the conferees that the provision to the fullest extent possible shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language in Section 102 is intended to assure that all agencies of the Federal Government shall comply with the directive set out in said section “to the fullest extent possible” under this statutory authorization and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.<sup>28</sup>

The provision calling upon each agency to conduct its own statutory review and, in effect, to show cause why it should not be fully bound by the directives in the Act, formerly contained as subsection (F) in Section 102, now

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25. 115 CONG. REC. H8284 (1969).

26. See H.R. REP. NO. 765, 91st Cong., 1st Sess. 10 (1969).

27. *Id.*

28. *Id.*

became Section 103.<sup>29</sup> The effect of Section 103 is to impose on each agency both a burden of statutory identification and justification of non-compliance with the provisions of the Act, and a limited period of time within which to assert any obstacles and recommend measures to overcome them. This mandatory review, accelerated by Executive Order 11,514<sup>30</sup> from July 1, 1971 (as provided in the Act), to September 1, 1970, eliminates defenses of federal agencies based upon alleged statutory inconsistencies which have not been timely asserted.

In the DOT report under Section 103 the Secretary declared:

After a thorough review within the Department and by an outside contractor we conclude that there is no conflict or inconsistency which prevents full compliance with the *provisions* of the Act. Clearly, more can always be done to further the broad *purposes* of the Act, and we have underway a great many actions towards this end.<sup>31</sup>

#### *The Council on Environmental Quality*

The Council on Environmental Quality is intended to function as keeper of the nation's environmental conscience and advisor to the President. The emphasis in the Congress, reflected in the Act, was on the presidential advisory role. Section 202 established the Council in the Executive Office of the President; Council members serve at the pleasure of the President.<sup>32</sup> Section 204 makes the President the recipient of the Council's advice, assistance, recommendations, studies, reviews, and appraisals.<sup>33</sup> The explanation of the conference substitute of Section 204(3) and (4) reported:

The committee does not view this direction to the Council as implying a project-by-project review and commentary on Federal programs . . . .

It is not the committee's intent that the Council be involved in the day-to-day decisionmaking processes of the Federal Government or that it be involved in the resolution of particular conflicts between agencies and departments. These functions can best be performed by the Bureau of the Budget, the President's interagency Cabinet-level Council on the Environment or by the President himself . . . .

The Council recommendations to the President are for his use alone . . . .

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29. 42 U.S.C. § 4333 (Supp. V, 1970).

30. Exec. Order No. 11,514 § 2(d), 35 Fed. Reg. 4247 (1970) [hereinafter cited as Exec. Order No. 11,514].

31. Letter from John Volpe, Secretary of Department of Transportation, to Russell Train, Chairman of the Council on Environmental Quality, Sept. 23, 1970.

32. 42 U.S.C. § 4342 (Supp. V, 1970).

33. *Id.* § 4344.

The President is, of course, free to utilize the services of the Council in any manner in which he desires.<sup>34</sup>

The legislative history does contain frequent references to "impartial and objective advice,"<sup>35</sup> and to the need for "unbiased information"<sup>36</sup> which the Council is intended to provide the President. However, these expectations go more to the independence of the new entity from program implementation responsibilities of existing federal departments, and do not proceed from any novel concept of the Council posture *vis-a-vis* the President.

The point is worthy of elaboration. The statute, by calling upon federal agencies with environmental expertise to make public comments upon the proposals, including legislation, of other agencies, provides no basis for distinguishing between Council comments and those of other expert agencies. Practically, there are some advantages to a presidential council with such a broad overview. The Council can evaluate each agency's overall environmental policies, recognize the strengths and weaknesses of the federal government's environmental competence and sensitivity, and pose issues larger than those typically considered in a single-agency project or proposal.

Legislative proposals with environmental ramifications come to the Council for clearance prior to being forwarded to Congress. A clearance role within the administration is not one which holds up well against subsequent public comment and criticism, the popular theory of clearance being to broker disparate emphases into a common policy. Yet Congress and the public would be disappointed with a council which remained mute on important administration programs that raised significant environmental issues.

