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APPLYING NEPA TO JOINT FEDERAL AND NON-FEDERAL PROJECTS

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INTRODUCTION

A major loophole has developed in the National Environmental Policy Act (NEPA)[1] which essentially allows private or state projects receiving federal funds to avoid the requirements of the Act. Either by arranging for environmentally damaging aspects of the project to occur before the federal funding agency becomes fully involved, or by taking early action which forecloses less environmentally damaging alternatives, project sponsors can defeat clearly enunciated national environmental policies. Because NEPA applies only to "federal action",[2] courts have held that they lack jurisdiction to enforce the Act's requirements against non-federal parties even though the project may later be "federalized" through the receipt of federal aid.[3]

This loophole could be narrowed by judicial adoption of standards which would allow courts to recognize "federal action" at an earlier stage in the relationship between the federal and non-federal project participants. Alternatively, the loophole could be eliminated administratively by federal agencies adopting status quo regulations which specify what preparatory work can and cannot be done if a project sponsor wishes to remain eligible for federal funds. This article will discuss both judicial and administrative steps which should be taken to ensure NEPA's effectiveness with respect to projects initiated by non-federal parties but subject to later "federalization" through the receipt of federal funding.[4] Since issues in this area are generally presented to the courts by plaintiffs seeking injunctive relief under NEPA against non-federal parties, special attention will be paid to the problems faced by such plaintiffs.

I. PRELIMINARY CONSIDERATIONS

A wide array of environmentally significant activities entail the

cooperative effort of federal and non-federal participants. The federal contribution to such joint ventures may consist of planning, physical construction, merely passive funding, or licensing of actions taken by a non-federal party. Characteristically, in the era of "new federalism", the federal government has borne a percentage of the bill for projects, such as highway construction, which are conceived and executed by agencies of state government. Projects of this sort normally must satisfy a multitude of federal criteria in order to be eligible for federal financial assistance. Additionally, federal agencies administering grant-in-aid programs must comply with certain procedural requirements applicable to federal agency decisionmaking.

The National Environmental Policy Act has generated numerous procedural requirements for federal agency decisionmaking with regard to joint federal and non-federal projects. The most consequential of these procedural requirements is imposed by §102(2)(C), which mandates preparation and consideration of an environmental impact statement (EIS) in connection with every "major federal action significantly affecting the quality of the human environment."[5] NEPA's requirements are intended to ensure a careful and informed consideration of environmental values by federal agency decisionmakers, with the result that environmentally optimal decisions are made in light of other relevant social and economic considerations. NEPA does not explicitly require federal agencies to refrain from damaging the environment, but only that they weigh environmental factors with other considerations and consider project alternatives which would have a less harmful impact on the environment.[6]

For an environmental impact statement prepared pursuant to §102(2)(C) of NEPA to serve its intended purpose as an aid in the federal decisionmaking process, it is essential that it be prepared as early as possible in the planning stages of a project.[7] The Council on Environmental Quality's Guidelines for Preparation of Environmental Impact Statements stress at several points the importance of preparation "as early as possible and in all cases prior to agency decision."[8] Of course, it would be a waste of agency resources if impact statements were prepared for every vague and remote project suggestion. But once a proposed project has taken on some discernible form and is likely to be given serious consideration, an environmental impact statement must be prepared "concurrently with initial technical and economic studies."[9] If the impact statement is prepared late in the decisionmaking process a dangerous

tendency will exist to make it merely a written justification for decisions previously made, rather than a tool for exploring alternatives and choosing the most beneficial course of action.

By the terms of NEPA §102(2)(C), environmental impact statements need be prepared only when "federal" action is involved in a project. In keeping with the strength of NEPA's policy declarations and the Congressional mandate to implement these policies "to the fullest extent possible," courts have adopted a liberal interpretation of "federal action".[10] For instance, impact statements have been required for projects needing only permits or approvals from federal regulatory agencies,[11] for private developments with mortgage guarantees from the Department of Housing and Urban Development,[12] and for state projects utilizing funds from "no strings" block grants from the Law Enforcement Assistance Administration (LEAA).[13] In the absence of a state Environmental Policy Act, however, state and private developers are not presently required by law to take into account the possible negative environmental impacts of their projects.

Notably, federal involvement in joint efforts generally consists only of ongoing federal review and planning assistance until quite late in the overall planning process when *ex post facto* ratification of non-federal action takes place, and federal funding is made available. In broad outline, the funding process consists of a preliminary period in which the state government or private developer conceives, plans, and lays the foundation for execution of a given project with the help of federal planning assistance, followed by a period of comprehensive federal review and approval of the project for federal funds. Owing to the relatively minor significance of the federal role in the early stages of joint activities, it is sometimes exceedingly difficult for the judiciary to determine the proper relationship of federal environmental requirements under NEPA to state activity in the preliminary period.

