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NATIONAL LAND USE PROPOSAL: LAND USE LEGISLATION OF LANDMARK ENVIRONMENTAL SIGNIFICANCE

*By Martin R. Healy**

Declaration of National Environmental Policy:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances 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, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, 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. - National Environmental Policy Act of 1969¹

Land use is the single most important element affecting the quality of the environment which remains substantially unaddressed as a matter of national policy. After four long years of deliberation, Congress is on the threshold of enacting legislation which will take a significant initial step toward asserting national leadership on this issue² while pursuing the declared national environmental policy.³ The proposed legislation has the potential for achieving far-reaching reforms in land use decisionmaking by federal, state, and local governments, and private land developers. Owing to these decision-making reforms, the land use proposal has been heralded by environmentalists as landmark legislation⁴ comparable in importance to the National Environmental Policy Act of 1969,⁵ the Clean Air Act Amendments of 1970⁶ and the Federal Water Pollution Control Act Amendments of 1972.⁷

Essentially, the proposed legislation attempts to induce states to comply voluntarily with the policies of the act through a grant-in-aid program administered by the Secretary of the Interior. To be eligible for federal financial assistance, states will be required to establish state land planning agencies responsible for conducting ongoing comprehensive land planning and coordinating state projects affecting land use.⁸ These state agencies must assert final au-

thority for making land use decisions of "more than local concern" and will be responsible for protecting land areas of critical environmental concern from destructive development as well as controlling the character, location, and land use impacts of major public and private growth-inducing activities.⁹ Widespread public participation will be encouraged at all stages of the state land use decision-making process to prevent it from being dominated by narrow economic interests.¹⁰

Though the thrust of the land use proposal is directed toward reforming state land use decisionmaking, the proposal contains reforms of federal agency land use decisionmaking which are also laudable. The proposed legislation augments and complements the federal agency decisionmaking reforms contained in the National Environmental Policy Act (NEPA), and coordinates federal actions on state lands with state land use plans meeting the act's requirements.¹¹ Notably, an important component of the new federal agency decisionmaking requirements will become effective automatically,¹² whereas state decisionmaking reforms depend on state willingness to participate in the proposal's federal assistance program.

The land use proposal, as presented in S.268, passed the Senate in June, 1973, during the 1st session of the 93rd Congress¹³ and is currently being considered by the House of Representatives.¹⁴ This article will discuss the proposed legislation anticipating that Congress may approve similar land use legislation before the 93rd Congress is adjourned in 1974. After briefly surveying background information concerning land use decisionmaking on state land, this article will analyze the provisions of S.268 relating to state and federal land use decisionmaking and will comment on possible amendments that could clarify ambiguities in the proposal.

I. BACKGROUND INFORMATION

During the 1920's and 1930's state legislatures undertook widespread delegation of land use decisionmaking authority to local government,¹⁵ considering land use control to be a matter of local concern. Since that time, approximately 10,000 local governments have instituted land use controls,¹⁶ and, to the extent that government currently engages in land use planning in any meaningful manner, such planning is conducted at the local level.¹⁷

In view of changing land use forces and conditions,¹⁸ the original assumption that local government should be the exclusive locus of land planning authority has grown increasingly attenuated. Al-

though the continuing need for land planning on the local level for purely local matters cannot be doubted, many land use problems have become so complex and have reached such dimensions that state, regional, and even national solutions are required.¹⁹ Local government zoning and subdivision controls, which were established to meet land use problems of the first quarter of this century, are often inadequate tools for effectively meeting land use problems of the last quarter of this century.²⁰ In the New York metropolitan area, for example, there are presently 500 separate jurisdictions exercising zoning power.²¹ Such balkanized, fragmented planning power is hardly capable of rationally addressing metropolitan problems which are not neatly divided by local political boundaries. Consequently, metropolitan land use issues remain unaddressed and unresolved

One highly visible and well documented phenomenon aggravated by fragmented zoning authority in urban areas is the socio-economic cleavage between suburbs and inner city.²² Owing to fortuitously established local political boundary lines, suburbanites avoid the tax burden of maintaining inner city services of which they continually avail themselves. More importantly, the political independence of the suburbs enables them to enact strict zoning ordinances which shield suburban land from low-cost housing, thereby increasing already heavy pressures on urban land.

Additional inadequacies of local land use controls stem from the fiscal dependence of local governments on property taxes. Because local governments rely heavily on property taxes for revenues, many local governments use zoning merely as a tool to attract high tax ratables such as industrial parks to their localities.²³ Faced with a need to generate greater property tax revenues, localities often do not adequately weigh the value of preserving environmentally important lands, such as estuaries, against the economic desirability of land development.

Aside from the inability of local government units to make adequate judgments on many land issues of more than local concern within their jurisdiction, one must realize that some of the most crucial land use issues lie geographically beyond the control of local governments in unincorporated state lands. More significantly, federal and state projects, whether conducted within the geographical confines of local government or not, are generally not controlled or even influenced by local government planning. State and federal highway planners of the recent past, for example, have been notoriously impervious to local outcries that they were destroying city

parklands, or routing highways into cities unable to cope with accompanying traffic congestion, automobile pollution or land development.²⁴ The impact of such state and federal projects on local planning is enormous, and, when conducted without regard to local preferences, does much to neutralize the effectiveness of even the most well-conceived local land use plans.

Congress has come to view state governments as the strategic and necessary vehicles for land use decisionmaking reform. By utilizing states, the need for making crucial land use decisions on a broader political base than local government can be satisfied, while, at the same time, land use decisionmaking can be kept close enough to the constituency most affected to be responsive to individual needs and circumstances. Consequently, Congress has tried to encourage states to reclaim much of the land use decisionmaking power delegated to local government in the early part of this century. This trend is evidenced by the Coastal Zone Management Act of 1972 (CZMA),²⁵ which authorizes financial aid to states which assert their police power to protect coastal areas from environmentally destructive development. The proposed Land Use Policy and Planning Assistance Act, S. 268, is similar to the CZMA in that it also relies on the persuasiveness of the federal dollar to prompt state initiative on land use issues. However, the land use proposal differs from the CZMA in one very important respect; whereas the CZMA is limited to coastal lands, the land use proposal encourages states to implement comprehensive land plans addressing all land use issues of more than local concern. The comprehensive approach of the national land use proposal with its stress on planning implementation is a mark of distinction which may make it the most significant advance in state land use planning since zoning.

II. FEDERAL, STATE AND PUBLIC ROLES UNDER S. 268

Three characteristics of the land use proposal must be discussed so that its objectives may be fully appreciated. First, the role of federal government under S. 268 is one of guidance rather than control. The substantive federal requirements imposed on states as a condition to receiving federal aid are extremely flexible and infringe only minimally with state freedom to make their own land use decisions.²⁶ Second, the redistribution of land use decisionmaking power from local governments to states under S. 268 need not be extensive. S. 268 does not require states to dismantle local government control over land use decisionmaking, but rather encourages them to take a leadership role in working cooperatively with local

governments to resolve issues of more than local concern.²⁷ Third, public participation at every phase of the land planning process under S. 268 is mandated.²⁸ Since the substantive outcome of state land use decisionmaking will be determined on each state's own political scales, the federal proposal attempts to insure, through public participation, that the scales will not be overbalanced in favor of unduly influential interests. These three characteristics of S. 268 will now be considered in greater detail.

A. The Federal Role

S. 268 proclaims that land is the nation's most valuable resource and declares that it is the federal government's responsibility to work cooperatively with states in securing the wise and beneficial management of that resource.²⁹ The proposal sets forth the goal of eliminating land use decisions based on "expediency, tradition, short-term economic considerations and other factors . . . unrelated or contradictory to sound environmental, economic, and social land use considerations."³⁰ However, it is clearly not a mandate to the states for compliance with substantive federal standards for land use decisionmaking.

The conspicuous lack of well-defined federal standards for judging the substantive quality of state decisionmaking under S. 268 is, in large part, a reflection of the fact that S. 268 is experimental legislation. Congress is unsure of how far it must eventually go to establish effective management of state lands. It is certain, however, that some action must be taken expeditiously, and that the states are desirable vehicles of reform.³¹ Accordingly, this legislation encourages state experimentation with novel land planning techniques while avoiding premature crystalization of federal strategies. In coming years, Congress will have an opportunity to analyze the administrative and political difficulties that will certainly arise from implementation of comprehensive planning on the state level and make the appropriate adjustments. As has been indicated by the Congressional experience in the areas of air and water pollution, years of analysis and a series of amendments may be necessary before reasonably effective environmentally protective legislation emerges.³² The land use proposal's numerous provisions for reports to Congress with recommendations for remedial legislation³³ provide a sound indicator that Congress views S. 268 as an initial, but vitally important step, in the long journey toward establishing effective land use management.

The proposal's procedural requirements are intended to insure

that state programs have certain basic elements necessary for effective planning: a comprehensive planning process, requisite authority for planning implementation, and meaningful opportunity for citizen participation.³⁴ Nevertheless, these procedural requirements embody a high degree of flexibility and allow states to respond creatively to their individualized needs. Nowhere is this flexibility more pronounced than with regard to the quantity and character of land areas and uses which must be covered by state land use programs:

(S. 268's) definitions (of land areas and uses of more than local concern) are purposely left incomplete in accordance with the purpose of the Act to improve the State's ability to devise and implement their *own* land use policies. By further refining these definitions the States make the first basic policy decisions concerning the scope and thrust of State land use programs.³⁵ (original emphasis)

Moreover, once the scope, procedures, and strategies of state land use programs have been tailored by each state to be consistent with S. 268, the federal government will not attempt to substitute its judgment for the state's on particular land use decisions.³⁶

Substantively, the states are required only to implement their land use programs in "good faith" in accordance with the general policies expressed in S. 268.³⁷ However, should a state establish a pattern of activity effectively ignoring its own land use program, such activity would be sufficient grounds for withdrawing federal assistance for lack of good faith implementation.³⁸ As protection against the possibility of having federal assistance arbitrarily or mistakenly withdrawn, S. 268 provides that the Secretary of the Interior, the administrator of the assistance program, must carry the burden of proving lack of good faith program implementation before a neutral arbitration board prior to withdrawal of federal assistance.³⁹ Clearly, then, S. 268 "is no guarantee of good planning and good control"⁴⁰ and does not purport to be. Rather, it is a Congressional attempt to provide the impetus for states to address difficult and politically sensitive land use issues.⁴¹