It was the President himself who broadened the concept of the Council's role to something approaching a federal ombudsman. In his Environmental Message, the President referred to the Council as "the keeper of our environmental conscience."<sup>37</sup> Executive Order 11,514,<sup>38</sup> issued March 5, 1970, directed the Council to issue guidelines to federal agencies for the preparation of environmental statements in accordance with Section 102(2)(C). The Executive Order also directed the Council to "conduct a continuing review of procedures employed in the development and enforcement of Federal standards affecting environmental quality . . . [to] recommend to the President policies and programs to achieve more effective protection and enhancement of environmental quality and . . . where appropriate, [to]

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34. 115 CONG. REC. S17456 (daily ed. Dec. 20, 1969).

35. S. REP. NO. 296, 91st Cong., 1st Sess. 14 (1969).

36. *Id.*

37. President's Message on Environmental Control, 116 CONG. REC. H743 (daily ed. Feb. 10, 1970).

38. Exec. Order No. 11,514, § 3(h).

seek resolution of significant environmental issues.”<sup>39</sup> The Executive Order also authorized the Council to conduct public hearings, and to issue “instructions” to agencies “as may be required to carry out the Council’s responsibilities under the Act.”<sup>40</sup>

The powers to review agency procedures, seek resolution of issues, and hold hearings are consistent with an action-oriented, policy-making authority. The presidential theory of the Council’s role would appear to be that of an activist monitor with obligations to police federal agency activities and, on occasion, to solicit public views and expose problems to a wide audience.

The Council does not, however, possess a veto authority over the actions of federal agencies. The powers of persuasion, the possibility of public comment, and the request for the President’s intercession are the extent of Council authority conferred by NEPA.

Congress desired that the Council maintain lines of communication with all affected segments of society. Section 205(1) of the Act directs the Council to consult with “representatives of science, industry, agriculture, labor, conservation organizations, State and local governments, and other groups, as it deems advisable.”<sup>41</sup>

On April 30, 1970, the Council issued interim guidelines to all federal agencies for the preparation of detailed statements on proposals for legislation and other major federal actions significantly affecting the environment.<sup>42</sup> The Council’s guidelines required each federal agency to establish no later than June 1, 1970, its own formal procedures for

- (1) identifying those agency actions requiring environmental statements;
- (2) obtaining information required in their preparation;
- (3) designating the officials who are to be responsible for the statements;
- (4) consulting with and taking account of the comments of appropriate Federal, State and local agencies; and
- (5) meeting the requirements of Section 2(b) of Executive Order 11514 for providing timely public information on Federal plans and programs with environmental impact.<sup>43</sup>

These procedures are to be consonant with the Council’s guidelines. Copies of each agency’s interim procedures have been filed with the Council on Environmental Quality. The Council is currently providing advice to the

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39. *Id.* § 3(a).

40. *Id.* § 3(i).

41. 42 U.S.C. § 4345(1) (Supp. V, 1970).

42. 35 Fed. Reg. 7390-93 (1970).

43. *Id.*

agencies on their procedures and guidance on the application and interpretation of the Council's guidelines.

The Council's guidelines contemplate a two-stage procedure for preparing environmental statements. Drafts are to be circulated tentatively setting out proposed actions and calling for comment from federal, state, and local agencies. The agencies required to be solicited for opinions are limited to those federal agencies with "jurisdiction by law or special expertise with respect to any environmental impact involved,"<sup>44</sup> and those state and local agencies "which are authorized to develop and enforce environmental standards."<sup>45</sup> Thus, contrary to some expectations, the Act is not a new exercise in public participation. It is perhaps an ironic commentary on the complexity and remoteness of some federal programs that a new procedure for interagency and intergovernmental consultation is widely regarded as a breakthrough. In fact, the Act arms state and local governments and regional commissions, to say nothing of some federal agencies formerly bypassed in the formulation of projects which affected their interests, with a useful tool for making themselves heard.