In deciding when a state or privately sponsored project which is to receive federal assistance becomes "federal", courts have attempted to determine the point at which the federal government joins "in partnership" with the non-federal sponsor.[14] It is reasoned that, until this so-called partnership stage is reached, there is no federal action and, consequently, courts have no jurisdiction under NEPA to enjoin the non-federal party, regardless of whether it is engaging in environmentally destructive activity or other activity which will effectively preclude later consideration of environmentally preferable project alternatives. This question of timing, then,

becomes one of major importance. If all environmentally damaging aspects of a project are completed or alternatives foreclosed before the sponsor joins "in partnership" with a federal agency to complete the project, NEPA's requirements can be effectively avoided.

Judicial response to these questions has been largely tentative and far from satisfactory. A convincing argument can be made that, owing to the unenthusiastic response of federal agencies to NEPA's mandates, non-federal participants in joint activities have been allowed to deliberately frustrate NEPA's purposes while remaining eligible for federal aid. In such situations, preparing an impact statement becomes a rather useless formality since it no longer serves as an aid in an open decisionmaking process or encourages agencies to consider alternatives having less harmful environmental impacts.

Nevertheless, courts have been slow in developing a definitive standard of review for determining when a project sponsor seeking federal financial aid becomes a partner of the federal government and, therefore, when the environmental impact statement must be prepared and considered. In order to more fully understand recent judicial opinions which emphasize the overall nexus between the federal agency and the non-federal project sponsor in deciding whether an action is yet federal, it is first necessary to trace two earlier developments: the highway cases which initially dealt with this problem and the "final decision" standard put forth in *City of Boston v. Volpe*[15] (hereinafter cited as *City of Boston*).

II. The Highway Cases

Since the Federal-Aid Highway Program is the nation's largest continuing public works program,[16] it is not surprising that highway cases were the first to deal with the issue of when an applicant for federal funds triggers NEPA requirements. For the most part, the highway cases recognized the need for early preparation of impact statements and, therefore, the need for early "federalization" of state highway projects in order to carry out both the letter and spirit of NEPA. However, in doing so they have not established standards which give much guidance when applied to other federal funding situations.

Often, courts would simply state that it was necessary to find federal action in a particular highway project which was a potential federal-aid recipient in order to make the Congressional directive found in NEPA meaningful. This rationale is evidenced most clearly in *La Raza Unida v. Volpe,*[17] (hereinafter cited as *La Raza*) and

Sierra Club v. Volpe,[18] a case decided a few months after *La Raza*:

> The rationale of *La Raza Unida* is that Congressional policy statements in federal environmental and similar statutes, together with the legislative history of these enactments, indicate a great concern of Congress with problems of environmental protection, particularly in the area of highway construction; that common sense suggests that all the protection which the Congress has sought to provide would be futile gestures were the states and federal agencies allowed to ignore federal statutes and regulations until deleterious effects upon the environment have actually occurred while the option for receiving federal funds still remains open.[19]

Another common reason for finding state highway projects subject to NEPA was the voluntary involvement of the states with federal funding and federal participation. As expressed in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.,* the state enters into a relationship with the federal government with its "eyes open having more than adequate warning of the controversial nature of the project and the applicable law."[20]

In *Indian Lookout Alliance v. Volpe,*[21] (hereinafter cited as *Indian Lookout*) the issue of whether a state highway program had become subject to NEPA was again presented. While primarily stressing the voluntary nature of the state's involvement with the federal agency, the court also reviewed the steps involved in the highway funding process itself. Under the federal-aid highway program, state highway departments are responsible for planning, designing and constructing the federal-aid highways, while the federal government reimburses the states for a portion of the costs. The Federal Highway Administration is responsible for assuring that federal standards are adhered to before states are reimbursed. This responsibility is carried out by requiring the state highway departments to obtain federal approvals at various stages in the highway building process.[22] Administrative regulations and guidelines call for location approval,[23] design approval[24] and an authorization to begin work.[25] Two other federal approvals are mandated by statute: program approval[26] and plans, specifications and estimates approval.[27]

No case has yet decided exactly what is the earliest point in this funding process at which a state highway plan becomes a major federal action. Before *Indian Lookout,* cases had held that highways which had received location approval from the Federal Highway Administration could be enjoined until an environmental impact statement was prepared.[28] The court in *Indian Lookout* reached fur-

ther back in time and held that the requirements of NEPA applied when the state highway department first *sought* location approval.[29]

In coming to this conclusion, however, the court applied no standard which can readily be used in situations outside the highway funding context to determine when a particular state or private project becomes "federalized". While noting generally that the state's voluntary involvement in the funding process and the CEQ guidelines call for early preparation of impact statements, the court also recognized that it would be impractical to require expenditures of considerable time and money on impact statements for indefinite or tentative proposals.[30] No reason was given, however, for coming down on one side of the line rather than the other.

Curiously, the court cited *City of Boston v. Volpe,* decided a year earlier, as precedent,[31] but refrained from applying the standard developed therein. If it had applied the *City of Boston* standard to the highway-aid funding process, the result would have been different because the state's initial actions to establish eligibility for federal aid would not have been sufficient by themselves to "federalize" the project.

