ENVIRONMENTAL LAW—FEDERAL COURTS HAVE AUTHORITY UNDER NEPA TO ENJOIN PRIVATE PARTIES—*Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973).

Harry Wolk, a private developer, was working with the Department of Housing and Urban Development (HUD) on the "Forest Glen Project," a 138-unit low and moderate income housing project situated on an 11.38 acre woodland tract in Stoughton, Massachusetts. A local homeowners' group, alleging that HUD had failed to prepare the type of environmental impact statement required by the National Environmental Policy Act (NEPA),[1] sought an injunction to halt the project. The court determined that the proposed project was likely to be found a "major federal action" and that the plaintiffs had shown a reasonable probability of prevailing on the merits. After further finding that the plaintiffs might suffer irreparable harm, while the defendant would not, the district court issued an injunction against HUD temporarily halting its participation in the project.[2]

While HUD was preparing an environmental impact statement

---

1 42 U.S.C. §§ 4321 *et seq.* (1970). Section 4332 provides in part:

> 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 irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

A less researched "Special Environmental Clearance Worksheet" had been filed which the court found did not comply with the Council on Environmental Quality's (CEQ) guidelines. According to the guidelines, every agency must consider NEPA policy and procedure *prior* to commencing major undertakings. The NEPA impact statement must include: (a) a description of the proposed project sufficient for careful assessment; (b) the probable environmental consequences of the project, both primary and secondary, including effects on population distribution, land uses, water, public services, etc.; (c) potential polluting effects of the project; and (d) rigorous exploration through hearings and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects. Inter-agency, federal, state and local, as well as private organizations' opinions and suggestions must be utilized in weighing the short term need against the long term environmental effects of the project. 36 Fed. Reg. 7724, 7725 (1971). *See generally* Kross, *Preparation of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81 (1972).

2 Silva v. Romney, 342 F. Supp. 783 (D. Mass. 1972).

pursuant to the injunction, Wolk commenced site preparation by cutting down trees on three acres of the tract. The homeowners' group, in *Silva v. Romney*,[3] filed a motion for interim relief preserving the *status quo* through the imposition of temporary restraints against Wolk. Relief was denied, ostensibly because the district court "deemed itself without authority to prevent the developer from doing 'as he wishes' with his own property."[4] However, the First Circuit remanded, holding that the private developer's request for, and subsequent HUD approval of, a $4,000,000 mortgage guarantee and an interest grant of $156,000 brought the federal agency and private developer into a relationship tantamount to a partnership. Thus, it found that a federal district court may enjoin private parties under the authority of NEPA.[5] The court also criticized HUD's lack of regulations designed to preserve the *status quo* pending issuance of an impact statement, since this condition compels the judiciary to intervene in situations which might be handled more efficiently by administrative rule.[6]

The major problem faced by the plaintiffs in *Silva* stems from the fact that section 102 of NEPA,[7] by its literal wording, refers only to agencies of the federal government. Thus, although NEPA's specific procedural mandates have been held to create a new legally protected interest and have consequently broadened the class of persons with "standing to sue" in environmental causes,[8] plaintiffs have been met with widely divergent viewpoints in the courts of appeals for the various

3 473 F.2d 287 (1st Cir. 1973).

4 *Id.* at 289.

5 *Id.* at 292.

6 *Id.* at 291.

7 42 U.S.C. § 4332 (1970).

8 *Compare* Sierra Club v. Morton, 405 U.S. 727 (1972), *aff'g* Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *with* Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). The legally protectible interest given to each American under NEPA is defined in section 4331 wherein the federal government is made "trustee" to insure that prior to the inception of a major federal project, each American's right to enjoy a healthful environment is carefully considered. Broad application of the "standing" privilege in regard to plaintiffs in an environmental controversy is dealt with in an extensive footnote in Environmental Defense Fund, Inc. v. Environmental Protection Agency, 465 F.2d 528, 530-31 n.1 (D.C. Cir. 1972). Once a legally protected interest is statutorily created, and the matter in question is not committed solely to agency discretion, then the person whose interest is invaded has "standing" to challenge the agency action. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.01 *et seq.* (1958). NEPA's mandate is not discretionary. Silva v. Romney, 473 F.2d 287, 292 (1st Cir. 1973). The legal right to a healthful environment thus creates the standing in citizens to force the federal government to act affirmatively in fulfilling NEPA procedural mandates. Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 251 (1970).

circuits when they have sought to impose NEPA compliance upon non-federal parties acting in concert with the government.