Executive Order 11,514 goes somewhat beyond the Act. This directive may be read as authority for calling upon federal agencies to establish new participatory procedures, including public hearings.<sup>46</sup>

#### *DOT's Environmental Guidelines*

Within DOT the Assistant Secretary for Environment and Urban Systems has been made responsible for developing the Department's policies and procedures in response to the Act. His office has also been designated the point of contact for coordinating the preparation of the Department's own statements and for developing the agency's comments on statements prepared by other federal departments. DOT's draft guidelines contemplate the preparation of a statement or a negative declaration with regard to

all grants, loans, contracts, purchases, leases, construction, research and development, rulemaking and regulatory actions, certifications, licensing, plans [both internal DOT plans and external plans], formal approvals [*e.g.*, of non-federal work plans], legislative proposals, Congressional testimony, program or budget proposals or actions [except for continuation of existing programs at approximately current levels, *i.e.*, plus or minus 25 percent] and any renewals or reapprovals of the foregoing.<sup>47</sup>

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44. 42 U.S.C. § 4332 (Supp. V, 1970).

45. *Id.*

46. Exec. Order No. 11,514 § 2(b).

47. Dep't of Transportation, Draft Guidelines, July 14, 1970.

Each operating administration—*e.g.*, the FHWA and the Federal Aviation Administration (FAA)—is given two weeks from the date the departmental guidelines are effective to prepare its own internal instructions to implement the order. The DOT guidelines follow the Council's guidelines by defining actions reportable under Section 102 as *all* actions, beneficial or adverse, significantly affecting the quality of the human environment.<sup>48</sup> Matters "likely to be highly controversial on environmental grounds" and all matters falling under Section 4(f) of the Department of Transportation Act of 1966 are to be the subject of environmental statements under Section 102.<sup>49</sup> The definitional guidelines specifically refer to "the approval of State highway programs and plans prior to grant of money" as included "Federal Actions."<sup>50</sup> Actions "likely" to have significant environmental effects and thus, to require preparation of the statements, are defined as those which:

- (1) noticeably affect the ambient noise level for a substantial number of people;
- (2) displace significant numbers of people;
- (3) divide or disrupt an established community, divide existing uses, *e.g.*, cutting off residential areas from recreation areas or shopping areas, or disrupt orderly, planned development;
- (4) have a significant aesthetic or visual effect;
- (5) have any effect on areas of unique interest or scenic beauty;
- (6) destroy or derogate from important recreational areas not covered by Section 4(f) of the DOT Act;
- (7) substantially alter the pattern of behavior for a species;
- (8) interfere with important breeding, nesting or feeding grounds;
- (9) significantly increase air or water pollution;
- (10) adversely affect the water table of an area;
- (11) disturb the ecological balance of a land or water area;
- (12) involve a reasonable possibility of contamination of a public water supply source, treatment facility, or distribution system.<sup>51</sup>

The draft DOT guidelines do not make reference to the specific implementational requirements which will now confront the Administrator of the FHWA. However, they do make clear that "[e]ach applicant for a grant, loan, permit, or other DOT approval . . . will be required to submit, together with the original application, either a draft 102(2)(C) statement or a negative declaration . . ."<sup>52</sup>

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48. *Id.* § 7.

49. *Id.* at Attachment § 4(b)(1).

50. *Id.* at Attachment § 3(c)(3).

51. *Id.* at Attachment § 4(c).

52. *Id.* § 7b.

*Solving Reporting Problems Raised by the Size of the Highway  
Program: Consolidation of Projects and Delegation  
of the Preparation of Statements*

Scrutiny of the DOT guidelines may suggest that one would be hard pressed to identify a proposed highway project not likely to entail at least one of the enumerated effects, thus bringing Section 102 into operation. But surely it was not the intention of the drafters that each of the 8,000 annual federal-aid highway projects be the subject of a separate environmental statement.

