SECTION 2

PROJECT ENVIRONMENTAL ANALYSIS

A. ENVIRONMENTAL ASSESSMENT REQUIREMENTS UNDER NEPA*

1. Introduction

NEPA is the Magna Carta of national environmental legislation. NEPA also is by far the most important environmental statute, both in terms of its broad statement of federal environmental policy and the practical effect of its procedural requirements on the activities and programs of federal agencies. Federal assistance triggers NEPA, which applies to many DOT programs because of the extensive assistance they provide to states and local governments. Indeed, FHWA probably carries out more environmental assessments under NEPA and has been a defendant in more NEPA litigation than almost any other federal agency.[1]

NEPA is a brief statute that provides only limited direction on the duty of federal agencies to prepare impact statements. Its principal requirement is that all agencies of the federal government must prepare a "statement," now known as an EIS, on all of their major actions that have a significant effect on the human environment.[2]

In addition, NEPA created the CEQ, which is authorized by Federal Executive Order to adopt regulations that implement NEPA.[3] FHWA is part of the DOT, which like all federal agencies has adopted procedures that implement NEPA for its programs.[4] FHWA has adopted regulations based on the CEQ regulations implementing NEPA[5] as supplemented by an informal guidance document issued as a Technical Advisory.[6] These regulations also apply to the FTA. The statute and regulations are supplemented by an extensive body of case law that the Supreme Court has called the "common law" of NEPA.[7] This section reviews the application of the statute, regulations, and case law to DOT programs that are subject to NEPA, with an emphasis on highway programs funded by FHWA.

The purposes of NEPA, as stated in its Section 2, are to:

> …declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[8]

The key section of NEPA is Section 102(2)(C).[9] It provides that the "responsible official" of a government agency must prepare an impact statement. The statement must include:

(i) The environmental impact of the proposed action;

(ii) Any adverse environmental effects that cannot be avoided should the proposal be implemented;

(iii) Alternatives to the proposed action;

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.

Two other sections in NEPA are important to DOT programs. Section 102(2)(D)[10] was adopted as an amendment to NEPA and applies to highway and other transportation modal funding. This paragraph effectively authorizes a delegation to state transportation agencies of the authority to prepare impact statements on highway projects. It provides:

> (D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
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> (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
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> (ii) the responsible Federal official furnishes guidance and participates in such preparation,
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> (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

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* This section is based on, but is a thorough revision of, DANIEL R. MANDELKER & GARY FEDER, THE APPLICATION OF NEPA (NATIONAL ENVIRONMENTAL POLICY ACT) TO FEDERAL HIGHWAY PROJECTS (Nat'l. Coop. Highway Research Program Legal Research Digest No. 15, 1990).

[1] This section concentrates on FHWA programs because they are the DOT programs most frequently litigated under NEPA, but cases addressing actions taken under other DOT programs are also considered.

[2] NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C). All citations to statutes and regulations are current as of the date of this chapter (1994 ed. U.S.C. with supplements, and 2001 ed. C.F.R. unless otherwise noted).

[3] 40 C.F.R. pt. 1500 (July 1, 2001) [hereinafter CEQ Reg.]. For Federal Aviation Administration regulations see FAA Orders 1050.1D, 5050.41. *See also* 45 Fed. Reg. 2544 (1980), as amended, 49 Fed. Reg. 28501 (1984). For Federal Railroad Administration regulations see 45 Fed. Reg. 40854, as amended, 45 Fed. Ref. 58022 (1980). The Council on Environmental Quality Web site has citations to agency NEPA regulations: http://ceq.eh.doe.gov.

[4] Department of Transportation Order 5610.1C [hereinafter DOT Order].

[5] 23 C.F.R. pt. 771 [hereinafter FHWA Reg.].

[6] Federal Highway Admin., Technical Advisory T 6640.8A [hereinafter FHWA Guidance].