B. The State Role

A second important characteristic of S. 268 is the balancing of state and local government roles in land use decisionmaking. The original land use proposal, introduced in 1970 by Senator Henry Jackson, required states to implement comprehensive planning for *all* land use decisions within their borders except those affecting urban areas.⁴² The Nixon Administration subsequently offered an

alternative approach on the grounds that such broad requirements for state control of land use decisions would be unnecessarily burdensome. That proposal required states to implement land use programs only for selectively chosen "critical land areas and land uses of more than local concern."⁴³

The Administration's "critical areas and uses" concept was borrowed from the American Law Institute's Model Land Development Code Tentative Draft No. 3.⁴⁴ The authors of the model code operated on the premise that local control of land use decisionmaking should be given up only where important state or regional interests clearly required it, and then only to the degree necessary to achieve state or regional objectives. After examining local land use decisionmaking, the model code's authors concluded that:

Probably 90% of the local land development decisions have no real state or regional impact. It is important to keep the state out of these 90%, not only to preserve community control, but to prevent the state agency from being bogged down in paperwork over a multitude of unimportant decisions.⁴⁵

Accordingly, the model code confined state land use decisionmaking to defined land areas and land uses of critical state concern. The success of this approach depends on the adequacy of the state definitions of critical land areas and land uses. The definitions must be of sufficient breadth to assure that all land use decisions which affect regional or state interests are made by states, yet narrow enough to permit land use decisions of purely local significance to remain with local government where they are most properly decided.

The current federal land use proposal adopts this "critical areas and uses" approach. Thus, the states under S. 268 need only assume decisionmaking authority over that small portion of the total number of land use decisions which are of more than local concern. Even with regard to land use decisions of more than local concern, S. 268 does not encourage states to totally pre-empt local land use decisionmaking. While states may, if they wish, exercise direct planning which wholly displaces local authority, they are expected to work cooperatively with local governments.⁴⁶

This Congressional preference, like the critical areas and uses approach, may have its roots in the American Law Institute's model land development code. Under the model code, local governments continue to make land use decisions of more than local concern, but are guided by rules and standards promulgated by a state land use planning agency. The state planning agency may participate at will

in local land use procedures and may appeal any local decisions with which it is dissatisfied to the state land use decision review board. In the judgement of the authors of the model code:

This system preserves the benefits of community control by assuring the local agency the right to make the initial decision in each case. It allows the State Land Planning Agency to concentrate on policy-making functions and participate in individual cases only to the extent it feels such participation is necessary to defend its policies. And by allowing the state board to review local decisions on the record made below, it avoids the necessity of creating an expensive and time-consuming procedure for new hearings at the state level.⁴⁷

As this implementation method is acceptable under S. 268, clearly local government may retain a vital role in land use decision-making.

C. The Public Role

A third major characteristic of S. 268 of central importance is its broad requirement for public participation.⁴⁸ A survey of zoning ordinance implementation well illustrates how ineffective planning efforts can be when decisionmaking becomes dominated by a narrow segment of the populace. Many legal commentaries on zoning have denigrated its accomplishments and reached strikingly similar conclusions: "the zoning process is basically an exercise in myth-making, an invitation to corruption in local government, an instrument of real estate interests, and an involved and time-consuming technicality that rarely produces concrete results in urban planning terms."⁴⁹ It is imperative that efforts to reform state land use decisionmaking processes carefully avoid the pitfalls that have so limited zoning's effectiveness. Witnesses at the land use hearings held by Congress strongly stressed the importance of widespread public participation as a protective measure:

In any land use legislation enacted by this committee, first and foremost, the criteria for public participation must assure that citizens are given opportunities for effective participation in the planning and decisionmaking process. . . . Past experience has shown us that, if given adequate opportunity, an informed public becomes an excellent watchdog over activities which affect the quality of life.⁵⁰

The Senate Committee's response to such suggestions was clear and unequivocal:

[W]ide participation in land use decisionmaking is regarded by the Committee as perhaps the most critical factor in the successful imple-

mentation of the Act. . . . The Committee believes and the Act so states, that participation of local governments, property owners, users of land, and the public must be provided at *all* stages of the development of the statewide land use planning process and State land use programs - from the definition to the implementation stage.⁵¹ (original emphasis)

“Meaningful” participation is stressed by S. 268,⁵² and the Senate Report expressly recognizes that adequate public notice of prospective decisionmaking is a prerequisite for such participation.⁵³ The Senate Committee notes that the policy of meaningful public participation in land use decisionmaking is “critically important to preserve the concept of due process, to assure an expression of personal values and judgments in establishing land use goals and policies, and to develop sufficient public faith in the resultant decisions so that resistance to their implementation will be minimized.”⁵⁴ The state’s responsibility to provide meaningful public participation can only be met by affirmative efforts to make citizen participation a factor of real consequence. These efforts shall include establishing a public education program designed to foster public involvement in state land use planning and making available to any citizen upon request any state land use data, information, studies, reports or hearings.⁵⁵

Citizen participation under S. 268 is not limited to administrative hearings on the scope and content of state land use programs. S. 268 requires that an administrative or judicial appeals process be provided for resolving land use disputes arising under state land use programs,⁵⁶ and here too broader representation of citizen interests is intended. This factor is of no small consequence since, as Joseph Sax points out, “(litigation) is in many circumstances the only tool for genuine citizen participation in the operative process of government.”⁵⁷ The zoning experience well illustrates the need for broad representation of citizen interests in land use litigation. Typically, zoning litigation merely involves the resolution of conflicts between narrowly defined, localized economic interests seeking to preserve or secure economic advantages.⁵⁸ Social and environmental issues are often ignored, or considered peripherally to the economic interests of the parties to the action. Fortunately, the Senate Report speaks with force on this point, expressing a Congressional desire to insure that a similar fate does not befall land use decisionmaking under S. 268:

The States are encouraged and expected to honor the general trend toward a wider recognition of those who can contest or appeal govern-

mental decisions. To do so would be in keeping with the basic premise of S. 268 that impacts of many land use decisions are no longer felt only by adjacent landowners. . . . but (are also felt by) citizens of the region, the State, and on occasion, the Nation.⁵⁹

Similarly, in accordance with the overriding theme of the land use proposal that social and environmental considerations in land use decisionmaking are fully as significant as economic considerations, state land planning legislation should specifically provide that all persons whose social and environmental interests have been substantially harmed by land use decisions, as well as those whose economic interests have been harmed, shall have standing to appeal those decisions. As John Quarles, Assistant Administrator of Enforcement of the United States Environmental Protection Agency, made clear at the land use hearings, this result is vitally important to the success of the land use proposal:

The biggest need is to get a system established within which environmentalists in States can have a forum to fight the battles (If such a forum is provided) I would be content to leave it to the forces at work in the political structure at the level of the localities and states to work out the balance.⁶⁰

Considering the importance of citizen access to judicial and administrative appeals processes for purposes of litigating social and environmental issues, perhaps Congress should consider explicitly requiring such access in state land use programs under S. 268.

III. THE STATE LAND PLANNING PROCESS

As a precondition to asserting leadership in land use decisionmaking, states are required to establish a comprehensive land planning process. This process shall include: (1) gathering detailed information on the character of all state land and its suitability for particular uses; (2) projecting the demands upon land resources that are likely to result from population growth, urban expansion, and public and private development; and (3) estimating present and future state land needs for housing, recreation, transportation, solid waste management, conservation of resources, industrial development and others.⁶¹ The Senate Report states with clarity that the information gathering process should not be prohibitively costly or overly academic, but should be a "functional body of information for use by planners, decisionmakers, and the public."⁶²

On the basis of the information, projections and estimates, states shall develop "a definite set of goals and objectives" which shall

“serve as convenient standards against which government officials and the public can measure the achievements of planning.”⁶³ At this stage, states will be able to identify which land use decisions are of more than local concern, and shall move to designate the land areas and uses which fall within the purview of the “critical areas and uses” defined by the federal land use proposal. This designation process shall include citizen participation, and, any “interested party” may appeal designation by an administrative agency.⁶⁴ The term “interested party” certainly seems more broadly applicable than the “aggrieved person” standing requirement under the typical state zoning enabling legislation.⁶⁵ However, the Senate has declined to define “interested party” for the purposes of the appeals process preferring to allow “flexibility for the States to work out their own, hopefully innovative procedures.”⁶⁶ Perhaps Congress should reconsider its position on this matter and explicitly require that the term “interested party” be broadly interpreted, since liberal standing requirements for this appeals process would appear to be a necessary component of adequate public participation in state land programs.

Following the designation of critical areas and uses, states shall develop specific strategies for accomplishing their land use goals. Under S. 268, these strategies must reflect a sound balance of social, environmental and economic considerations and be in furtherance of the policies of S. 268 with regard to each of the critical areas and uses. Particular emphasis in state planning should be placed on anticipating future land use problems and developing strategies to remove the cause of those problems before they arise.⁶⁷

The next major preparatory step will be the creation of a state land use planning agency vested with primary responsibility for executing the state land use program. The agency’s authority must include the power to regulate and prohibit development of critical land areas and land uses, and to coordinate state land uses with land uses on adjacent Federal lands and Indian reservations.⁶⁸

Incorporated in the state land use decisionmaking process will be several safeguards in addition to general participation provisions designed to insure that the interests of local government are adequately considered by state planners. Before promulgating regulations for implementing the state land use program, for example, the land use planning agency must consult with an intergovernmental advisory council composed of local government officials.⁶⁹ The presence of the advisory council should help state and local governments to cooperate fully in developing and implementing land planning

strategies that are responsive to local, as well as state needs. The state planning agency, in addition, must weigh the potential effects that various land use strategies will have on local property tax bases.⁷⁰ If a particular land use policy will seriously undercut the tax base of a locality, states may wish to consider an alternative strategy or some method of alleviating the financial disability of the locality. The importance of this provision is underscored by testimony of the American Society of Consulting Planners: "Unless land use becomes a neutral factor with respect to local revenue raising ability, the local resistance to land use policies imposed from above may well totally thwart any efforts by the states to enact the desired land use planning program."⁷¹

This preliminary stage of establishing the state planning process with requisite safeguards, formulating a satisfactory state plan, and creating a state planning agency with authority for planning implementation, shall take place within three years from the enactment of the proposed legislation.⁷² Actual implementation of the land planning program, with a single exception,⁷³ shall take place within five years after the proposal is enacted.⁷⁴

IV. SCOPE AND SUBSTANCE OF STATE LAND USE PROGRAMS

To qualify for federal aid under the land use proposal state programs must be responsible for land use decisionmaking affecting the "critical land areas and uses" defined in the proposal. The defined critical areas and uses address four major land use issues of more than local concern: (1) controlling growth inducing forces in accordance with a developmental plan; (2) regulating large scale rural subdivisions and housing developments; (3) preventing arbitrary exclusion of development of regional benefit by local government; and (4) protecting lands of peculiar social and environmental significance.⁷⁵ As previously mentioned, the federal proposal does not rigidly prescribe the scope and applicable standards of decisionmaking for each of the critical areas and uses, but allows states the flexibility necessary for them to resolve individual land use problems. S. 268's descriptions of critical areas and uses and substantive policies merely require states to address important land use issues. Participation of concerned citizens in the state decisionmaking process will be necessary to insure that those issues are adequately resolved.