Two possibilities are worthy of consideration to further the efficient administration of the Act. First, it will no doubt be necessary to consolidate projects for purposes of Section 102(2)(C). In fact, highway projects are often arbitrary increments designated as separate links for individual contract-letting. A project can be a single bridge, a road-widening, or even the painting of lane divider markings. Many such projects are without significant environmental effects. For the remaining projects, it is likely that highway links consisting of a number of projects, and even of diverse, significant environmental effects, could be the subject of a single environmental statement. Currently a number of projects are grouped for purposes of consideration in one public hearing sequence, and a similar consolidation for environmental analysis may be possible.

Second, the high degree of delegation to state and local governments which characterizes federal-aid highway development should generally be observable in the regulations governing the preparation of environmental statements. Initially, at least, draft statements would presumably be the work of state highway planners, prepared in conformity with FHWA policy and procedure memoranda or other federally prescribed regulations. The opportunity for state and local agency comment could be afforded at the location and design hearings and the draft statement with comments could be forwarded to the FHWA regional office after the hearings. A DOT official could then review the draft environmental analysis, agency comments, etc., along with other customary materials pertaining to location, design, safety, and adequacy to meet projected traffic needs. The DOT official would, of course, be the "responsible official" contemplated by the statute, and he would circulate the draft statement to federal agencies.

A problem arises in determining at what stage in highway project planning the statement is to be circulated to federal agencies. Given the incremental nature of federal highway approvals—first of corridor, then of design features—the question arises, at which stage is federal agency comment to be solicited? Separate location and design hearings allow state and local agencies opportunities to make themselves heard on both questions.

If federal agencies are to be consulted after the location hearing but before the design hearing their influence will be felt only with regard to location. On the other hand, if they are consulted after the design hearing they will have entered the process so late that major commitments will be practically irreversible. Technically, FHWA project approval is not final until either design approval has been secured, or until plans, specifications, and estimates are submitted and ratified.<sup>53</sup>

Insofar as FHWA decision-making is purposely applied through federal interventions to ratify or disapprove planning phases which become progressively more detailed, authentic participation should provide for parallel consultations with federal agencies at each of at least two steps. The conclusion that two statement sequences will have to be accomplished, one for each of the two major approvals, appears unavoidable. Accounting for a draft and final statement on each approval the total number of statements becomes four.

In testimony before the Subcommittee on Roads of the Senate Public Works Committee, FHWA Administrator Francis Turner outlined the approach that FHWA is considering regarding the preparation of environmental statements. "Where practical, responsibility for compliance with Section 102(2)(C) of the Act will be delegated to Regional Federal Highway Administrators . . ." with highly controversial projects continuing to be forwarded for review by FHWA headquarters in Washington.<sup>54</sup> Senator Muskie expressed reservations about the possibility that the federal regional administrators will rely too heavily upon state highway departments for the detailed environmental analysis required by NEPA.<sup>55</sup>

Adverting to his own experience as a state executive, Muskie doubted whether state highway departments are sufficiently sensitive to environmental considerations to carry out the purposes of NEPA. Turner replied that the "sheer size" of the highway program made such delegation inevitable. Senator Muskie emphasized the importance of prescribing broad and detailed federal regulations to assure that the states observe the requirements of the Act.<sup>56</sup>

Decentralization of environmental responsibilities undoubtedly poses a staffing problem to DOT as well as to other federal agencies commenting on highway projects through their field representatives. In addition to the task

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53. Exec. Order No. 11,514 § 2(b).

54. Testimony of F.C. Turner, Federal Highway Administrator, Dep't of Transportation, before the Senate Public Works Committee, Subcommittee on Roads, August 25, 1970.