In *City of Boston v. Volpe*,[9] the First Circuit determined that a "tentative allocation" of funds to the Massachusetts Port Authority for runway construction was not sufficient federal involvement to allow an injunction to issue under NEPA against the Port Authority. The court devised a "focus" test to determine whether judicial intervention was warranted as to the non-federal recipient of federal aid. When continuous stages of decisional involvement between federal and private parties are required, as for highway aid, the "focus" is fixed at the time that the aid is approved, and the judiciary may intervene at that point.[10] However, the *City of Boston* court found that airport aid was a one-time-only allocation for the whole project, and the "tentative" intra-agency allocation was not sufficient federal involvement to allow the enforcement of NEPA against the non-federal party.[11] The First Circuit had to distinguish between degrees of "federal involvement" because four months earlier the district court had allowed an injunction against a non-federal party in *Boston Waterfront Residents Association, Inc. v. Romney*.[12] In that case, HUD had approved and granted over $30,000,000 to the Boston Redevelopment Authority (BRA) for demolition work along Boston's historic waterfront. The grant had been made in 1965 and, at the commencement of the litigation, one-third of the funds were still unused. The district court held this to be sufficient "continuing federal involvement" with the project to enforce a temporary injunction against BRA until a NEPA impact statement was prepared by HUD.[13]

The defendant in *Silva v. Romney* relied primarily on *City of Boston*, claiming that

> the district court lacks power to enjoin a private party from using his land as he pleases simply because an application for federal aid has been filed.[14]

Judge Coffin, writing for the circuit court in *Silva*, distinguished the preliminary and tentative allocation of federal funds in *City of Boston* from the *Silva* situation in which the developer's request for aid on the Forest Glen Project had been approved. He held that the firm mortgage

9 464 F.2d 254 (1st Cir. 1972).
10 *Id.* at 259.
11 *Id.*
12 343 F. Supp. 89 (D. Mass. 1972).
13 *Id.* at 91.
14 473 F.2d at 289.

commitment issued by HUD created a contract between the federal agency and the private developer, who then could be viewed as a "partner" with HUD.[15] This finding is consistent with the "focus" test he had created in *City of Boston*.[16] Although he was referring to airport aid in that case, the test is equally applicable to HUD aid requiring that each "progress payment of the mortgage be approved by the Commissioner."[17] Plans, specifications, estimates, construction and conditions of rental were all dictated by HUD during its "continuing involvement" with the private developer.[18]

A similar problem was faced by the Fourth Circuit in *Ely v. Velde*.[19] That case involved a block grant given by the Law Enforcement Assistance Administration (LEAA) to the state of Virginia for construction of a penal facility. Although the court demanded that LEAA comply with NEPA, it refused to enjoin the state from proceeding with the project while the statement was being prepared.[20] It held that NEPA was applicable only to the federal agency, especially in this case where the monetary grant required no continuing federal involvement.

Despite the apparent unambiguity of *Ely's* holding, confusion still exists in the Fourth Circuit due to its earlier decision in *West Virginia Highlands Conservancy v. Island Creek Coal Co.*[21] In that case, the district court had enjoined both private and federal defendants from proceeding with a project in a national forest until an impact statement was filed. Only the federal party appealed, so the Fourth Circuit had no opportunity to deal directly with the propriety of enjoining a private party.[22] If, however, the major thrust of *Ely* was that *no* non-federal party may be enjoined under NEPA, it would seem that the circuit court could have raised the issue of the propriety of enjoining Island Creek on its own motion.[23] Instead, it ignored the issue.

The Fifth Circuit faced the same question in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*,[24] a case in which highway construction had been approved prior to the filing of an impact statement concerning the proposed

---

15 *Id.*

16 464 F.2d at 258.