A. *Rational Control of Growth Inducing Forces*

Under S. 268 state programs shall regulate "key facilities,"⁷⁶ a

critical use which includes many growth inducing activities of the public sector. These "key facilities" are defined as (1) "public facilities . . . which tend to induce development and urbanization of more than local impact," such as major airports, highway interchanges and recreational facilities, and (2) major energy generating and transmitting facilities such as power plants, transmission lines, oil and gas pipelines and refineries.⁷⁷ States must control the siting of key facilities and associated structures, and regulate lands surrounding present and proposed future key facilities sites to prevent inconsistent land uses.⁷⁸ The value of having states regulate lands presently and potentially affected by nearby key facilities is clear. Owing to residential development on lands adjacent to airports, for example, airport expansion necessary to fulfill regional needs is often precluded because increased air traffic incident to expansion would constitute a nuisance. Similarly, where vacant land is set aside for future airport development, unless land surrounding the proposed site is properly regulated, inconsistent uses such as hospitals or residences may arise which make the site unsuitable for airport development.⁷⁹ Analogous considerations hold true for proposed highway and power plant sites.

A second critical land use, "large scale development,"⁸⁰ complements the key facilities critical use by encompassing many private sector developmental forces. "Large scale development" is defined as private development which "because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of more than local significance."⁸¹ In determining the scope of activities to be included in this category, states are to consider the following criteria:

[T]he amount of pedestrian or vehicular traffic likely to be generated; the number of persons likely to be present; the potential for creating environmental problems such as air, water, or noise pollution; the size of the site to be occupied; and the likelihood that additional or subsidiary development will be generated.⁸²

Since large scale development must present issues of "more than local significance in the judgement of the state,"⁸³ states could vary the definition of this use to conform with the character of land in different areas of the state. Since development in urban areas is less likely to be of "more than local significance" than development in pristine areas, for example, the definition of large scale development may be comparatively less inclusive in these areas.⁸⁴

Once an activity is designated by a state as a large scale development the state must control its "impact upon the environment"⁸⁵

in accordance with the objectives of its developmental plan.⁸⁶ By controlling the siting and land use impacts of key facilities and the environmental impacts of large scale development, states may give practical effect to their strategies for future growth. It should be noted, however, that under S. 268 states are given leeway to interpret the loosely-worded statutory definitions of key facilities and large scale development broadly or narrowly as they see fit. For instance, states must determine what constitutes a "major" highway interchange. Similarly, states will be required to decide whether a "large scale" housing development in an area has 20 or 200 units.⁸⁷

B. Large Scale Rural Subdivisions and Housing Developments

Although conceptually regulation of rural subdivisions and housing developments is a subcategory of the large scale development critical use, the Senate concluded that current housing development practices pose such an acute threat to land resources that separate treatment of this issue is warranted. Thus, "land sales and development projects,"⁸⁸ a critical use which includes rural subdivisions and rural housing developments of fifty units or more, is treated differently than other critical areas and uses in several ways. First, implementation of this aspect of the state land use program will take place within three years of the enactment of the federal proposal, preceding implementation of the balance of the state program by two years.⁸⁹ Senator Gaylord Nelson, author of S. 268's land sales and development projects provision, explained the need for accelerated implementation of state programs for this land use:

[T]here is one land use practice that is of such pressing national concern that speedy action by the most appropriate Governmental level must be begun immediately if we are to avoid a resource tragedy of unprecedented proportions. I am speaking of the explosion of massive real estate developments for second homes or year-round living outside the Nation's cities and suburbs. This is epidemic of land development that is threatening nearly every remaining scenic area in this country.⁹⁰

To remedy this situation, S. 268 sets forth relatively detailed standards for home developers which stand in sharp contrast with the vague federal policies set forth in connection with the key facilities and large scale development critical uses.⁹¹ The federal standards are modeled after planned unit development (PUD) enabling legislation,⁹² a flexible land use control device enacted by states to allow

localities to regulate the rate and character of development. PUD enabling legislation allows localities to limit the rate of growth in accordance with their capability for providing additional public services for new development. This is achieved by controlling the local property tax/municipal service cost relationship so that development pays its own way.⁹³ PUD also enables localities to regulate the character of development to meet the needs and desires of the prospective populace for such amenities as recreational facilities, parks and environmental preservation.⁹⁴

By including PUD requirements in state land use programs, the Senate intends to "make the full range of State expertise—hydrologists, transportation advisors, pollution experts, etc.—available to rural local governments which cannot financially afford, but cannot afford to do without, such counsel."⁹⁵ In addition to preventing developers from placing unreasonable burdens on local government ability to provide necessary public services,⁹⁶ state programs must insure that the effects of development on soil erosion, scenic beauty and open space possessing recreational potential are taken into consideration before proposed development is licensed.⁹⁷

Land sales and development projects, as defined by S. 268, include "subdivisions or housing developments of fifty or more units located ten miles or more beyond the boundaries of any standard metropolitan statistical area or any other general purpose local government certified by the Governor as possessing the capability and authority to regulate such activities."⁹⁸ The exclusion of standard metropolitan statistical areas (SMSA's) and the ten mile ring which surrounds them reflects a desire to limit state attention to rural areas where the home development boom has been most damaging. Since it is likely that subdivisions and housing developments of appreciable magnitude in SMSA's and their surrounding areas will later be included in the large scale development critical use, coverage of such development is not as necessary under this critical use.

More troublesome than the urban area exclusion is the Governor's authority to exempt from coverage local governments having "capability and authority" to regulate land sales and development projects.⁹⁹ A literal reading of the federal definition of land sales and development projects would require that the local government's territory and a surrounding ten mile wide ring be exempted whenever the Governor exercises his prerogative. Although the exclusion of such a wide area surrounding SMSA's may be justified on the rationale that the proposal seeks to focus state attention on rural

areas, the exclusion of such rings around local governments outside SMSA's is not supported on this ground. Moreover, since the exempted local governments are to have "capability and authority" for controlling subdivisions and housing developments in the exempted territory, this literal reading would require local governments to exercise sweeping extraterritorial powers over areas that are many times larger than their own territory.¹⁰⁰ It seems unlikely that the Senate envisioned such an extraordinary result, especially in light of the silence of the proposal's legislative history on this point.

A sensible interpretation of this provision only can be made with reference to its underlying legislative purpose—to avoid unnecessary duplication of adequate local regulatory efforts by the state program.¹⁰¹ To accomplish this purpose, Governors should be permitted to exempt areas over which local governments have actual planning authority and capability whether this includes extraterritorial planning powers or not. In this way, local government planning ability would be given full effect, while avoiding the consequence of vesting local governments with sweeping new extraterritorial powers.

If this difficulty of construction is surmounted, another weakness in the definition may manifest itself if states are permitted to interpret local government "capability and authority" to regulate exempted lands as referring only to local zoning and subdivision ordinances. Unless local government regulation of the exempted areas is able to achieve the objectives of PUD, the legislative purpose of mitigating the harmful effects of land sales and developments projects will be frustrated. Hopefully, Congress will clarify this matter before the land use proposal becomes law by explicitly stating that exempted localities must have "capability and authority" for effectively implementing PUD regulations without state assistance.

C. Development of Regional Benefit

State land use programs under S.268 must prevent local government from "arbitrarily or capriciously" restricting or excluding development which is within the critical use "public facilities, housing or utilities of regional benefit."¹⁰² The value of this state check on local planning authority is well illustrated by controversies over the location of government subsidized low-income housing. Many local governments presently resist the location of government subsidized housing within their borders on grounds that such housing has an unfavorable cost/revenue impact, or that it will alter the character

of their neighborhoods in terms of traffic volume, property values, or scenic beauty.¹⁰³ Racial prejudice against anticipated occupants of such development often fortifies local resistance to low-cost housing. Under S. 268 the states shall weigh the need for low cost housing on a regional scale against local arguments that such developments should be excluded, and shall override local decisions where they are clearly contrary to regional needs.¹⁰⁵ Under the purview of this critical use, states may wish to review local government decisions to exclude airports, power plants, or sanitary landfills in a similar manner.

D. Protection of Socially and Environmentally Important Lands

State land use programs must protect lands contained in the category "areas of critical environmental concern."¹⁰⁶ This area is defined by the land use proposal in general terms by a single basic definition and three subcategory definitions. Like the flexibly worded statutory definitions of the key facilities and large scale development critical uses, the definition of areas of critical environmental concern will provide states with only a general guide as to which land areas fall within its purview. With regard to this critical area, however, the Secretary of the Interior shall have authority to require states to include socially or environmentally important lands of "more than statewide significance."¹⁰⁷

The basic definition of areas of critical environmental concern is "lands where uncontrolled or incompatible development could result in damage to the environment, life or property, or the long term public interest which is of more than local significance."¹⁰⁸ By using the word "could" in this definition the proposal tends to focus state attention on "opportunity areas" where environmental destruction has not yet occurred.¹⁰⁹ It need not be shown that any specific development is planned for a particular area or that such development will cause the requisite social or environmental damage; all that must be shown is that such damage "could" occur on the land in question.