55. *Id.*

56. *Id.*



of allocating the new work load imposed by NEPA on all federal agencies, agencies must begin to reorganize their field representation to build interdisciplinary environmental skills into offices which, in the case of DOT, have traditionally been the regional outposts of a single modal administration. As a review agency, the Department of Housing and Urban Development (HUD) is faced with similar problems. In the past, HUD review of projects subject to Section 4(f) of the Department of Transportation Act has occurred in its Washington division of environmental planning. Doubtless, Washington review will no longer be feasible. Thus, HUD 102 procedures make all but precedent-making or controversial decisions reportable and reviewable by HUD regional offices.<sup>57</sup> However, HUD regional offices do not include representatives from the environmental division any more than regional offices of FHWA include a staff component reporting to the Office of Environment and Urban Systems. One obvious solution would be to provide for regional representation by the agencies' environmental offices. The alternative, under a strict reading of NEPA, would leave decisions with significant environmental effects made without interdisciplinary planning vulnerable to court attack.

Although it may be acknowledged that NEPA imposes severe new burdens upon the FHWA, they are no greater burdens than have long been willingly borne where economic, technical, and safety considerations are involved. The FHWA, along with all other federal agencies, is now being challenged to bring resource allocation into line with a national outlook and values which have moved beyond the narrower concerns reflected in the organization and posture of agencies designed in an earlier era to perform less sophisticated tasks.

#### *Evaluating Alternatives to Highway Projects*

Section 102(2)(C)(iii) of NEPA requires that an environmental statement include an analysis of alternatives to the proposed action.<sup>58</sup> The statute makes the identification and analysis of alternatives, like other components of the statement, the responsibility of the appropriate federal official and not of critical participants in the hearings or of aggrieved public interest groups.<sup>59</sup>

A requirement that alternatives to a proposed project be considered prior

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57. HUD, Responsibilities and Interim Procedures for Environmental Matters by HUD Offices Under P.L. 91-190, June 19, 1970.

58. 42 U.S.C. § 4332(2)(C)(iii) (Supp. V, 1970).

59. Where proposed projects would entail significant adverse effects the government should bear the burden of proving the infeasibility of alternatives. The Administrative Conference of the United States has proposed standards for applying legal requirements to consider alternatives in project approvals, a problem directly raised by the decision in *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

to final approval was incorporated in Section 4(f) of the Department of Transportation Act of 1966, and has been applicable to projects requiring the use of lands from public parks, recreation areas, wildlife and waterfowl refuges, and historic sites since July 1, 1968. However, Section 4(f) merely prohibits the Secretary from approving any such project unless no "prudent and feasible alternative" exists.<sup>60</sup> While this provision would therefore appear to require a prior consideration of alternatives, it includes no requirement that they be described and individually evaluated as part of a detailed environmental analysis. Now that such a requirement is in the law, it is important to recognize the implications of the new policy. In the larger urban areas, alternatives which entail less harm to environmental values than new highways will often be new or expanded public transportation systems. Adherence to national environmental policy would appear to require that such alternatives be more than speculative if they are truly to enter into the decision-making process. The fact that adequate funds are not available to carry out alternatives which are environmentally preferable to highways would seem to argue for greater funding of the alternative modes, a fusion of funding in a single, multi-modal transportation fund, or no highway project at all.<sup>61</sup>

Some adverse environmental effects are inevitable in the siting of most highways. The Act does not require that the alternative which is least environmentally harmful in all cases be preferred. Competing considerations of cost, convenience, etc., are also to be weighed. The Act is not a one-sided, development-be-damned effort to stand astride history and yell "Stop!" to the engineer. It is rather a decisive order not to act against the environment without very compelling reasons.<sup>62</sup>

*The Problem of Applying NEPA to Projects Authorized  
Prior to January 1, 1970*

An unavoidable problem in administering NEPA is determining the extent to which the Act applies to projects in various stages of completion when the Act was passed. The same problem arose in the administration of Section 4(f) of the Department of Transportation Act.<sup>63</sup> The interim guidelines of the Council on Environmental Quality address the problem as follows:

To the fullest extent possible the section 102(2)(C) procedure

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60. 49 U.S.C. § 1653(f) (Supp. V, 1970).

61. For an extensive discussion of the highway trust fund see *The Highway Trust Fund: Road to Anti-Pollution?*, 20 CATHOLIC U.L. REV. 171 (1970).

62. 115 CONG. REC. S17451 (daily ed., Dec. 20, 1969).