17 HUD Reg. B, 24 C.F.R. § 221.541 (1972).

18 HUD Reg. B, 24 C.F.R. §§ 220.501 *et seq.* (1972).

19 451 F.2d 1130 (4th Cir. 1971).

20 *Id.* at 1139.

21 441 F.2d 232 (4th Cir. 1971).

22 *Id.*

23 Lack of federal jurisdiction may be raised by an appellate court on its own motion at any time. 1 J. MOORE, FEDERAL PRACTICE ¶ 0.60[4], at 609 (2d ed. 1972).

24 446 F.2d 1013 (5th Cir. 1971).

route. The court held this to be a major federal action requiring an impact statement. By arbitrarily dividing the highway project into sections, the highway authority had been able to acquire federal aid without waiting for an impact statement to be filed. It claimed that the aid would be used on the non-controversial portions, and the controversial section, going through a park, would be built solely with state funds. Since the court here refused to accept that reasoning, the state attempted to evade NEPA by renouncing *any* further use of federal funds. On the basis of the federal funds already utilized on the project, the court labeled the entire highway a "system" whose total approval and compliance with NEPA was essential.[25] Without any discussion of NEPA's applicability to non-federal agencies, the Highway Authority was enjoined from further action until the impact statement was filed.

The same result was reached in the Wisconsin case of *Scherr v. Volpe*.[26] The basis for this litigation was the planned expansion of a conventional two-lane highway into a four-lane expressway. After finding that NEPA had not been complied with, the court enjoined from further construction activities the "agents, servants and *all other persons working in concert or cooperation with defendants*" until an impact statement was filed.[27] As in *San Antonio*, the *Scherr* court failed to discuss the threshold question of its jurisdiction to enjoin non-federal parties.

In addition to those cases in which the courts have either enjoined or refused to enjoin non-federal parties, there is another group of cases in which the courts have been able to halt major federal actions without the necessity of enjoining such parties. These cases typically are concerned not with federal aid, but with the issuance or denial of federal permits or approvals. Illustrative of this genre are *Calvert Cliffs Coordinating Committee v. AEC*[28] and *Izaak Walton League of America v. Schlesinger*.[29] These cases involved Atomic Energy Commission

---

25 *Id.* at 1022, 1023. The Fifth Circuit followed the United States Supreme Court's reasoning in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), that Congress is the proper forum to resolve priorities conflicts, not the states which are recipients of federal funds. Congress has stipulated that parklands and environmental values are to be considered paramount when juxtaposed with highway needs. *Id.* at 412. For a discussion of *San Antonio Conservation Society*, see Note, *To Enforce Federal Environmental Laws, a Federal Court Can Declare a State Highway Project to be "Federal" and Enjoin the State from Proceeding on its Own*, 50 TEX. L. REV. 381 (1972).

26 336 F. Supp. 882 (W.D. Wis. 1971).

27 *Id.* at 886 (emphasis added).

28 449 F.2d 1109 (D.C. Cir. 1971).

29 337 F. Supp. 287 (D.D.C. 1971). The order of the court, which is not officially reported, appears at 3 E.R.C. 1453, 1456.

(AEC) operating permits for nuclear powered electrical generating stations. Another example is *Davis v. Morton*,[30] which challenged the approval by the Bureau of Indian Affairs of a long-term lease of Indian lands. In each of these cases, injunctions were issued only against the federal agencies pending NEPA compliance, but since the federal actions were the sole element necessary for the projects to proceed, the private power companies and the private lessee of the Indian lands were all effectively, albeit not explicitly, enjoined from proceeding.