Both "uncontrolled" and "incompatible" development which is capable of causing environmental damage may warrant an area's inclusion in this critical area. In previously considered proposals only "uncontrolled" development was mentioned.¹¹⁰ An inference could be drawn from reference only to "uncontrolled" development that areas where development was in fact controlled, as by local government zoning or subdivision ordinances, were automatically excluded from this critical land area notwithstanding the fact that

such controls inadequately protect lands of social and environmental importance.¹¹¹ Since the Senate Committee did not wish to give rise to this inference, the definition was revised to make reference to both "uncontrolled" and "incompatible" development.

Standing alone this definition would be incredibly broad and so vague as to provide little guidance to states concerning which lands fall within its scope. As regards the requirement that development of land "could" result in damage, it is hard to visualize any land to which development could not cause at least some damage. However, the definition does not indicate the degree of potential "damage" that must be shown before land is included in this category. To partially answer this question, and to provide states with more concrete guidance concerning which lands are to be included in this critical area beyond that provided in the basic definition, the proposal sets forth three subcategories of critical environmental concern: (1) fragile or historic lands; (2) natural hazard lands; and (3) renewable resource lands.¹¹² States are free to interpret these definitions broadly or narrowly,¹¹³ subject only to the special check of the Secretary of the Interior.¹¹⁴

Fragile or historic lands include lands where development could cause "irreversible damage to important historical, cultural, scientific, or esthetic values or natural systems which are of more than local significance."¹¹⁵ Before an area is included in this subcategory it must be established that the area's historic, cultural, scientific, aesthetic or environmental values are "important" and are "of more than local significance." Although this may appear to impose two separate standards, it seems unlikely that any values "of more than local significance" would not also be "important." Secondly, it must be shown that the area is capable of sustaining "irreversible" damage from uncontrolled or incompatible development. This latter requirement initially appears to impose a heavy burden on those advocating an area's inclusion in this subcategory. Upon analysis however, the requirement becomes almost superfluous. Once significant financial resources have been expended for constructing buildings or altering landscapes, restoration of an area to its original condition is economically prohibitive in nearly every circumstance.¹¹⁶ As the Senate Report points out, "land cannot be recycled."¹¹⁷ Moreover, this "irreversible" development "could" always conceivably be carried out in such a way as to cause at least some minimal damage to an area's values. Therefore, once an area's extra-local importance has been established, the burden of showing a potential for irreversible damage to those values will

probably be met. This analysis, however, may in some instances defeat the Congressional objective of having states confine their land programs to decisions of more than local concern since relatively insignificant damage may also be irreversible. For this reason, Congress should discard the word "irreversible" in the definition of this subcategory, and substitute one such as "significant" which focuses on the quantum of harm potentially inflicted on an area rather than a specific attribute of the potential damage—i.e., that is irreversible. Following this change, two questions would become relevant to determining an area's eligibility for inclusion in this subcategory: (1) are the area's values of more than local significance?; and (2) are these values capable of sustaining significant damage from uncontrolled or incompatible development? If the answer to both of these questions is in the affirmative, the area should be included in the fragile or historic lands subcategory.

Because even these standards are not subject to precise definition, and provide states with only minimal guidance, the proposal goes on to specifically list several areas which must be made part of the fragile or historic lands subcategory: "shorelands of rivers, lakes, and streams; rare or valuable ecosystems and geological formations; significant wildlife habitats; and unique scenic or historic areas."¹¹⁸ State discretion in including even these areas, however, remains broad:

Clearly, major policy decisions are involved in determining what is a shoreline (is it a shoreline of all bodies of water or only bodies of a certain size? is it limited to relatively undeveloped shorelines? is its extent 400 feet inland the water, four hundred yards, or any land the use of which has a direct impact on the water?).¹¹⁹

Similar policy decisions must be made by states in determining what are "rare" ecosystems, "significant" wildlife habitats, and "unique" scenic or historic areas. Once states identify land as being within this subcategory, S. 268 requires them "to assure that use and development (of these areas) will not substantially impair (their) historic, cultural, scientific, or esthetic values or natural systems or processes."¹²⁰

"Natural hazard lands," the second subcategory of areas of critical environmental concern, include areas where development could cause "unreasonable" danger to life and property. The proposal requires areas such as "floodplains and areas frequently subject to weather disasters, areas of unstable geological, ice or snow formations, and areas of high seismic or volcanic activity" to be included in this subcategory.¹²¹ States must determine what constitutes an

“unreasonable” danger to life and property, and, for example, whether such dangers occur on 10, 30, or 100 year floodplains.¹²²

Once states designate lands in this subcategory, their laws and regulations must assure that “unreasonable dangers to life and property” will be “minimized or eliminated.”¹²³ Curiously, this requirement can be construed to allow development which involves “unreasonable” dangers that have been “minimized.” Since it is doubtful that Congress intends to sanction unreasonable dangers of any kind, whether minimized or not, a sensible construction of this provision will require unreasonable dangers to be reduced to the point that they have been eliminated.

By comparing this subcategory to the land sales and development projects critical use, an anomaly in developmental standards may appear. The PUD requirements imposed on land sales and development projects prohibit housing developments in areas which “constitute an undue risk to public health and safety” such as “flood plains and areas of high seismicity and unstable soils.”¹²⁴ To the extent that these areas and areas where “development could cause unreasonable danger to life and property” under the natural hazard lands subcategory overlap, there will be inequitable treatment of housing developments as compared to other kinds of development. Housing developments will be prohibited from locating in these danger areas under any circumstances, whereas other forms of development will be prohibited from so locating only if doing so causes unreasonable dangers that are not circumvented or sufficiently mitigated by precautionary measures. Congress should correct this anomaly by amending the PUD requirements so that the same standard of care is imposed on housing developments as on other kinds of development where the two danger areas coincide.

“Renewable resource lands,” the third subcategory, include areas where development could result in loss or reduction in the long-range production of water, food, or fiber of more than local concern. Such areas as “watershed land, aquifers, and aquifer recharge areas, significant agricultural and grazing lands, and forest lands” are required by the proposal to fall within this subcategory.¹²⁵ Lands within this subcategory must be managed so as to “minimize or eliminate” losses in long-range productive capacity.¹²⁶

S. 268 provides a federal check on state discretion to determine the scope of areas of critical environmental concern by requiring the Secretary of the Interior to independently review state land resources and submit to participating states a list of areas of “more than statewide significance” which must be designated as areas of

critical environmental concern.¹²⁷ The Senate Report clarifies the meaning of areas of "more than statewide significance" by noting that such areas must (1) be of "more than casual and passing importance" and (2) "require very careful planning and management efforts to preserve their quality."¹²⁸ If a state does not include all areas found by the Secretary to fall within this class within two years after notification of his findings, that state's land program will be ineligible for federal aid, provided that the Secretary can prove before a neutral arbitration board that his classification of the areas at issue was "reasonable."¹²⁹ Since the Secretary need show only the reasonableness of his judgment, this provision provides substantial federal control over the comprehensiveness of state land programs with regard to areas of critical environmental concern.

The proposal requires the Secretary to afford "opportunity for public comment" prior to his designation of areas of critical environmental concern of more than statewide significance.¹³⁰ Access to the resource of public comments will undoubtedly provide valuable assistance to the Secretary, as examination of state lands by the Department of the Interior may not by itself be adequate. A truly meaningful public role in this designation process can only be insured, however, by providing a mandamus proceeding to enable citizens to force the Secretary to make determinations over the status of contested areas. Congress should adopt this method of strengthening the citizen role when enacting S. 268.

As previously indicated, once states designate lands as areas of critical environmental concern, they exercise broad discretion in formulating the land management strategies which will regulate development of this critical area.¹³¹ Generally speaking, development of areas of critical environmental concern may be allowed wherever it is "compatible with the basic environmental or renewable resources values or safety problems of the land in question."¹³² Industrial, commercial, and residential development of these areas need be excluded only to the extent that it cannot be harmonized with the social and environmental policies expressed by S. 268 in connection with the subcategories of critical environmental concern. To some significant degree, however, development of these lands for cultural, historical, recreational, and conservation purposes will probably take place. This result is fully consonant with the Congressional objective of securing the place of these "non-developmental" uses against the pressures of growth for the benefit of present and future generations.¹³³

V. PROSPECTS FOR EFFECTIVE STATE ACTION

A. *The "Carrot" and the "Stick"—Motivating the States to Act*

Perhaps the greatest controversy over the land use proposal concerns the issue of how to motivate states to participate in S. 268's land use program. Many Congressmen feel that the "carrot" of federal money will not provide sufficient motivation for states to overcome the strong political opposition which will inevitably arise from the attempt to rearrange land use decisionmaking authority.¹³⁴ The Jackson bill of 1970 therefore included a "stick" which provided that if, after five years, a state had not adopted a land use program meeting the requirements of the Act, no federal action having substantial impact on land or water resources would be allowed to proceed in that state.¹³⁵ This stick, called a "cross-over sanction" because of its effect on federal programs other than the principal program, is logically consistent with the purpose of the land use proposal because it prevents unplanned development from irreversibly committing land resources to uses that may ultimately prove undesirable. Thus, if states were content with unplanned development, the federal government would not contribute to the harmful effects of such development by undertaking major land impacting projects on that state's land. The bill provided an escape clause in cases of overriding national interest, and where states undertook to comply with the Act.¹³⁶ This sanction would put enormous pressure on states to comply with the land use proposal since many federal projects are of vital economic and social importance to states. However, because the sanction drew powerful opposition,¹³⁷ the Nixon Administration suggested a modified cross-over sanction as a compromise. The Administration's sanction provided partial funding cutbacks for three years affecting only three federal programs with particularly high land use impacts: highway development, airport development, and land and water conservation fund projects.¹³⁸ Funds withheld under this sanction would not be forever lost to states, but would be "held in escrow" until they complied with the land use proposal. Nevertheless, even this weakened version of cross-over sanctions was not approved by the Senate in passage of S.632, the Jackson bill of 1972.¹³⁹

Testimony in the land use hearings of 1973 again stressed the importance of sanctions in this legislation. Russell Train, as Chairman of the Council on Environmental Quality, testified that:

(This legislation) needs sanctions—tough sanctions—or it will never work. . . . [T]he major issue confronting the states is not so much

financial as it is political, namely, the relationship between state and local government over who exercises what power over land development.¹⁴⁰

He went on to say: “[W]e are here talking about a very fundamental shift of political power in an exceedingly sensitive area within the states and we believe that the Governors and State legislatures are going to need this kind of backup leverage from the Federal Government to enact the necessary measures called for by this bill.”¹⁴¹ Senator Jackson attempted to insert sanctions into S. 268 by amendment on the Senate floor, but the amendment was defeated,¹⁴² and the proposal passed the Senate without sanctions.¹⁴³ Since the Senate would not approve cross-over sanctions, the motivation for states to participate in land use planning under this proposal as it now stands depends totally upon the size of the “carrot” offered by Congress.