63. Netherton, *Transportation Planning and the Environment*, 1970 URBAN L. ANN. 1.

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 Public Law 91-190 on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.<sup>64</sup>

Recent judicial decisions have dealt with the problem. In the case of *Pennsylvania Environmental Council v. Bartlett*,<sup>65</sup> plaintiffs sought to enjoin defendant federal and state transportation agencies and their contractors from proceeding further with planning and construction of a secondary road-widening extending into a creek. The plan would have necessitated a fill in the creek along a 4,100 foot corridor, extending from ten to 60 feet into the creek. The significant environmental impact of the action does not appear to have been contested. Since the planning and letting of contracts for the construction had predated passage of NEPA, the court concluded that application of the Act to the project now would be retroactive. The court interpreted the phrases "to use all practicable means and resources" and "to the fullest extent possible" in Sections 101 and 102 as indicative of a "moderate, flexible and pragmatic approach," inconsistent with a retroactive congressional intent.<sup>66</sup> The court therefore concluded: "Since the contract here in question was awarded and finalized prior to the Act's passage, no violation of the Act occurred on the part of the Secretary of Transportation."<sup>67</sup>

In *Texas Committee v. United States*,<sup>68</sup> a conservation group sought an injunction against the proposed granting of a loan by the Farmers Home Administration (FHA) where the loan was to finance the construction of a golf course on the site of a wildlife area, and no environmental statement had been prepared. The court granted the injunction, even though it found that FHA had completed "all their preliminary work," including approval of the loan, prior to the time when NEPA became law. The court concluded: "Since no money has been expended and since no construction has begun, the Court of Appeals may find the FHA can comply with Section 102."<sup>69</sup>

The long lead time involved in highway planning makes it important to develop clear standards for determining when the Act will apply. In testi-

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64. Interim Guidelines, § 11, 35 Fed. Reg. 7392-93 (1970).

65. Civil No. 70-123 (M.D. Pa., Apr. 30, 1970).

66. *Id.*

67. *Id.*

68. Civil No. A-69-CA-119 (W.D. Tex., Feb. 5, 1970).

69. *Id.*

mony before the Senate, the FHWA Administrator declared:

Projects which have received location approval but are still at a stage where a meaningful review in accordance with the Environmental Policy Act can be made will be processed in accordance with procedures that are issued.<sup>70</sup>

An appropriate cut-off would appear in most cases to be the actual letting of construction contracts. Where such contracts were let prior to January 1, 1970, project delay for environmental reappraisal, possibly entailing contractor expenses recoverable as damages, would not generally appear to be a practical and feasible requirement of the Act. In some cases, other commitments made prior to January 1, 1970, might practically preclude further reappraisal of ancillary facilities or dependent construction on which contracts have been let in 1970.

#### *The Uses of Environmental Impact Statements*

Section 102(2)(C) adds a mode of environmental analysis intended to accomplish three broad functions. An environmental statement serves primarily to assure that the environmental analysis is performed at the outset. The statement should then function throughout the period of project development and review as an option-defining instrument, first isolating effects, then identifying alternatives. Section 102(2)(C) will only function well to the extent that it becomes a decision-maker's tool. If the provision is treated as a procedural hurdle, or if the statement comes to serve as a retrospective justification of actions decided in advance of, and without regard for, environmental concerns, then the agency-by-agency statutory recodification which the legislative drafters hoped to avoid will be necessary after all.

An additional function of Section 102(2)(C) is to furnish a detailed record of environmental decision-making for purposes of review. The Council on Environmental Quality is, of course, one of a number of agencies to which this review possibility is important. The Act provides for review by federal agencies with jurisdiction by law or special expertise with regard to environmental considerations.<sup>71</sup> Review by state and local government agencies with power "to develop and enforce environmental standards"<sup>72</sup> is also prescribed, although in the view of the Council the conduct of hearings such as are already required by law with respect to highway projects furnishes the opportunity for state and local government views to be heard. The receipt of a draft statement should alert a reviewing agency to possible incompatible

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70. Turner testimony, *supra* note 54.