In the monetary aid cases like *Silva, Ely* and *San Antonio,* the parties stand in a different relationship. In these cases the non-federal parties might have been able to proceed without the federal funds, either because their own financial resources would have been sufficient or because they relied on the ultimate approval of the grant. An injunction against the federal agency may not, as in *Silva,* effectively deter the private party from continuing with the project. In order to avoid complete derogation of NEPA policy, while at the same time observing their role as courts of limited jurisdiction,[31] the courts have been forced to distinguish, either explicitly or implicitly, between the various relationships of federal agencies and non-governmental parties. The type of relationship determined to exist has depended upon the amount of money involved and the degree of supervisory powers to be exercised by the federal agency within the proposed project. Thus, "continuing involvement" includes those on-going projects in which federal agency decisions and allocations to the non-governmental party continue over a long period of planning and construction.[32] "Tentative allocation" means that the federal agency has not made certain its commitment to the non-governmental party.[33] Lastly, a "block grant" is a no-strings-attached, one-time allocation to a state, city or non-governmental agency.[34] In cases of "continuing involvement," private parties have been enjoined under NEPA,[35] while if the aid is a "tentative allocation" or "block grant," the injunctions have been refused.[36]

---

30 325 F. Supp. 749 (E.D. Ark. 1971).

31 Jurisdiction in environmental cases is usually premised upon 28 U.S.C. § 1331 (1970), the general "federal question" grant. With respect to private parties not involved with a federal agency, it is difficult to imagine a "federal question" arising under NEPA.

32 Boston Waterfront Residents Ass'n, Inc. v. Romney, 343 F. Supp. 89, 91 (D. Mass. 1971).

33 City of Boston v. Volpe, 464 F.2d 254, 254 (1st Cir. 1972).

34 Ely v. Velde, 451 F.2d 1130, 1130 (4th Cir. 1971).

35 Boston Waterfront Residents Ass'n, Inc. v. Romney, 343 F. Supp. 89 (D. Mass. 1971).

36 City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

The arbitrary and capricious results of drawing such fine lines of distinction led the *Silva* court to confess to

> a sense of growing uneasiness seeing decisions determining the obligations of federal and non-federal parties under NEPA turn on any one interim step in the development of the partnership between the parties. Such an approach unrealistically stresses advantageous factors which bear little relationship to either the broad concerns of NEPA or the interests of the potential grantee, private or public.[37]

The remainder of this note will be concerned with possible criteria by which courts may more openly assess governmental/private party relationships. The *Silva* court summarily decided that a "partnership" contract arose between HUD and Wolk when HUD made a financing commitment to him.[38] The weakness of this decision stems from the use of the word "partnership" in such a colloquial manner and without adequate analysis. It is apparent from the contractual agreement between HUD and Wolk that they did not agree to share profits and losses, nor did they agree to continue the relationship beyond this one project; in short, they neither agreed nor intended to become partners. The type of business association which this HUD/developer relationship most closely resembles is the joint venture.[39] In general, a joint venture is founded upon contract, and the mutual rights and liabilities of the venturers stem from that contract.[40] However, the rights and liabilities of the venturers vis-à-vis third parties stem not from the contractual intent of the venturers, but from the "legal intent" inferred from their actions.[41] That is, parties who are not legally joint venturers may, because of their representations to third parties, either be held to the liability of joint venturers,[42] or be estopped to deny that such a relationship exists between them.[43] Thus, parties who are not joint venturers with respect to each other may,

37 473 F.2d at 290.

38 *Id.*

39 This conclusion is based upon the fact that joint ventures, unlike partnerships, are formed for one particular purpose only and do not involve a continuing relationship. In addition, in a joint venture the parties need not agree to share losses. *See* Roegge, Talbot & Zinman, *Real Estate Equity Investments and the Institutional Lender: Nothing Ventured, Nothing Gained*, 39 FORDHAM L. REV. 579, 590-91 (1971); Dorsey, *Rights and Obligations of Joint Venturers as Principals Under the Standard Form of Surety Bonds*, 1971 ABA SECT. INS. NEG. & COMP. LAW 144-45.

40 Dorsey, *supra* note 39.

41 Roegge, Talbot & Zinman, *supra* note 39, at 594.

42 Albina Engine & Mach. Works, Inc. v. Abel, 305 F.2d 77, 82 (10th Cir. 1962).

43 Rivett v. Nelson, 158 Cal. App. 2d 168, 173, 322 P.2d 515, 520 (1958).

depending upon the nature of their representations and the reliance which they have induced, be held jointly bound for certain purposes, for example, environmental enforcement, and not bound for others, such as tort and contract liability.