III. City of Boston and the "Final Decision" Test

Until recently the major case setting out a definite standard of review to be applied in determining when the federal government becomes a partner in an otherwise local project was *City of Boston v. Volpe.*[32] In *City of Boston,* the city was seeking a preliminary injunction against the Massachusetts Port Authority (an autonomous, special purpose public entity) to restrain it from expanding facilities at Logan Airport which would inevitably result in increased air traffic over Boston. The city contended that the Federal Aviation Administration (FAA) had violated NEPA by failing to issue an environmental impact statement in connection with the processing of the Port Authority's request for a federal airport development grant, and therefore the Port Authority should be restrained from beginning work on the project until an impact statement was filed and considered. The court, however, held that the process of obtaining federal funding had not progressed to the point where the project had become "federal". Thus there was no jurisdiction under NEPA to enjoin the non-federal party even though construction was already taking place. The test used was whether the funding process had reached a stage where the federal agency had made a "final decision".[33]

The essence of the court's standard of review hinges on the inter-

pretation of the words "final decision". Was the court looking for the point in the funding process when the federal agency had made a legally binding agreement to fund the project? Or did "final decision" mean acceptance of a broad outline of the project proposal, which would then be seriously considered for federal funding? If the court intended "final decision" to indicate a legally binding contract, it cut the heart out of NEPA as applied to federally funded projects. The Act clearly intends that the environmental impact be considered *in making* the "final decision" to go ahead with a particular project, and yet this approach would render a court unable to enforce NEPA's requirements until *after* there had been a legally binding decision.

As with most federal funding procedures, the process of obtaining an Airport Development Aid grant is extremely complicated. The court in *City of Boston* found that, at the time the case was before it, the funding process had progressed to a point where:

> a state authority, fully empowered to raise and spend funds for airports, has "requested" a federal grant, 14 C.F.R. §151.21(a), the federal agency has made a "tentative allocation" of funds for the project, 14 C.F.R. §151.21(b), and the authority has then submitted a formal application, 14 C.F.R. §151.21(c).[34]

In applying its test, the court found that the tentative allocation was not binding on the FAA but represented only "an administrative device for budgetary and program planning."[35] Thus there had been a general approval of the project, but no binding contract to fund it. The court apparently held that since no final commitment of federal funds had been made, the FAA had not as yet become a partner in the airport expansion project. The practical effect of the court's test was that, although the defendant's actions were "far from that ordained by the letter and spirit of the National Environmental Policy Act,"[36] the court held that it lacked jurisdiction to enjoin airport construction by the non-federal party.[37]

The ultimate effect of a general application of the final decision test would be to exempt federally funded projects from NEPA requirements.[38] Courts would lack jurisdiction to enforce NEPA before a final decision was made. By the time that decision was made by the federal agency, less environmentally damaging project alternatives would have been foreclosed by the action of the non-federal party. Although a court might then find a procedural violation of NEPA, no effective remedy would be possible, since it would be too late to duplicate the kind of staged infusion of environmental infor-

mation and consideration into the decisionmaking process that NEPA contemplates.[39]

In applying the final decision test, the court in *City of Boston* was hard-pressed to distinguish cases interpreting NEPA in the context of federal aid for highway construction. It did so by pointing to the difference in the funding process for highways:

> In all of the cases in which a court found a highway to be federal, the federal government had at least granted location approval. And while location approval does not carry with it a commitment of funds, it is a decision, in the ordinary course final, that a federal aid highway is approved for a particular location and that the focus for the next set of hearings and review will be not the same question but the more specific one whether a particular design meets the relevant standards. In contrast, the airport aid scheme contemplates, so far as the statute is concerned, a single decision to fund or not fund a project . . . The salient feature of a tentative allocation of airport aid, as opposed to highway location approval, is that while the whole of a proposed airport project thereby receives a generally favorable reaction, the whole is in the ordinary sense given closer scrutiny before final decision.[40]

The *Indian Lookout* highway case, which was decided after *City of Boston,* did find federal action before location approval was received from the federal agency. Assuming that the *City of Boston* court would have simply dismissed *Indian Lookout* as wrongly decided, there are still many difficulties with its distinction between airport and highway funding.

The court's distinction seems to be applying one meaning of "final decision" to the highway funding process and another in the case of airport aid. In the case of highway aid the court finds location approval to be a final decision as to the outline of the particular project. However, when the court looks at airport aid, it finds tentative allocation not to be a final, legally binding decision to commit federal funds, although it clearly is a general approval of the project's substance. Actually, neither location approval for highways nor tentative allocation of airport aid are final decisions by federal agencies to grant funds to a particular project. The question should be whether tentative allocation of airport aid involves a final federal decision with regard to an environmentally significant aspect of the airport project, such as its location or general outline. The fact that most airport grant agreements are executed within a matter of weeks after "tentative" allocation, and some within a few days,[41] strongly suggests that such allocation may be more "final" than the court believed.

In rejecting the applicability of the highway cases, the court in *City of Boston* not only used different yardsticks in comparing the funding processes, but also ignored the reasons given by various courts in the highway cases, which, for the most part, focused on policy and equitable considerations rather than on the nature of the funding process. A state's voluntary involvement in the funding process and the need for early application of NEPA's procedures are considerations which would appear to be equally relevant in contexts other than highway projects. Indeed, even the First Circuit itself, in *Silva v. Romney*[42] (hereinafter cited as *Silva*), expressed doubt as to the validity of the distinction it had drawn between the highway and airport funding procedures in *City of Boston,* and evidenced a new approach for finding "federalization" of projects which are potential recipients of federal aid.