71. 42 U.S.C. § 4332(2)(C)(v) (Supp. V, 1970).

72. *Id.*

plans for land use, possible disruption of other agencies' programs, or potential destruction of fragile environmental resources.

To complete the "action-forcing mechanism" an additional review possibility is necessary. Judicial review of environmental statements may be expected to amplify further upon the effects of the Act. Detailed Council review will necessarily be limited to items of special significance and the courts will be relied upon to provide citizens' groups with a means of obtaining review of completed decisions. Court review of environmental aspects of projects upon which statements had been prepared has resulted most notably in the granting of an injunction against issuance of a permit by the Secretary of the Interior to build the Alaska-pipeline road.<sup>73</sup>

Standing of environmental litigants to obtain review of highway determinations has been significantly broadened in recent years.<sup>74</sup> Doubtless, the next few years will witness a further refinement of the environmental responsibilities of highway planners. An issue which appears certain to arise concerns the extent to which an agency decision to construct a new highway will be scrutinized for indirect environmental impacts likely to flow from construction of the new road. In *Wilderness Society v. Hickel*,<sup>75</sup> the court, *inter alia*, rejected as inadequate an environmental statement which ignored the oil pipeline facility which the road was proposed to parallel and serve. A direct consequence of the development of the road was to be the construction of a pipeline characterized by a number of environmental unknowns.

What can be said of the new road which will likely open a remote area to development, or alter the character of existing development with significant damage to environmental values? Where the road would inevitably cause undesirable effects, statements which ignore these effects risk exposing a decision to attack or failure to consider the full range of environmental impacts. Where statements frankly report on what reasonably can be predicted as consequences from new road construction, they will pose a dilemma to the agency and the courts regarding the extent to which an agency will be required to look beyond its immediate activity in anticipating environmental impact and to refrain from furthering developmental schemes, potentially adverse to the environment. No court has yet directly addressed this issue.

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73. *Wilderness Soc'y v. Hickel*, Civil No. 928-70 (D.D.C., June 17, 1970).

74. *See, e.g.*, *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (1970). For an analysis of recent court opinions and literature on standing, see Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970); *Challenging Highways: Widening the Access to Judicial Review*, 20 CATHOLIC U.L. REV. 143 (1970).

75. Civil No. 928-70 (D.D.C., June 17, 1970).

*The Adequacy of Existing Highway Planning Procedures*

In its first annual report on the quality of the nation's environment, the Council on Environmental Quality described highways as follows:

Federally assisted highway construction has been the major determinant of growth patterns and development in this country since 1956. The program has given the American people a degree of mobility never before known. But the momentum of construction and the economic importance of new road building have raised obstacles to thoughtful long-range planning for the environment. Urban expressways have relieved congestion on our city streets but sometimes in the process have disrupted established neighborhood patterns, consumed urban parklands, and raised noise levels in residential areas. In some cases, expressways have abetted the conversion of downtown commercial districts into places that live only from 9 to 5. Construction of suburban arteries can easily be justified as a short-range solution to pressing problems of congestion. Yet it can also spur new development far from the city core, reward land speculators, create a need for more public services, destroy natural areas, dump more cars into the central city and promote a pattern of suburban settlement that nearly precludes mass transit.<sup>76</sup>

Policy and Procedure Memorandum 20-8 (PPM 20-8), entitled "Public Hearings and Location Approval,"<sup>77</sup> was issued by the FHWA to implement the environmental and public participatory policies of existing federal highway law. PPM 20-8 provides for two public hearings, on location and design, respectively, prior to project approval by the Secretary. It also provides for a full opportunity for presenting views on major design features, including the social, economic, environmental, and other effects of alternate design. A listing of 23 categories of such effects covers a wide range of environmental factors. Coordination with federal, state, local and private agencies with regard to environmental resources is provided for, and written comments received from such agencies are to be furnished to the public. State highway departments are instructed to "consider" social, economic, and environmental effects before submission of requests for location or design approval.<sup>78</sup>

The thrust of this directive is to place upon other agencies and the public a large part of the burden of developing the environmental record. A single example will suffice. Air pollution is listed as one effect upon which testimony is to be taken. The form in which evidence relating to air pollution aspects of a new freeway is collected depends on the information brought

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76. ENVIRONMENTAL QUALITY, THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 194-95 (1970).