[7] Kleppe v. Sierra Club, 427 U.S. 390, 420 (1976). NEPA case law as well as CEQ's implementing regulations are thoroughly reviewed in D. MANDELKER, NEPA LAW AND LITIGATION (2d ed. 1992 and annual supplements.) [hereinafter NEPA LAW AND LITIGATION]. *See also* Annot., *Necessity and Sufficiency of Environmental Impact Statements under § 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C) in Cases Involving Highway Projects*, 64 A.L.R. FED. 15 (1983).

[8] 42 U.S.C. § 4331.

[9] 42 U.S.C. § 4332(2)(C).

[10] 42 U.S.C. § 4332(2)(D).

> (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.
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> The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

Section 102(2)(E)[11] of NEPA contains another important requirement that affects environmental assessments of federal actions. It independently requires an analysis of alternatives to an action, even if an agency does not have to prepare an impact statement. It provides that federal agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

2. What is a "Federal Action?"

a. In General

NEPA does not define the term "action," but CEQ regulations define "major federal action" as "including projects and programs entirely financed or partly financed, assisted, conducted, regulated or approved by federal agencies."[12] FHWA and FTA regulations[13] implement CEQ regulations by defining an "action" to include a highway project proposed for FHWA and FTA funding as well as activities, such as use permits and changes in access control, that do not require a commitment of federal funds.[14]

FHWA and FTA regulations specify three classes of actions that require different levels of documentation under NEPA.[15] One class, which includes a new controlled access highway, normally requires an impact statement. The second class consists of actions categorically excluded from NEPA. The third class consists of actions where a preliminary environmental assessment is required because the significance of the environmental impact is not clearly established.

b. Federally Funding: Preliminary Actions

The clearest case in which NEPA applies to FHWA and FTA programs is when these agencies fund a project.[16] NEPA does not usually apply to federal funding for the early phase of a project, such as planning or preliminary engineering studies. Whether NEPA applies turns on language that requires an impact statement only when a federal agency makes a "proposal" for an action. The Supreme Court gave the term "proposal" a definitive interpretation in *Kleppe v. Sierra Club*.[17] That case made it clear that an impact statement is required only when an agency has made a final decision on a project, not when an action is only contemplated. If FHWA or FTA has provided funding only for preliminary studies and is not even contemplating funding for a project, it would seem clear that an impact statement is not required at that point because the agency has not made a final decision.

This conclusion is supported by CEQ regulations. The regulations require an impact statement only when an agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated."[18]

Transportation project cases illustrate this point. *Macht v. Skinner*[19] was a suit to enjoin the construction of the Central Baltimore Light Rail Line where it was claimed that state and federal officials failed to comply with NEPA. The only federal involvement in the project was a $2.5 million FTA grant to help the state complete alternative analyses and draft EIS's for proposed extensions that would be federally funded. The court held that federal funding for these preliminary studies did not federalize the extension because the federal agency had not yet finally decided to assist the state in the final design or construction of the extensions.

c. Federally Approved Actions Not Funded by the Federal Government

i. Federal Actions Required to Allow an Action to Proceed.— NEPA case law makes it clear that NEPA applies when a federal agency takes an action that authorizes a nonfederal agency to proceed with a project.[20] CEQ regulations are in agreement.[21] A problem arises in state programs when a project is not funded by federal funds but requires some action from the federal agency before it can proceed.

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[11] 42 U.S.C. § 4332(2)(E).

[12] 40 C.F.R. § 1508.18(a).

[13] These regulations are hereinafter referred to as "FHWA regulations."

[14] 23 C.F.R. § 771.107(b). NEPA case law recognizes that federal funding is enough to constitute a federal action subject to NEPA. NEPA LAW AND LITIGATION, *supra* note 7, at § 8.04[3].

[15] 23 C.F.R. § 771.116.

[16] *E.g.*, Zarilli v. Weld, 875 F. Supp. 68 (D. Mass. 1995) (highway).

[17] 427 U.S. 390 (1976). *See also* § 2D, *infra*.

[18] 40 C.F.R. § 1508.23.

[19] 916 F.2d 13 (D.C. Cir. 1990). *See also* Save Barton Creek Ass'n v. Federal Highway Admin., 950 F.2d 1129 (5th Cir. 1992) (early coordination activities for highway project did not federalize project for purposes of NEPA).