IV. Silva v. Romney and the Nexus Test

The same court which set forth the final decision test in *City of Boston,* subsequently backed off from a mechanical application of the test in *Silva v. Romney*.[43] In *Silva,* the First Circuit shifted the object of its inquiry from a particular stage in the funding process to the overall "nexus" between the federal agency and the project sponsor. The case involved a housing project undertaken by a private developer who was seeking a mortgage guarantee and interest grant from the Department of Housing and Urban Development (HUD). The District Court was willing to enjoin HUD from giving any assistance until an environmental impact statement had been prepared. However, when the developer began to cut trees at the project site, the court refused to enjoin the private developer from taking interim action affecting the environment. The court based this decision on the ground that it lacked power to enjoin a private party from using his land as he pleases merely because an application for federal aid had been filed. However, Chief Circuit Judge Coffin found that the project had reached the "partnership" stage between HUD and the developer. Therefore, the developer could be restrained from taking any further action until the impact statement had been issued. The court made this determination after noting that HUD had already approved the mortgage guarantee and interest grant, and that although final closing had not yet taken place, HUD had made a "180 day commitment."

This result would have followed had the court simply applied the test it had set forth in *City of Boston* (i.e., whether the funding process had reached a stage where the federal agency had made a

final decision to fund the project). The court, however, chose instead to speak of the overall nexus between HUD and the developer being so extensive as to constitute "partnership".

> While this case, as we have noted, is not controlled by *City of Boston,* we confess to a sense of growing uneasiness in seeing decisions determining the obligations of federal and non-federal parties under NEPA turn on any one interim step in the development of the partnership between the parties. Such an approach unrealistically stresses adventitious factors which bear little relationship to either the broad concerns of NEPA or the interests of the potential grantee, private or public. Hence, in the present case, the mere fact that a binding contract has been entered into between HUD and the developer is but one manifestation of and quite irrelevant to an ongoing planning process by all parties to the project which must provide for the reasonable expectations of the parties.[44]

The nexus test is less rigid than the narrow funding standard because it recognizes that federal participation involves more than just the granting of funds. It would include all considerations relevant to the "ongoing planning process." For example, has the federal agency been involved with planning and regulation of past and future aspects of a project? Also entering into the court's analysis would be the "reasonable expectations of the parties." Even if there is not yet a binding contract, are the circumstances such that the non-federal party reasonably expects that federal aid will ultimately be forthcoming? Because of the many possible relevant considerations, however, the nexus test is also a good deal less precise, and requires a case-by-case factual determination of the extent of the relationship between the federal agency and the non-federal project sponsor.[45]

The Second Circuit Court of Appeals was quick to adopt the nexus test. *Proetta v. Dent*[46] concerned the denial of a preliminary injunction against eviction and demolition by New York City on a site where a private company had planned plant expansion to be financed by a federal loan. No federal funds were to be received by the city for the demolition work. It had become involved in the project only for the purpose of helping to prevent private industry from leaving the city. The question was whether the city was subject to an injunction pending fulfillment of NEPA requirements, even though the city itself would not directly be receiving federal funds. The court found that no partnership relationship existed between the city and the federal government. "While not deciding whether a non-recipient of a loan may ever be in partnership with the federal government, upon the facts in this case we find that the nexus

between the City and EDA [The Economic Development Administration of the Commerce Department] is insufficiently proximate to warrant restraint of the former for lack of statutory compliance by the latter."[47]

Other courts will most likely utilize the nexus test as a good way of determining the necessary relationship between a federal agency and the potential recipient of federal funds sufficient to confer jurisdiction over the non-federal party under NEPA. Continuing litigation applying the standard to myriad federal administrative procedures will undoubtedly lead to a clarification of the test. The First Circuit itself presently has an opportunity for further development of its new standard in *City of Boston v. Brinegar,*[48] a case factually very similar to *City of Boston v. Volpe.*

City of Boston v. Brinegar deals again with the expansion of Logan Airport,[49] this time specifically with construction of a new General Aviation/Short Take Off and Landing runway and a runways extension project. At the time the injunction restraining the Port Authority from construction of the runways was sought, the FAA had not made a tentative allocation of funds, although the Port Authority had filed a request for aid. The District Court felt constrained to follow *City of Boston v. Volpe,* although it clearly felt uncomfortable in doing so. It held that the project had not yet reached the federal partnership stage. "Consequently, even though the timing of actual construction in relation to the grant application may eventually result in effective, if not deliberate, frustration of the National Environmental Policy Act, the court has no present power to enjoin the construction of the runways project by the Authority."[50]

On appeal from this decision, the Circuit Court has an opportunity to make clear that it no longer intends to apply a test based solely on the stage of the funding process, which in practice allows the agencies involved to effectively ignore environmental considerations. In applying the nexus standard, the court will be able to take into consideration not only the procedures of the funding process, but also the District Court finding that:

> After the filing of the application, the representatives of the Authority consulted with officials of the FAA on every aspect of the runways project to make sure that the runways project would qualify under ADAP [Airport Development Aid Program]. It is likely that all of the environmentally significant decisions concerning the runways project will have been made, not only by the Authority but by the responsible FAA officials, before the final EIS [impact statement] is released.[51]

Such a finding, under the nexus test, should be determinative of the issue of project federalization.