The *Silva* case presents a good example of the type of fact situation to which these general principles are applicable. The offer to complete the "Forest Glen Project" was made by Wolk when he submitted a "firm commitment" to HUD, which included a combined application and commitment fee of $3.00 per $1,000 of the amount of the mortgage for which he applied.[44] The commitment issued by HUD constituted an acceptance of the offer and thus created the contract.[45] To have reached this stage, Wolk must have submitted plans and specifications commensurate with HUD guidelines as to the number of units, costs per unit, maximum rental to be charged per unit, as well as numerous other required specifications.[46] The federal/private party "community of interest" rested on these inextricably commingled contributions to the project's development. Wolk, as private developer, entered the relationship with the expectation of making a profit, while HUD's consideration would be an increased housing supply. In effect, Wolk promised to contribute his construction skill and expertise as well as his land in exchange for the federal mortgage guarantee and interest grant.[47] In addition, Wolk had to agree that

> [t]he property, including improvements, shall comply with any material zoning or deed restrictions applicable to the project site and with all applicable building and *other governmental regulations*.[48]

The existence of such HUD contracts are made known in the local communities through both the familiar signs at the project site and through the representations which the builders must make to the local governments for site plan approvals, etc. Thus, the concerned citizen who is aware of the federal government's protective policy toward the environment has a right to expect that a project under the federal aegis will comport with at least minimal environmental standards. At least as to the protection of this limited environmental interest, the agency and developer are joint venturers. If these legitimate expectations are not fulfilled and the public reliance proves ill-founded

---

44 HUD Reg. B, 24 C.F.R. § 221.504 (1972).

45 473 F.2d at 289; HUD Reg. B, 24 C.F.R. § 221.509 (1972).

46 *See* HUD Reg. B, 24 C.F.R. §§ 236 *et seq.* (1972).

47 *Cf.* Saxon v. Howey, 247 Mich. 508, 226 N.W. 228 (1929).

48 HUD Reg. B, 24 C.F.R. § 221.545(c) (1972) (emphasis added).

because the federal agency has abrogated its statutory responsibilities, then an injunction should issue against the joint venture itself. Thus, Wolk, having dedicated certain property to the joint venture, and having induced public reliance, should, as an agent of the Forest Glen venture, be prohibited from utilizing the property to his own benefit. This is true notwithstanding the fact that he has legal title to the property and is using his own funds to commence work on it.[49]

The exact moment at which the federal agency/private party relationship becomes a joint venture for environmental purposes is admittedly a difficult determination for the courts. However, it is common knowledge that the enormous monetary outlay required in the construction of low income residential complexes is rarely at the command of an individual. Although private parties may have the resources to do initial preparatory work, courts should take notice of the reliance which such parties place upon future appropriations from the federal government for the completion of the projects. Considering the plethora of governmental regulations to which the mortgagor must submit when entering this undertaking, it is not unreasonable for the court to also impose NEPA standards on the venture itself and, through the venture, upon the private party, since "it is beyond challenge that one in partnership with the federal government can be prohibited from acting in a certain manner."[50]

In conclusion, private developers who have voluntarily sought federal aid and have induced public reliance upon federal supervision of environmental standards should not be permitted to evade federal regulations such as NEPA. This is especially true in a case such as this, involving the cutting of trees, where lack of early compliance is tantamount to the Act's abrogation. NEPA is not designed to permanently halt projects, but to make agencies and their private partners consider environmental factors along with all others *before* beginning construction.[51] Until all governmental agencies incorporate within their regulations some means of forcing NEPA compliance upon the private parties who request their aid, the courts must look to the common law principles of third party reliance upon representations in order to find that the parties are joint venturers for environmental purposes, and to thereby carry out the congressional mandate.

Isabel Brawer Stark

---

49 *See* Dorsey, *supra* note 39, at 150.

50 Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).

51 Statement by Senator Henry M. Jackson, *Hearing on S. 1075, S. 237, S. 1752 Before Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 40 (1969).