Appropriations under S. 268 include \$100,000,000 annually for supporting up to 90% of the cost of state land planning programs for the first five years following enactment of the proposal, and 66% thereafter.¹⁴⁴ These appropriations can only add to and cannot replace state monies already being used for land use planning.¹⁴⁵ In allocating funds, the Secretary of the Interior must “take into account the amount and nature of each state’s land resource base, population, extent of areas of critical environmental concern, financial need, and other relevant factors.”¹⁴⁶ States which act more expeditiously than required by the proposal’s timetable for compliance shall receive preferential consideration.¹⁴⁷ An additional \$15,000,000 will be available for supporting up to 90% of the cost of interstate land planning projects,¹⁴⁸ though such projects are not a requisite for receiving other grant money.¹⁴⁹

A myriad of federal programs may indirectly provide further financial support for state land planning efforts under S. 268. Under the Land and Water Conservation Fund Act of 1965,¹⁵⁰ for example, \$323,000,000 was appropriated for assisting states in acquiring recreational lands in 1973.¹⁵¹ An additional \$100,000,000 was appropriated in that year¹⁵² under the Open Space Law to assist states and localities in the acquisition of parks and open space.¹⁵³ The Housing and Urban Development (HUD) “701 program”¹⁵⁴ for assisting states and local governments in comprehensive planning efforts also reached a funding level of \$100,000,000 in 1973.¹⁵⁵ Additionally, the Coastal Zone Management Act (CZMA),¹⁵⁶ which encourages states to establish protection plans for shorelines, is funded at over \$30,000,000 annually.¹⁵⁷ Possibly the combined effect of these and

other federal programs will make compliance with S. 268 less economically burdensome.

It should be noted, however, that while states may partake in all of these programs without complying with S. 268 if they so choose, they must participate in the HUD 701 program and, where applicable, the CZMA before they are eligible for federal assistance under S. 268.¹⁵⁸ Moreover, state land use programs must be consistent with the Clean Air Act (CAA), Federal Water Pollution Control Act (FWPCA), and other federal pollution control statutes within the jurisdiction of the Environmental Protection Agency before federal assistance is rendered.¹⁵⁹ Most assuredly, therefore, states already complying with the CAA and the FWPCA, and participating in the CZMA and HUD 701 program will find compliance with S. 268 a more practical undertaking than those that are not.

B. The Taking Issue—A Potential Obstacle to Implementation

The Fifth Amendment to the United States Constitution provides that "private property (shall not) be taken for public use, without just compensation (to property owners)."¹⁶⁰ The degree to which government can restrict the use of private property without compensation has been the subject of extensive litigation. Recently some state courts have allowed greater latitude in government regulation of private property without requiring compensation.¹⁶¹ In an effort to keep the federal land use proposal within constitutional bounds and to quell the fears of property owners, the Senate Committee print of March 28, 1973 contained an amendment offered by Senator Jordan which read as follows:

Any person having a legal interest in land, of which a State has prohibited or restricted the full use and enjoyment thereof, may petition a court of competent jurisdiction to determine whether the prohibition diminishes the use of the property so as to require compensation for the loss and the amount of compensation to be awarded thereof.¹⁶²

This provision, however, was vigorously criticized by many witnesses at the Senate hearings.¹⁶³ First, the provision is subject to a judicial inference that a compensation standard more liberal than the constitutional minimum is intended. By expressly referring to the diminution of use as the factor by which courts should determine whether compensation is due, the amendment could restrict judicial consideration of other factors, which, when thrown into the balance, allow more stringent government regulation of property without compensation. Second, by reading the Jordan amendment in connection with the section's introductory clause,¹⁶⁴ the amend-

ment may be construed to require the enactment of new compensation legislation by states. Either of these eventualities could cripple the effectiveness of state land use programs by requiring many billions of dollars in additional compensation to be paid before the land use regulations could be implemented.¹⁶⁵

The Senate Committee, recognizing the danger of inadvertently imposing unnecessary compensation requirements, deleted the Jordan amendment and substituted the following:

Nothing in this Act shall be construed as enhancing or diminishing the right of owners of property as provided by the Constitution of the United States or the constitution of the State in which the property is located.¹⁶⁶

This provision does not eliminate the right of land owners to petition a court of competent jurisdiction for property taken without just compensation as due process requirements already guarantee that right. It does, however, successfully avoid any inference that landowner compensation under this Act must be greater than constitutionally required.

The provision incorporates both federal and state compensation standards into the land use proposal. The limits to which state regulatory efforts can go without compensation will therefore be determined by each state's constitution as long as the bounds of the Fifth Amendment to the United States Constitution are not exceeded. In states where the judiciary narrowly circumscribes state authority to restrict property owners' use of land without providing compensation, therefore, implementation of state land use programs pursuant to S. 268 may be prohibitively costly. Fortunately, some recent state supreme court decisions evidence a trend in judicial thinking more finely attuned to the needs of the times.¹⁶⁷

VI. REFORM OF FEDERAL AGENCY DECISIONMAKING UNDER S. 268

Any effort to comprehensively reform land use decisionmaking on state lands would be inadequate unless it somehow took into account the impact of federal agency decisionmaking. Accordingly, S. 268 imposes new obligations on federal agency activity conducted within: (1) states ineligible for assistance under S. 268; (2) states eligible for assistance under S. 268; and (3) federal lands adjacent to state lands.

A. *Federal Action in States Found Ineligible for Federal Assistance Under S. 268*

The land use proposal builds on the foundation of the National

Environmental Policy Act of 1969 (NEPA)¹⁶⁸ in order to improve federal agency decisionmaking in states without land use programs complying with S. 268. Controversy about NEPA has focused on the procedural requirements of §102(2)(C). That much-litigated section requires all federal agencies embarking upon major actions significantly affecting the quality of the human environment (1) to consult with and obtain comments from any federal agency with jurisdiction by law or special expertise with respect to the environmental impact involved, and (2) to prepare a detailed environmental impact statement which shall be made available to the public together with comments obtained from other agencies.¹⁶⁹ These procedural requirements are designed to shape federal decisionmaking in two ways. First, interagency consultation prior to federal action should reduce agency "tunnel vision"¹⁷⁰ and foster consideration and balancing of a wide range of goals, with emphasis on preserving and enhancing environmental quality. Second, placing an affirmative burden on the acting agency to prepare a written statement explaining a proposal's environmental effects should create a reviewable record, allowing administrative decisions to be scrutinized by higher administrative levels, the courts and the public.

The federal land use proposal will expand the requirements of NEPA §102(2)(C) for federal agencies conducting activities in states without S. 268 land use programs. "Where any major Federal action significantly affecting the use of non-Federal lands is proposed after five fiscal years from the date of enactment of the Act in a State which has not been found eligible for grants pursuant to (this Act)," the responsible federal agency shall make findings with regard to S. 268's land use considerations, and incorporate these findings in the NEPA interagency consultation process and environmental impact statement.¹⁷¹ Specifically, the responsible federal agency must hold public hearings in the affected state, with adequate public notice, six months in advance of the proposed action for discussing all relevant considerations of the federal land use proposal. The agency shall then make findings which shall be submitted to the Secretary of the Interior, and, where appropriate, to the Secretary of Housing and Urban Development, for review and comment. The agency's findings together with these comments shall be made part of the detailed statement required by NEPA §102(2)(C).¹⁷²

Fusion of the requirement that agencies make findings with regard to S. 268's land use objectives with the NEPA decision-making process may implicitly impose substantive as well as procedural obligations on agency decisionmaking. Some courts

have construed NEPA to require federal agencies to balance environmental considerations along with other factors of decisionmaking “fully and in good faith” before choosing a course of action.¹⁷³ After passage of the land use proposal, in addition to weighing NEPA’s policies regarding preservation of environmental quality, federal agencies may also be obligated to consider S. 268’s policies of land resource preservation “fully and in good faith.” For example, when affecting lands that would fall within the category “fragile or historic lands” under a state land use program, agencies may be required to weigh in their deliberations the Congressional policy that their activities “(should) not substantially impair the historic, cultural, scientific or esthetic values or natural systems or processes” of those lands.¹⁷⁴

B. Federal Action in States Found Eligible for Federal Assistance Under S. 268

Not only must federal activities in eligible states be consistent with state land use programs,¹⁷⁵ but, when conducted in those states in areas not subject to the land use program, federal activities must “to the extent practicable . . . minimize any adverse impact on the environment.”¹⁷⁶ Unlike NEPA’s impact statement requirement this requirement is not limited to “major” federal actions “significantly affecting” the environment.¹⁷⁷ The requirement is flatly applicable to all “public works activities.”¹⁷⁸ For this reason, federal assistance to state activities, even if minimal, may impose an obligation on the federal agency to minimize adverse environmental impacts of the assisted activities.

Citizen actions brought against federal agencies for violating this requirement, moreover, may be more easily sustainable than suits challenging the substantive content of agency decisionmaking under NEPA. Courts presiding over NEPA litigation may be reluctant to overturn agency decisionmaking on the grounds that the agency did not adequately weigh environmental values in the NEPA balancing process because that process involves so many intangibles, such as the relative weights of conflicting Congressional policies as applied to the facts of the case.¹⁷⁹ S. 268’s requirement, however, is worded in a direct manner—federal agencies *shall minimize* adverse environmental impacts to the extent practicable. In suits to enjoin agency action under this requirement, therefore, the issue will concern whether an agency reasonably decided that a method of minimizing adverse environmental impact was impracticable, rather than whether an agency reasonably balanced conflicting Con-

gressional policies. Concerning this less abstract issue, especially where plaintiffs have participated in administrative hearings preceding agency action to make known the existence of practicable alternative sites or construction techniques for minimizing adverse environmental impacts, courts may more readily grant equitable relief. To more adequately insure rigorous judicial review of agency action with regard to this requirement, however, perhaps even stronger statutory language, such as a mandate to agencies to minimize environmental damage "to the *fullest* extent practicable," would be warranted.