This hoped-for development of the nexus test would remove one major obstacle faced by plaintiffs seeking to enforce NEPA requirements. However, with the exception of highway projects funded through the Federal Highway Administration, where the quantity of litigation has resulted in a fairly clear understanding of what preparatory work may be done before issuance of the impact statement, plaintiffs still have a major task ahead of them in convincing courts to move forward in developing a clear standard of review. Courts often appear innately conservative in deciding jurisdictional questions such as their ability to enjoin non-federal parties under a statute which, on its face, applies only to federal agencies. In addition, they are understandably concerned that by interfering in agency procedures, they may require impact statements to be prepared for projects which ultimately do not receive federal funds, thereby wasting agency resources. Thus, when agencies assert that they are not committed to fund a project and may, in fact, decide not to fund it, courts are naturally hesitant to require preparation of an environmental impact statement. Plaintiffs may now meet the difficult challenge of overcoming these tendencies by clearly showing that a close relationship between the federal agency and non-federal party exists and that the parties "reasonably expect" that the project will eventually receive federal funds.

V. Other Considerations in Seeking Judicial Solutions

Plaintiffs must realize that there are alternative routes by which to force early consideration of environmental factors other than that of establishing a sufficiently proximate nexus between federal and non-federal parties with regard to a particular project. For instance, many states today have their own Environmental Policy Acts, which impose obligations akin to those of NEPA on state agencies and many private developers.[52] In addition, where the non-federal party receives continuing federal support and supervision on a wide range of matters, a current segmented project may be characterized as part of a long-range plan which requires federal approval at its inception. If an environmental impact statement was not prepared and considered at that early planning stage, a court's jurisdiction under NEPA over the segment at issue might be based on federal approval of the overall plan, of which the segment is an integral part.[53]

Once plaintiffs are successful in convincing a court that it has

jurisdiction to enjoin a particular non-federal party until the federal funding agency has prepared an adequate environmental impact statement, the non-federal party may still attempt avoidance of the court order by dissolving the so-called partnership relationship between itself and the federal agency. Recent court decisions have restricted this possibility, however, to those cases in which the project sponsor is willing to totally reject federal funding and return any funds already received.[54]

In *Ely v. Velde*[55] the Fourth Circuit Court of Appeals clearly set forth this principle. The state of Virginia had planned to build a correctional center with funds received from an LEAA block grant, a "no strings" grant allocated to eligible states solely on the basis of population.[56] When the state encountered resistance to its selected site based on both NEPA and the National Historic Preservation Act, the state tried to disentangle itself from the controversy by saying that it would not use federal funds to build the center, but would continue its plans using only state money. The state contended that it could thereby remove the "federal action" label from the project and no longer be subject to the federal requirements. However, the Court of Appeals held that even though the federal funds had come from a block grant, the state must return to the federal government that portion of the grant which it had planned to use for the correctional center, and not use it for an alternative noncontroversial project. Only then could the state free the project from the requirements of NEPA.

The numerous actions pressing for enforcement of NEPA in joint activity situations have the side effect of putting project sponsors on notice that if environmentally damaging work is begun before issuance of an impact statement, a court may find that a partnership relationship with the federal agency exists and issue an injunction halting work in midstream. While courts do take into consideration economic hardship that could result from enjoining a project after work has begun,[57] Justice Douglas' recent opinion in *Warm Springs Dam Task Force v. Gribble,*[58] (hereinafter cited as *Warm Springs*) confirms that courts will not hesitate to halt projects even after large sums of money have been expended if they feel that doing so is necessary to enforce NEPA. In *Warm Springs* Douglas halted construction work on a dam, even though $35 million had already been expended on the project, until the Court of Appeals could consider the adequacy of the contested impact statement. He spoke harshly of what he saw as the prevailing attitude towards implementation of NEPA: "The tendency has been to downgrade this

mandate of Congress, to use shortcuts to the desired end, to present impact statements after a project has been started and when there is already such momentum that it is difficult to stop."[59] Sponsors of projects seeking federal funding should take cognizance of the possibility that if they start work before issuance of an adequate impact statement, they may be forced to come to an abrupt halt at a highly inconvenient point.

VI. Status Quo Regulations

There is serious question whether the task of restraining project sponsors should be left solely to the judiciary. Even with a developing court standard which enables judicial recognition of federal action at an earlier stage in projects seeking federal funding, the dilemma persists. Until federal action is found, courts can do nothing to prevent non-federal parties from doing irreparable harm to the environment and foreclosing less environmentally damaging project alternatives. In *Silva,* Judge Coffin called upon the federal funding agencies to address this problem by issuing status quo regulations as a guide to applicants for aid.[60] Such regulations would specify what preparatory work an applicant could begin before issuance of an adequate environmental impact statement without losing its eligibility.