77. 3 C.F.R. App. A (1970).

78. *Id.*

forward by participants at the hearing. If public interest groups choose to adapt the sophisticated tools of computer simulation in order to project pollution, their work will be politely accepted and presumably considered. If no one addresses himself to problems of air quality then evidence on the point will not likely be sought.<sup>79</sup>

Yet all who have been impressed with the sophistication of highway planning techniques—of origin-destination studies, of gravity equations and induced demand factors—cannot but be struck by the paradoxical imprecision of the measures accepted as adequate where environmental resources are concerned. Average vehicle ages, speeds, volumes, and emissions can be projected and simulated for different periods and under different weather conditions to estimate the pollution load which may hover in the air over a new urban freeway. Systems techniques can also be employed to project the impact of a new urban expressway upon downtown parking and street congestion. If presently unquantified environmental amenities and values are to be given appropriate consideration in decision making along with economic and technical considerations, FHWA itself will have to adapt its tools to problems of environmental analysis.

Program administration which positively exploits the new authority conferred by NEPA will move toward more sophisticated environmental planning. It will range farther afield from the pure problems of road building toward increasing activism in conditioning new highway grants upon land use regulation commitments by state and local governments in areas likely to be impacted by new roads. Park replacement requirements have begun this procession on a small scale. Ultimately, however, the undeniable impact of federal programs upon the environment must entail broader federal assumption of environmental responsibilities. The National Environmental Policy Act, calling for a "balance between population and resource use,"<sup>80</sup> has articulated a goal which nothing short of a national land use policy can achieve. In any such policy, highways are a key element. Major interchanges and entry points to limited access highways are areas of critical environmental concern for which large scale land use plans and regulations ought to be developed prior to highway project approval. Environmental problems are worthy of the same careful analysis, consultant studies, etc., as construction and design factors now receive. The new approach will be costly. FHWA Administrator Turner has estimated that conservation of environmental resources is currently adding as much as 25 percent to the

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79. For a thorough discussion of the problems of air pollution and the highway see Schneiderman, Cohn & Paulson, *Air Pollution and Urban Freeways: Making a Record on Hazards to Health and Property*, 20 CATHOLIC U.L. REV. 5 (1970).

80. 42 U.S.C. § 4331(b)(5) (Supp. V, 1970).

cost of some projects.<sup>81</sup> As the nation moves to refine tried and proven methods of highway building which have helped give the American people a degree of mobility never before known, it is useful for environmental activists and veteran highway builders alike to recall that

it becomes possible to grow increasingly critical of the course of urban development, without recognizing that it has been the wealth generated by this movement that makes possible the consideration of more elegant alternatives.<sup>82</sup>

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81. Turner testimony, *supra* note 54.

82. REPORT OF THE NATIONAL GOALS RESEARCH STAFF, TOWARD BALANCED GROWTH 14 (1970).



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*As the title of his article indicates, Professor Gray reviews the environmental requirements of highway and historic preservation legislation of the past four years. Specifically, he discusses the legislative background and intent of Section 138 of Title 23 of the United States Code; Section 4(f) of the Department of Transportation Act; the National Historic Preservation of 1966; and the "urban impact" amendment to Section 128 of Title 23. These provisions establish requirements for a broad consideration of non-transportation social values in the highway planning process. In order to furnish guidelines to state highway departments in the enforcement of these legislative provisions, the Department of Transportation has issued important administrative directives, including Policy and Procedure Memorandum 20-8 and directives on relocation benefits for persons and businesses displaced by highway projects. Professor Gray explains these directives as well as the new organizational arrangements to meet environmental responsibilities within the Department of Transportation.*