C. *Coordinating Land Use on Federal Land and Adjacent State Land*

The federal government owns one-third of our nation's land.¹⁸⁰ Moreover, 90% of this land is concentrated in eleven western States, and in some instances, is disbursed in a checkerboard pattern across these states.¹⁸¹ Coordinated use of adjacent federal and state lands in these states is therefore extremely important to rational planning. Two requirements for compatibility of uses on these lands are imposed by S. 268. First, the federal land management agencies must coordinate their inventory, planning, and management programs with state and local planning efforts pursuant to S. 268 "to the extent such coordination is not inconsistent with paramount national policies, programs, and interests."¹⁸² To prevent this requirement from being merely hortatory, the proposal requires that federal land management agencies publish a draft statement concerning the consistency of their actions with state and local land use planning at least forty-five days in advance of a proposed action.¹⁸³ The federal agency, moreover, must hold a public hearing, with adequate public notice, at least seven days prior to publication of the final statement regarding the consistency of the proposed federal action with state and local land planning efforts.¹⁸⁴

The second compatibility requirement is imposed on states. In order to qualify for federal grants, state land use programs must include methods for insuring that federal lands, particularly national parks, wilderness areas, and game and wildlife refuges, are not "significantly damaged or degraded as a result of inconsistent land use patterns on adjacent non-Federal lands."¹⁸⁵ Inconsistent uses would include unsightly strip mining on the borders of national parks, or water-polluting industry directly upstream from wildlife refuges.¹⁸⁶ The consistency requirement may also oblige states to encourage complimentary uses on state lands adjacent to federal

lands, such as hotels and restaurants for accommodating vacationers patronizing national parks.¹⁸⁷

To resolve intergovernmental conflicts that may arise concerning land use on adjacent federal and non-federal lands, Ad Hoc Federal-State Joint Committees will be established by the Secretary of the Interior at his discretion or upon the request of the Governor of any state engaged in land use planning pursuant to this Act.¹⁸⁸ These joint committees shall make recommendations to the Secretary of the Interior who,¹⁸⁹ in turn, must take any appropriate or necessary action to minimize conflicts between federal and state planning, including making recommendations to Congress for legislative action.

VII. CONCLUSION

It is a matter of urgency that effective land use legislation be enacted. Failure to pass this legislation when it was first introduced in 1970 has already led to "more waste, inefficiency and environmental damage than took place in the first 100 years of our existence as a nation."¹⁹¹ Three major advances in addressing the nation's impending land use crisis will be accomplished upon passage of the land use proposal, S. 268, as it now stands. First, a Congressional commitment will be made to solving national land use problems, and a foundation upon which to build future Congressional action will be established. Second, significant reforms of federal agency decisionmaking will become effective, such as the incorporation of new environmentally protective policies into the decisionmaking process conducted by federal agencies pursuant to the National Environmental Policy Act. And, finally, state governments will be encouraged to initiate comprehensive planning and institute decisionmaking for land use issues of more than local concern at the state level.

Although these accomplishments are both significant and urgently needed, it must be remembered that many formidable hurdles to effective land use decisionmaking shall remain after the proposal is enacted. State courts may be unwilling to allow states to adequately protect land without imposing compensation requirements and may retain restrictive standing requirements for land use litigation. Local government reliance on property taxes for revenues may remain an obstacle to balanced local land use decisionmaking and cause strong local opposition to state efforts to regulate local land use. Many states may choose not to engage in land use planning. Others that do engage in planning may not effectively protect

land resources of statewide or national importance. Management of federal land, moreover, is addressed by this proposed legislation only insofar as it affects adjacent state lands even though thorough land use decisionmaking reform on federal lands is certainly needed.¹⁹² As aptly expressed on the Senate Floor by Senator Henry Jackson, Chairman of the Senate Interior and Insular Affairs Committee, and key personage behind the formulation and promotion of the national land use proposal:

I am confident that this is a sensible beginning and, it is a beginning, let us not kid ourselves.¹⁹³



FOOTNOTES

*Staff Member, ENVIRONMENTAL AFFAIRS.

¹The National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et seq.* (1970), at § 4331.

²The first national land use policy proposal, S.3354, was introduced in January 1970 by Senator Henry Jackson during the 91st Congress. The bill was reintroduced as S.632 during the 92d Congress along with a proposal of the Nixon Administration, S.992. S.632 was reported from committee, S. REP. No. 92-869, 92d Cong., 2d Sess. (1972), and passed the Senate on September 19, 1972. H.R. 7211, a companion measure in the House, was reported from committee, H.R. REP. No. 92-1306, 92d Cong., 2d Sess. (1972), but remained in the Rules Committee through the conclusion of the 92d Congress. Both the Jackson and Nixon proposals were reintroduced in the Senate during the 93d Congress as S.268 and S.924 respectively. S.268 was reported from committee, S. REP. 93-197, 93d Cong., 1st Sess. (1973), and passed the Senate on June 21, 1973. H.R. 10294, the House Land use proposal of the 93d Congress, was reported favorably from committee on February 13, 1974, H.R. REP. No. 93-798, 93d Cong., 2d Sess. (1974), and is now in the Rules Committee where action on the bill has been postponed indefinitely.

³42 U.S.C. §4331 (1970) (reprinted above in caption). Fittingly, the proposed legislation has emanated from Senator Jackson's Interior and Insular Affairs Committee, the same Committee responsible for formulating the nation's declaration of environmental policy.

⁴See, e.g., *Hearings on H.R. 4862 et al. Before the Subcommittee on the Environment of the House Committee on Interior and Insular Affairs*, 93d Cong. 1st Sess. at 364 (1973); (hereinafter cited as *House Hearings*); 119 Cong. Rec. S-14475 (1973), remarks of Senator Edward Kennedy.

⁵42 U.S.C. §4321 *et seq.* (1970).

⁶The Clean Air Act Amendments of 1970, 42 U.S.C. §1857 *et seq.* (1970).

⁷The Federal Water Pollution Control Act Amendments of 1972, 12 U.S.C. §24, 15 U.S.C. §§633, 636, 31 U.S.C. §711, 33 U.S.C. §§1251-65, 1281-92, 1311-28, 1341-45, 1361-76 (Supp. II, 1972).

⁸S.268, 93d Cong., 1st Sess. §202 (1973), as referred to the House Comm. on Interior and Insular Affairs (June 24, 1973).

⁹*Id.* §203.

¹⁰*Id.* §§101 (e), 102(b) (8), 202(a)(7), (a)(8), (a)(10), (a)(11) and (a)(12), 203 (e), 204(1), 208(b), 303, 307(c), 308(a)(3), 401(b), 405, and 605; S. REP. No. 93-197, 93d Cong., 1st Sess. 94 (1973) (hereinafter cited as S. REP.).

¹¹S.268, 93d Cong., 1st Sess. §§207, 208, 401, 402, 403 and 404, (1973), as referred to the House Comm. on Interior and Insular Affairs (June 24, 1973).

¹²*Id.* §208.

¹³*Id.* The Land Use Policy and Planning Assistance Act, 119 CONG. REC. S-1164-72 (1973).

¹⁴The House of Representatives national land use proposal of the 93d Congress, H.R. 10294, was reported favorably by the Interior and Insular Affairs Committee on February 13, 1974, H.R. REP. No. 93-798, 93d Cong., 2d Sess. (1974). However, the House Rules Committee has deferred action on the bill indefinitely, and H.R. 10294 may never reach the House floor. During the 92d Congress, the House Rules Committee successfully blocked passage of H.R. 7211, the House land use proposal of 1972. It will indeed be unfortunate if the handful of congressmen on the Rules Committee continue to abuse their power by unilaterally preventing passage of this urgently needed legislation.

¹⁵S. REP., *supra* n. 10, at 74. To facilitate state delegation of zoning and subdivision control authority to local government during this period, the Department of Commerce published two model statutes, the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act, in 1924 and 1928 respectively. The model acts were widely enacted by states. They are reprinted in National Land Use Policy Legislation, 93d Congress: AN ANALYSIS OF LEGISLATIVE PROPOSALS AND STATE LAWS, Senate Comm. on Interior and Insular Affairs, 93d Cong., 1st Sess., at 480-92, (April, 1973), (hereinafter cited as BACKGROUND PAPERS II). *See also*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), which upheld a zoning ordinance without requiring compensation of property

owners under the Fifth Amendment to the United States Constitution.

¹⁶*Building the American City*, Report of the National Commission on Urban Problems, 91st Cong., 1st Sess., at 199 (1969), (hereinafter cited as *Douglas Commission Report*).

¹⁷See generally, Hagan, D., URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, (West Pub. Co., 1971), (hereinafter cited as Hagman).

¹⁸Between now and the year 2000 we will build again all that we have built before. This "second America" will place enormous burdens on our finite land resources, irretrievably committing them, for all practical purposes, to specific uses. Important historical, cultural scenic and environmental areas, if not protected, will be forever lost. See, e.g., S. REP., *supra* n. 10, at 35-7, 44; *Hearings on S.268 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 3, at 3-12 (1973), (hereinafter cited as *Senate Hearing*, pt. 3).

¹⁹See generally, Lamm, R. and S. Davidson, *The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternative*, 49 DENV. L.J. 1 (1972); Hartke, V., *Toward a National Growth Policy*, 22 CATH. U.L. REV. 231 (1973).

²⁰S. REP. *supra* n. 10, at 75; Bosselman, F., and D. Callies, *The Quiet Revolution in Land Use Control*, at 2-3, (Council on Environmental Quality, 1971).

²¹*Douglas Commission Report*, *supra* n. 16, at 209.

²²See, e.g., *Douglas Commission Report*, *supra* n. 16, at 199-222; Note, *Segregation and the Suburbs: Low Income Housing, Zoning and the Fourteenth Amendment*, 56 IOWA L. REV. 1298 (1971).

²³S. REP., *supra* n. 10, at 76.

²⁴*Id.* at 77. But see, Federal Aid Highway Act of 1968, 23 U.S.C. §§128(a) and §138 (1970); Gray, O., *Environmental Requirements of Highway and Historic Preservation Legislation*, 20 CATH. U.L. REV. 45 (1970).