Judge Coffin suggested possible standards for framing such status quo regulations. Specifically, it was noted that only preparatory work which is environmentally neutral or virtually so should be permitted before completion and review of an impact statement.[61] He also stated that the regulations would require a balancing of the freedom of the private party with the recognition that he has voluntarily submitted to some degree of federal regulation by applying for aid. The regulations could allow even environmentally damaging activities if the sponsor could meet a heavy burden of proof that the project would be completed with or without federal aid.[62]

For example, the Atomic Energy Commission has adopted status quo regulations which prohibit "any clearing of land, excavation or other substantial action that would adversely affect the natural environment of a site . . ." prior to the Commission's decision on applications for permits to construct nuclear facilities.[63] These regulations were challenged in *Gage v. Atomic Energy Commission*[64] (hereinafter cited as *Gage*) as not being comprehensive enough because they permit acquisition of land at the proposed site before the environmental impact statement has been prepared, thereby precluding consideration of alternative sites for atomic energy plants.

However, the Circuit Court of Appeals for the District of Columbia avoided this issue by ruling that because the plaintiffs had chosen not to participate in the rulemaking process, although urged to do so by staff of the AEC, they could not later demand judicial review of the adequacy of the regulations.

Since it is rare that such parties are specifically asked to take part in the rulemaking process, most plaintiffs would not encounter this barrier. However, the *Gage* decision points up the importance to plaintiffs of not waiting until some environmentally damaging activity is imminent before seeking to protect the environment. When agencies are proposing regulations, environmentally concerned parties should participate in the rulemaking proceedings. If agencies do not respond to the need for status quo regulations, consideration should then be given to initiating court action to require them to do so.

Silva went further than politely suggesting that it would be helpful if agencies issued status quo regulations. That court strongly suggested that agencies could be *required* to issue such regulations:

> Apart from the practical advantages of regulations in the precommitment stage, there would seem to be strong legal underpinnings, if not an actual mandate. Congress has *"direct[ed] that to the fullest extent possible:* (1) the policies, regulations, and public laws of the United States *shall* be interpreted and administered in accordance with the policies set forth in (NEPA)." 42 U.S.C. §4332(1) [court's emphasis]. We cannot think of any stronger language which could have been used to underscore the importance of protecting the environment. These duties are not discretionary, but are specifically mandated by Congress, and are to be reflected in the procedural process by which agencies render decisions. Moreover, the President has required that agencies review their "statutory authority, administrative regulations, policies, and procedures, including those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies . . . which prohibit or limit full compliance with the purposes and provisions of (NEPA)." Executive Order 11514, 35 Fed. Reg. 4247 (March 7, 1970) . . . The coexistence of this regulatory gap and the strength of the Congressional and Presidential directives might well justify a court in requiring an agency to formulate status quo regulations.[65]

A mandate that agencies formulate status quo regulations is based not only upon the wording of NEPA and Executive Order 11514, but also upon Guidelines of the Council on Environmental Quality (CEQ). In response to the *Silva* decision, the new CEQ guidelines state: "For major categories of projects involving an applicant and identified . . . as normally requiring the preparation of

a statement, agencies should include in their procedures provisions limiting actions which an applicant is permitted to take prior to completion and review of the final statement with respect to his application."[66]

CEQ's specific instruction that agencies formulate status quo regulations should carry particular weight with a court faced with plaintiffs seeking a court order requiring an agency to do so. Justice Douglas' *Warm Springs* opinion stressed the importance of the CEQ, when he reversed a District Court because "[T]he Council on Environmental Quality, ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements, has taken the unequivocal position that the statement in this case is deficient, despite the contrary conclusions of the District Court."[67]

The CEQ Guidelines are especially useful in overcoming the tendency of courts not to interfere with administrative procedures, particularly administrative decisions not to issue regulations.[68] In deciding whether to require promulgation of status quo regulation, courts will be faced with contrary administrative positions: CEQ's directive that status quo regulations be promulgated and defendant agency's refusal to do so. Given the relative importance of CEQ's interpretation of NEPA as expressed by Justice Douglas, it would appear that courts ought to order reluctant agencies to issue status quo regulations.

Conclusion

Status quo regulations seem to be the best way to close the loophole in NEPA which developed when courts held that they lacked jurisdiction to enforce NEPA against non-federal parties who, while seeking federal funding, proceed to do irreparable damage to the environment or foreclose less environmentally damaging alternatives. Parties seeking environmental protection will achieve more far-reaching results by bringing suit against federal agencies which do not have status quo regulations, rather than against the non-federal parties individually. Each time plaintiffs proceed against non-federal parties under NEPA, they must face the substantial burden of showing a sufficient nexus between the federal agency and the non-federal project sponsor. However, until such time as agencies either choose or are forced to issue such regulations, suits continue to be necessary against potential recipients of federal aid who are, together with their federal cohorts, frustrating the National Environmental Policy Act.

As environmentalists continue to press courts to enforce early compliance with the impact statement requirement of NEPA, clearer standards will emerge for determining when the relationship between the federal agency and the non-federal project sponsor has become close enough to give the courts jurisdiction over the non-federal party. If enough litigation is commenced by concerned groups, perhaps project sponsors and federal agencies will begin to realize that it is far easier and more beneficial for everyone concerned to prepare and evaluate impact statements as one of the first steps in developing a project which is to be considered for federal funds — which is, after all, no more than the original intent behind the National Environmental Policy Act.

FOOTNOTES

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[1] 42 U.S.C. §4331 *et seq.* (1970).

[2] 42 U.S.C. §4332(2)(C) (1970).

[3] City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972); City of Boston v. Brinegar, 6 E.R.C. 1961 (D. Mass. 1974); Citizens for a Balanced Environment v. Volpe, 376 F.Supp. 806 (D. Conn. 1974), *aff'd per curiam* 6 E.R.C. 2089 (2d Cir. 1974).

[4] Although the problem of the timing of NEPA requirements is similar for non-federal projects needing federal approvals or having other significant involvement with federal agencies, this article will deal only with projects which are potential "federal action" due to applications for federal funding.

[5] 42 U.S.C. §4332(2)(C) (1970).

[6] This is not to suggest that NEPA requirements are solely procedural. To the extent NEPA creates substantive environmental criteria for federal action, these too are applicable to such joint activities. These substantive criteria apply to federal activities regardless of whether they are "major . . . actions signficantly affecting the quality of the human environment," since this limiting phrase refers only to the §102(2)(C) procedural requirement. For consideration of NEPA's substantive requirements see F. Anderson, NEPA IN THE COURTS (1973) (hereinafter cited as Anderson); Briggs, *NEPA as a Means to Preserve and Improve the Environment - The Substantive Review*, 15 B.C. IND. & COM. L. REV. 699 (1974).

[7] Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971), *modified on rehearing* 455 F.2d 1122; Arlington Coalition on

Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974). *See generally* Anderson, *supra* n. 6, at 179-86.

[8] 40 C.F.R. §1500.2(a). *See also* §§1500.1(a), 1500.7(a) (1973).

[9] 40 C.F.R. §1500.2(b) (1973).

[10] 42 U.S.C. §4332 (1970), interpreted to require strict compliance in the landmark opinion Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

[11] Sierra Club v. Hardin, 325 F.Supp. 99 (D. Alas. 1971) (permit to build paper mill); Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971) (AEC license for atomic power plant); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) (Dept. of Interior approval of lease of Indian land); Scenic Rivers Association v. Lynn, 7 E.R.C. 1172 (E.D. Okla. 1974) (HUD approval of Statement of Record and Property Report under Interstate Land Sales Act).

[12] Hiram Clark Civic Club v. Lynn, 476 F.2d 421 (5th Cir. 1973) (no EIS required for other reasons); Silva v. Romney, 342 F.Supp. 783 (D. Mass. 1972); Goose Hollow Foothills League v. Romney, 334 F.Supp. 877 (D. Ore. 1971).

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

[14] Silva v. Romney, 473 F.2d 287, 290 (1st Cir. 1973); Jones v. Lynn, 477 F.2d 885, 894 (1st Cir. 1973) (concurring opinion); Proetta v. Dent, 484 F.2d 1146, 1148 (2d Cir. 1973); Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013, 1027 (5th Cir. 1971); Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974). Courts use the term "partnership" in NEPA cases in its popular, not legal sense. For a discussion of the advisability of replacing the term with the legal concept of joint venture see Note, *Federal Courts Have Authority Under NEPA to Enjoin Private Parties - Silva v. Romney,* 4 SETON HALL L. REV. 653 (1973).

[15] City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972) (hereinafter cited as *City of Boston*).

[16] Peterson and Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation,* 2 E.L.R. 50001 (hereinafter cited as Peterson and Kennan).

[17] La Raza Unida v. Volpe, 337 F.Supp. 221 (N.D. Cal. 1971), *aff'd* 488 F.2d 559 (9th Cir. 1973), *cert. denied* 409 U.S. 890 (1972) (hereinafter cited as *La Raza*).

[18] Sierra Club v. Volpe, 351 F.Supp. 1002 (N.D. Cal. 1972).

[19] *Id.* at 1007.

[20] Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013, 1028 (5th Cir. 1971).

[21] Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973) (hereinafter cited as *Indian Lookout*).

[22] Peterson and Kennan, *supra* n. 16, at 50001.

[23] FHWA Policy and Procedure Memorandum 20-8 (Jan. 14, 1969), *Statutes and Regulations,* E.L.R. 46505.

[24] *Id.*

[25] FHWA Policy and Procedure Memorandum 21-1 (April 15, 1958), *Statutes and Regulations,* E.L.R. 46507.

[26] 23 U.S.C. §105(a) (1958).

[27] 23 U.S.C. §106(a) (1958).

[28] Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Sierra Club v. Volpe, 351 F.Supp. 1002 (N.D. Cal. 1972); La Raza Unida v. Volpe, 337 F.Supp. 221 (N.D. Cal. 1971), *aff'd* 488 F.2d 559 (9th Cir. 1973), *cert. denied* 409 U.S. 890 (1972). *See generally* Peterson and Kennan, *supra* n. 16, at 50017-23; Comment, *Environmental Analysis and Reporting in Highway System Planning,* 121 U. PENN. L. REV. 875 (1973).