²⁵The Coastal Zone Management Act of 1972, 16 U.S.C. §1451-64 (Supp. II, 1972).

²⁶S.268, 93d Cong., 1st Sess. §§204 and 306(g) (1973), as referred to the House of Representatives Committee on Interior and Insular Affairs (June 25, 1973).

²⁷*Id.* §203(b).

²⁸*Id.* §§101(e), 102(b)(8), 202(a)(7), (a)(8), (a)(10), (a)(11) and (a)(12), 203 (e), 204(1), 208(b), 303, 307(c), 308(a)(3), 401(b), 405, and 605; S. REP., *supra* n. 10, at 94.

²⁹*Id.* §102(a).

³⁰*Id.* §101(a). This policy seems consonant with the philosophical assertion of the S. REP., *supra* n. 10, at 73, that: "Land must be considered as more than a commodity to be bought, sold, and consumed; rather it should be viewed as a finite resource to be husbanded."

³¹S. REP., *supra* n. 10, at 46.

³²*See, e.g.*, The Water Pollution Control Act, 33 U.S.C. §1151 *et seq.* (1970). Since its enactment in 1948, the act has been amended in 1956, 1961, 1965, 1966, 1970 and 1972.

³³*See, e.g.*, S.268, 93d Cong., 1st Sess. §§206, 305(c), 307, 308, 403, 404(f)(3), 508 and 602 (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973). Of particular importance in this regard is §307 which directs the Council on Environmental Quality to prepare recommendations for Congress concerning the possible adoption of substantive national land use policies.

³⁴S.268, 93d Cong., 1st Sess. §§202(a) and (b) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

³⁵S. REP., *supra* n. 10, at 127.

³⁶*Id.* at 61-62.

³⁷S.268, 93d Cong., 1st Sess. §204(2)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

³⁸*House Hearings, supra* n. 4, at 256.

³⁹S.268, 93d Cong., 1st Sess. §306(g)(1) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁴⁰*House Hearings, supra* n. 4, at 256.

⁴¹119 CONG. REC. S-11470 (1973).

⁴²S.3354, 91st Cong., 2d Sess. (1970).

⁴³S.992, 92d Cong., 1st Sess. (1971). For a comparison of the provisions of S.992 and S.632, the Jackson proposal of 1971-72, *see*, NATIONAL LAND USE POLICY BACKGROUND PAPERS ON PAST AND PENDING LEGISLATION AND THE ROLES OF THE EXECUTIVE BRANCH, CONGRESS, AND THE STATES IN LAND USE POLICY AND PLANNING, Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess., at 18-20, (hereinafter cited as BACKGROUND PAPERS). The full text of these proposals is reprinted therein at 136-210.

The Nixon Administration's proposal was developed principally through the efforts of the Council on Environmental Quality; *House Hearings, supra* n. 4, 246.

⁴⁴The American Law Institute, A MODEL LAND DEVELOPMENT CODE, Tentative Draft No. 3 (Philadelphia, April 22, 1971), (hereinafter cited ALI MODEL CODE).

⁴⁵Testimony of Richard F. Babcock, chairman of the American Law Institute's project on the formulation of a model state land development code, reprinted in BACKGROUND PAPERS, *supra* n. 43, at 30-1.

⁴⁶S.268, 93d Cong., 1st Sess. §§203(b) and (c) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁴⁷BACKGROUND PAPERS, *supra* n. 43, at 30.

⁴⁸S.268, 93d Cong., 1st Sess. §§101(e), 102(b)(8), 202(a)(7), (a)(8), (a)(10), (a)(11), and (a)(12), 203(e), 204(1), 208(b), 303, 307(c), 308(a)(3), 401(b), 405, and 605; S. REP. *supra* n. 10, at 94.

⁴⁹Makielski, Jr., S., *Zoning: Legal Theory and Political Practice*, 45 J. URBAN LAW 1, at 3, (1967).

⁵⁰*House Hearings*, *supra* n. 4, at 363. *See also*, *House Hearings*, *supra* n. 4, at 475.

⁵¹S. REP., *supra* n. 10, at 94.

⁵²S.268, 93d Cong., 1st Sess. §102(b)(8)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁵³S. REP., *supra* n. 10, at 94.

⁵⁴*Id.* at 91.

⁵⁵S.268, 93d Cong., 1st Sess. §§ 202(a)(10) and (a)(11) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁵⁶*Id.* §203(e).

⁵⁷Sax, J., *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION*, at 57, (Knopf Pub. Co., New York, 1971).

⁵⁸Makielski, S., Jr., *Zoning: Legal Theory and Political Practice*, 45 J. URBAN LAW 1, at 20 (1967). In great measure, this occurrence can be traced to the judiciary's imposition of strict standing requirements on those seeking to appeal zoning decisions. *See* Ayer J., *The Primitive Law of Standing in Land Use Disputes: Some Notes From a Dark Continent*, 55 IOWA L. REV. 344 (1969).

⁵⁹S. REP., *supra* n. 10, at 93.

⁶⁰*House Hearings*, *supra* n. 4, at 475.

⁶¹S.268, 93d Cong., 1st Sess. §202(a)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁶²S. REP., *supra* n. 10, at 91.

⁶³*Id.* at 98.

⁶⁴S. 268, 93d Cong., 1st Sess. §202(a)(8) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁶⁵*See* Ayer, J., *The Primitive Law of Standing in Land Use Disputes: Some Notes From a Dark Continent*, 55 IOWA L. REV. 344. (1969).

⁶⁶S. REP., *supra* n. 10, at 93.

⁶⁷*Id.* at 91.

⁶⁸S.268, 93d Cong., 1st Sess. §202(b)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁶⁹*Id.* §202(b)(6).

⁷⁰*Id.* §202(a)(14).

⁷¹*Senate Hearings*, pt. 3, *supra* n. 18, at 294.

⁷²S.268, 93d Cong., 1st Sess. §202(a)(introductory clause) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁷³*Id.* §202(d).

⁷⁴*Id.* §203(a)(introductory clause).

⁷⁵*Id.* §203(a)(3).

⁷⁶*Id.* §203(a)(3)(B).

⁷⁷*Id.* §601(j), as interpreted by S. REP. *supra* n. 10 at 129. In the event that any state or local agency activities which significantly affect land use are not designated as "key facilities" and regulated as such, they must nevertheless be conducted in a manner which is consistent with the state planning program. *Id.* §203(a)(3)(G).

⁷⁸*Id.* §203(a)(3)(B).

⁷⁹*See also*, The Airport and Airway Development Act of 1970, 49 U.S.C. §1718 (4)(1970), which already encourages state regulation of these areas by providing up to 50% of the cost of constructing airports when adjacent lands have been properly regulated by state and local government.

⁸⁰S.268, 93d Cong., 1st Sess. §203(a)(3)(E)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁸¹*Id.* §601(k).

⁸²*Id.* These criteria are borrowed from ALI MODEL CODE, *supra* n. 44, at §7-401(2). *See also*, the explanatory note following §7-401. One possible indicator of the type of activities that states may designate as large scale development is the list of "complex sources" of air pollution published by the United States Environmental Protection Agency, 38 FED. REG. 6279 (Mar. 8, 1972), which must already be regulated by states under the Clean Air Act.

⁸³S.268, 93d Cong., 1st Sess. §601(k) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁸⁴*See generally*, ALI MODEL CODE, *supra* n. 44, at §7-401(3), and explanatory note following.

⁸⁵S.268, 93d Cong., 1st Sess. §203(a)(3)(E)(1973) as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁸⁶*Id.* §202(a).

⁸⁷S. REP., *supra* n. 10, at 62.

⁸⁸*Id.* §202(d), as defined at §601(1).

⁸⁹*Id.* compare §202(a) and (d), with §203(a).

⁹⁰*Senate Hearings*, pt. 3, *supra* n. 18, at 2.

⁹¹S.268, 93d Cong., 1st Sess. (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973); compare §202(d) with §203(a)(3)(B) & (a)(3)(E).

⁹²119 CONG. REC. S.11473 (1973).

⁹³Sternlieb, G., R. Burchell and J. Hughes, *Planned Unit Development: Environmental Suboptimization*, 1 ENV. AFF. 694, 697 (1971).

⁹⁴*Id.*

⁹⁵S. REP., *supra* n. 10, at 96-7.

⁹⁶S.268, 93d Cong., 1st Sess. §202(d)(2)(D)(vii)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

⁹⁷*Id.* §202(d)(2)(D).

⁹⁸*Id.* §601(1).

⁹⁹*Id.*

¹⁰⁰Although extraterritorial land use controls are employed by local governments in twelve states, in no state have such controls extended to a distance of ten miles, the maximum being five miles. *Douglas Commission Report*, *supra* n. 15, at 210.

¹⁰¹S. REP., *supra* n. 10, at 103. "(The definition) provides that the State develop a program for those projects only in remote, rural or other areas where local government is ill-equipped to regulate the projects itself." (emphasis added).

¹⁰²S.268, 93d Cong., 1st Sess. §203(a)(3)(C)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973). Although the Senate declined to offer a definition of this critical use in S.268, preferring to let the states formulate their own definitions, a predecessor of S.268 defined this critical use as "land use and private development on non-Federal lands for which there is demonstrable need affecting the interests of constituents of more than one local government which outweighs the benefits of any applicable restrictive or exclusionary local regulations." BACKGROUND PAPERS II, *supra* n.15, at 680. See also, ALI MODEL CODE, *supra* n. 44, at Art. 7, Pt. 3, which offers one possible method for states to implement this aspect of their programs.

¹⁰³See generally, Hagman, *supra* n. 17, at 86-99, 471-8.

¹⁰⁴Note, *Segregation and the Suburbs: Low Income Housing, Zoning and the Fourteenth Amendment*, 56 IOWA L. REV. 1298 (1971).

¹⁰⁵It should be noted, however, that some state constitutions pro-

vide for local "home rule" and, in these states, state legislatures may not have the authority to override local zoning decisions without a constitutional amendment. But *see*, Hagman, *supra* n. 17, at 35. "Even when home rule is provided in the (state) constitution, permitting local control over local affairs, there are few matters today which the legislature could not make a matter of statewide concern by legislation so declaring." In Massachusetts, a state which constitutionally provides for "home rule," legislation was enacted providing for state agency review of local government decisions to exclude low-income housing receiving state or federal subsidization, MASS. GEN. LAWS ANN. ch. 40B, §§20-23 (Supp., 1969). The law was subsequently upheld by the Supreme Judicial Court of Massachusetts as not violative of the home rule provision of the State constitution. *Board of Appeals of Hanover v. Department of Community Affairs*, 1973 Mass. Adv. Sh. 491 (1973).