[29] 484 F.2d 11, 21 (8th Cir. 1973).

[30] *Id.*

[31] *Id.*

[32] 464 F.2d 254 (1st Cir. 1972).

[33] *Id.* at 259.

[34] *Id.* at 258.

[35] *Id.* at 259.

[36] *Id.* at 257.

[37] It is interesting to note that the Port Authority never ultimately received federal funding for the project involved in City of Boston. *See generally* D. Nelkin, JETPORT, THE BOSTON AIRPORT CONTROVERSY (1974).

[38] For other criticism of the "final decision" test *see* Note, *An Airport Construction Project is Not Subject to the National Environmental Policy Act Until Federal Funds are Allocated,* 39 J. AIR & COM. 121 (1973); Anderson, *supra* n. 6, at 71-73.

[39] Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 514 (D.C. Cir. 1974).

[40] 464 F.2d 254, 259 (1st. Cir. 1972).

[41] Brief for Appellants at 30 n.9, City of Boston v. Brinegar, *appeal docketed,* No. 74-1255, 1st Cir., August 6, 1974.

[42] Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) (hereinafter cited as *Silva*).

[43] *Id.*

[44] *Id.* at 290-91.

[45] *Silva I: The Need for HUD Status Quo Regulations,* 3 E.L.R. 10155 (1973).

[46] Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973).

[47] *Id.* at 1148.

[48] City of Boston v. Brinegar, 6 E.R.C. 1961 (D. Mass. 1974), *appeal docketed,* No. 74-1255, 1st Cir., August 6, 1974 (Interlocutory Order, 1st Cir., Jan. 10, 1975, postponed decision indefinitely "until such time as events have further crystallized.").

[49] For an interesting account of the entire controversy surrounding the expansion of Logan Airport *see* D. Nelkin, JETPORT, THE BOSTON AIRPORT CONTROVERSY (1974).

[50] City of Boston v. Brinegar, 6 E.R.C. 1961, 1966 (D. Mass. 1974).

[51] *Id.* at 1962.

[52] *See* Wyman, Dutton, Dunn, *The Adequacy of Environmental Impact Statements and the Development of State Law,* 27 SW. L. J. 630 (1973); Hagman, *NEPA's Progeny Inhabit the States - Were the Genes Defective?,* 7 URBAN L. ANN. 3 (1974).

[53] Conservation Society of Vermont v. Secretary of Transportation, 362 F.Supp. 627 (D. Vt. 1973) (EIS required for entire regional interstate highway); Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) (EIS required for overall research and development program); Jones v. Lynn, 477 F.2d 885, 890-91 (1st Cir. 1973) (EIS should be prepared for entire urban renewal project rather than for individual parcels); Sierra Club v. Froehlke, 359 F.Supp. 1289 (S.D. Tex. 1973) (Wallisville Reservoir project enjoined until EIS prepared for overall Trinity River basin project), *rev'd sub nom.* Sierra Club v. Callaway, 6 E.R.C. 2080 (5th Cir. Aug. 26, 1974) (individual reservoir project was not an "integral part" of overall project). *Contra,* Movement Against Destruction v. Volpe, 361 F.Supp. 1360 (D. Md. 1973) (EIS not required for regional interstate highway); Citizens for Mass Transit Against Freeways v. Brinegar, 357 F.Supp. 1269 (D. Ariz. 1973). *See generally* Comment, *Environmental Analysis and Reporting in Highway System Planning,* 121 U. OF PENN. L. REV. 875 (1973); Anderson, *supra* n. 6 (favors preparation of impact statements in "tiers").

[54] Named Individual Members of the San Antonio Conservation

Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971); Ely v. Velde, 497 F.2d 252 (4th Cir. 1974).

[55] 497 F.2d 252 (4th Cir. 1974).

[56] 451 F.2d 1130, 1133 n.8 (4th Cir. 1971); *see also* Note, *The Application of Federal Environmental Standards to the General Revenue Sharing Program: NEPA and Unrestricted Federal Grants,* 60 VA. L. REV. 114 (1974).

[57] *See* Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974).

[58] Warm Springs Dam Task Force v. Gribble, 94 S.Ct. 2542 (Douglas, Circuit Justice, 1974), *aff'd per curiam* 94 S.Ct. 3202 (1974).

[59] *Id.* at 2546.

[60] 473 F.2d 287, 291 (1st Cir. 1973).

[61] *Id.*

[62] *Id.* at 292 n.8.

[63] 37 Fed. Reg. 5745 (1972).

[64] 479 F.2d 1214 (D.C. Cir. 1973).

[65] 473 F.2d 287, 292 (1st. Cir. 1973).

[66] 40 C.F.R. §1500.7(a) (1973).

[67] Warm Springs Dam Task Force v. Gribble, 94 S.Ct. 2542, 2547 (Douglas, Circuit Justice, 1974), *aff'd per curiam* 94 S.Ct. 3202 (1974).

[68] *See generally* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375 (1974); Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185 (1974).