¹⁰⁶S.268, 93d Cong., 1st Sess. §203(a)(3)(A)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973), defined at §601(i).

¹⁰⁷*Id.* §204(1).

¹⁰⁸*Id.* §601(i).

¹⁰⁹S. REP., *supra* n. 10, at 62.

¹¹⁰BACKGROUND PAPERS II, *supra* n. 15, at 680.

¹¹¹*See generally, House Hearings, supra* n. 4, at 395.

¹¹²S.268, 93d Cong., 1st Sess. §601(i)(1),(i)(2) and (i)(3)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹¹³*Id.* §601(i). The subcategories are "subject to State definition of their extent."

¹¹⁴*Id.* §204(1).

¹¹⁵*Id.* §601(i)(1).

¹¹⁶*See* remarks of Russell Train, as Chairman of the Council on Environmental Quality, *House Hearings, supra* n. 4, at 242, "[A]s we reduce or stop the introduction of pollutants into the air or a waterway, the natural biotic systems recover and the air and water quality can be restored. In the case of land use, however, man induced changes are more apt to be irreversible. The drained wetland, the flooded valley, the farmland that is subdivided or paved can never be restored in any practical sense. Thus, land use decisions tend to be permanent and thereby limit future options."

¹¹⁷S. REP., *supra* n. 10, at 44.

¹¹⁸S.268, 93d Cong., 1st Sess. §601(i)(1)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹¹⁹S. REP., *supra* n. 10, at 127.

¹²⁰S.268, 93d Cong., 1st Sess. §203(a)(3)(1973) as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹²¹*Id.* §601(i)(2).

¹²²*House Hearings, supra* n. 4, at 397. *See also*, S. REP., *supra* n. 10, at 62.

¹²³S.268, 93d Cong., 1st Sess. §203(a)(3)(A)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹²⁴*Id.* §202(d)(2)(D)(iv).

¹²⁵*Id.* §601(i)(3).

¹²⁶*Id.* §203(a)(3)(A).

¹²⁷*Id.* §204(1).

¹²⁸S. REP., *supra* n. 10, at 101.

¹²⁹S.268, 93d Cong., 1st Sess. §306(g)(2)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹³⁰*Id.* §204(1).

¹³¹S. REP., *supra* n. 10, at 101. "Once those lands are within (areas of critical environmental concern), the State may adopt toward them the policies it believes appropriate."

¹³²*Id.* at 128. The Senate Report also notes that "multiple use" management of areas of critical environmental concern is permitted. For multiple use management as applied to the United States Forest Service, *see* 16 U.S.C. §§528-31(1970). *See, generally*, Zaelke, D., *Controlling Forest Service Discretion Under the Multiple Use Act*, 3 ELR 50017. For severe criticism of Forest Service management of federal lands under the multiple use principle, *see*, *Sierra Club v. Morton*, 405 U.S. 727 at 748, n. 7 (1972). (Douglas, J., dissenting). The Forest Service experience may indicate that where areas of critical environmental concern are managed under the multiple use principle, although the broad definition of the critical area may provide an initial springboard for far reaching state efforts to preserve land resources of environmental importance, continued citizen participation in the decisionmaking process conducted by states may be necessary for the sustained protection of these lands.

¹³³42 U.S.C. §4321 et seq. (1970); S.268, 93d Cong., 1st Sess., §203(a)(3)(A)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹³⁴*See, e.g.*, remarks of Senator Jackson, 119 CONG. REC. S-11506-7 (1973).

¹³⁵S. REP., *supra* n. 10, at 105-6.

¹³⁶*Id.* at 106.

¹³⁷*See, House Hearings, supra* n. 4, at 238 and 294.

¹³⁸S. REP., *supra* n. 10, at 107.

¹³⁹*Id.* at 107-9.

¹⁴⁰*House Hearings, supra* n. 4, at 243. Russell Train has since become the Administrator of the Environmental Protection Agency.

¹⁴¹*Id.* at 245.

¹⁴²119 CONG. REC. S-11506-18 (1973).

¹⁴³*Id.* at S-11641-72.

¹⁴⁴S.268, 93d Cong., 1st Sess. §608(a) and §606(a)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁴⁵*Id.* §606(d).

¹⁴⁶*Id.* §606(c).

¹⁴⁷S. REP., *supra* n. 10, at 131.

¹⁴⁸S.268, 93d Cong., 1st Sess. §§608(b) and 606(b) (1973) as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁴⁹*Id.* §205(a).

¹⁵⁰The Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§4601-5, 4601-7, 4601-9, 4603-10a, 4603-10c, 4602-11 (1970).

¹⁵¹BACKGROUND PAPERS II, *supra* n.15, at 103.

¹⁵²*Id.* at 104.

¹⁵³The Open Space Law, 42 U.S.C. §1500-d-1(1970).

¹⁵⁴The Housing Act of 1954, 40 U.S.C. §461(1970).

¹⁵⁵BACKGROUND PAPERS II, *supra* n. 15, at 104.

¹⁵⁶16 U.S.C. §1451-64 (Supp. II, 1972).

¹⁵⁷BACKGROUND PAPERS II, *supra* n. 15 at 8.

¹⁵⁸S.268, 93d Cong., 1st Sess. §204(G)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁵⁹*Id.* §203(a)(3)(F). The Environmental Protection Agency Administrator shall review state programs to insure their consistency with federal pollution control legislation within this jurisdiction. *Id.* §306(b)(2).

¹⁶⁰U.S. CONST. amend. V.

¹⁶¹*See generally, Bosselman, F., D. Callies and J. Banta, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL, at 212-35, (Council on Environmental Quality, 1973).*

¹⁶²S.268, 93d Cong., 1st Sess. §303(f)(Senate Comm. on Interior and Insular Affairs, Comm. Print, March 28, 1973).

¹⁶³*See, e.g., Senate Hearing, pt. 3, supra* n. 18, at 351-3.

¹⁶⁴S.268, 93d Cong., 1st Sess. §203(a)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁶⁵The shackling effect of unnecessary compensation requirements

on land use regulations is well illustrated by the Highway Beautification Act of 1965, 23 U.S.C. §§131, 136, 319 (1970). See, Lamm, R. and S. Yasinow, *The Highway Beautification Act of 1965: A Case Study in Legislative Frustration*, 46 DENV. L. REV. 437 (1969). Owing to its compensation requirements the Act which proposed to control billboards serves as the single greatest impediment in many states to passing effective billboard control legislation.

¹⁶⁶S.268, 93d Cong., 1st Sess. §203(f) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁶⁷See, e.g., *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (Wis. 1972), in which Chief Justice Hallows upheld a zoning ordinance restricting the use of plaintiff's wetlands to "natural and indigenous" uses, noting that "too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the (public's right to environmental quality)," 201 N.W.2d 761, at 770; *In re Spring Valley Development*, 330 A.2d 736 (Me. 1973), upholding a statute which required plaintiff to demonstrate before the State's Environmental Improvement Commission that his proposed subdivision of 92 acres of land would not cause substantial adverse environmental impact. The court asserted that "we consider it indisputable that the limitation of use of property for the purposes of preserving from unreasonable destruction the quality of air, soil and water for the protection of the public health and welfare is within the police power," 330 A.2d 736, at 748.

¹⁶⁸42 U.S.C. §4321 et seq. (1970).

¹⁶⁹42 U.S.C. §4332 (2)(C) (1970).

¹⁷⁰Commonly, federal agency decisionmaking has been "mission-oriented"—i.e., focused on one goal to the exclusion of others. This has led to some unfortunate occurrences. See text at n. 24, *supra*. NEPA is intended to create an interdisciplinary and integrated decisionmaking process whereby agencies can consider a wide range of goals other than those set forth in their enabling legislation.

¹⁷¹S.268, 93d Cong., 1st Sess. §208(b).

¹⁷²*Id.*

¹⁷³*Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, at 1115 (D.C. Cir. 1971) cert. denied, 404 U.S. 942 (1972). See generally, Anderson, F., *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT*, at 246-74, (John Hopkins Press, RFF, Baltimore, 1973) (hereinafter cited as Anderson); Cohen and Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy*

Act of 1969, 13 B.C. IND. & COMM. L. REV. 685 (1972).

¹⁷⁴S.268, 93 Cong., 1st Sess. §203(a)(3)(A) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁷⁵*Id.* §207(a) and (b).

¹⁷⁶*Id.* §207(c).

¹⁷⁷42 U.S.C. §4332(2)(C)(1970).

¹⁷⁸S.268, 93d Cong., 1st Sess. §207(c)(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁷⁹*See generally*, Anderson, *supra* note 173, at 246-74.

¹⁸⁰ONE THIRD OF THE NATION'S LAND, Report of the Public Land Law Review Commission (June, 1970).

¹⁸¹*Id.* at 327. The percentage of federally owned lands in these eleven states is as follows: Alaska—95.3%, Nevada—86.4%, UTAH—66.5%, Idaho—63.9%, Oregon—52.2%, Wyoming—48.2%, Arizona—44.6%, California—44.3%, Colorado—36.3%, New Mexico—33.9%, Montana—29.6%, Washington—29.4%.

¹⁸²S.268, 93d Cong., 1st Sess. §401(a) (1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁸³*Id.* §401(b).

¹⁸⁴*Id.*

¹⁸⁵*Id.* §402(a)(1).

¹⁸⁶S. REP., *supra* n. 10, at 120.

¹⁸⁷119 CONG. REC. S-11523 (1973).

¹⁸⁸S.268, 93d Cong., 1st Sess. §403(1973), as referred to the House Comm. on Interior and Insular Affairs (June 25, 1973).

¹⁸⁹*Id.* §403(e).

¹⁹⁰*Id.* §403(f).

¹⁹¹Remarks of Senator Jackson, 119 CONG. REC. S-11508 (1973).

¹⁹²But *see*, H.R. 10294, 93d Cong., 1st Sess. (1973) which contains a separate title on the management of federal lands.

¹⁹³119 CONG. REC. S-11511 (1973).