[20] This principle was established in an early NEPA case, Scientists' Inst. for Public Information (SIPI) v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).

[21] 40 C.F.R. § 1508.18(4) (action includes projects approved by permit or other regulatory decision).

Only a few cases have considered this question under NEPA and they are divided.[22] In a case whose reasoning can apply to transportation projects, *Winnebago Tribe of Nebraska v. Ray*,[23] the question was whether an impact statement was required for a 75-mile proposed private power line. The argument for applying NEPA was that 1.25 miles of the line required a federal permit for a river crossing. The federal agency had jurisdiction only over the river crossing, and the court held that this was not sufficient to convert the construction of the entire transmission line into a federal action. The court indicated that three factors determined whether the federal agency had exercised enough control over the nonfederal action to make the action federal:

> (1) the degree of discretion exercised by the agency over the federal portion of the project;
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> (2) whether the federal government has given any direct financial aid to the project; and
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> (3) whether "the overall federal involvement with the project [is] sufficient to turn essentially private action into federal action."[24]

This issue has arisen in highway cases. For example, in *Maryland Conservation Council v. Gilchrist*,[25] a nonfederal highway was held subject to NEPA because it required a federal dredge and fill permit, federal approval to convert parkland acquired with a federal grant, and federal approval to use parkland for the highway. The highway was to be constructed by a county that had received federal planning funds but had not received additional federal funding.

Gilchrist indicates NEPA does not apply when actions by a state agency do not require federal review. NEPA would not have applied in that case if federal actions on the project were not required. This point has been made in NEPA cases that did not concern highway projects. In *Crounse Corp. v. Interstate Commerce Comm'n*,[26] the court held that the Commission, when assessing the environmental impacts of a corporate merger, did not have to consider the environmental impacts of corporate projects it did not have the power to approve. The courts have reached the same result even when federal subsidies were made available for state and local projects, but the federal agency did not exercise enough control over the project to make it a federal action. In these cases the state or local agency made the decision to undertake the project and exercised project control.[27]

These cases indicate that federal project approvals for nonfederal projects will bring the project under NEPA if the federal approval is essential to the nonfederal project, and if the federal agency exercises enough control to make the project federal. The *Gilchrist* case indicates that a dredge and fill permit required under the CAA falls in this category. Related navigation and similar permits would also fall in this category, unless the part of the project for which a permit is required is too much of a "small handle" to make NEPA applicable.

Another class of cases in this category are cases in which a state or local agency requires approval from the FHWA for access to or over a federal Interstate or other highway for a highway project. FHWA regulations implementing the federal-aid highway act[28] require FHWA approval for permanent or temporary access to federally-aided highway right-of-way, including airspace over the right-of-way.[29] FHWA must approve access if it is in the public interest.

If a request for access has not yet been acted on, FHWA has not yet made a final decision and NEPA does not apply.[30] Neither does NEPA apply when the access requested is temporary. In *Citizens Organized to Defend Env't, Inc. v. Volpe*,[31] the DOT, as authorized by an agreement, approved a plan that granted exclusive temporary access to a mining company to allow mining equipment to cross a federal highway for a 24-hour period. The court held that the crossing approval was not a major federal action that required an impact statement. No planning was required for the crossing approval, the time involved in granting approval was minimal, there were no environmental consequences, and the DOT's decision was nondiscretionary.

The *Citizens* case probably would not apply to a decision to grant permanent access over a federal highway for a nonfederal highway.[32] The reasons for holding that a grant of temporary access is not a major federal action do not apply when the federal agency grants permanent access. The holding in *Citizens* that

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[22] NEPA LAW AND LITIGATION, *supra* note 7, at § 8:04[2]. *Compare* Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987) (action not federal when agency approved Indian contracts for city parking ramp for city facility) with Colorado Indian River Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985) (NEPA held applicable to 156-acre development project when only federal action was a permit for riprap to stabilize a river bank).

[23] 621 F.2d 269 (8th Cir.), *cert. denied,* 449 U.S. 836 (8th Cir. 1980).

[24] *Id*. at 272 [citing NAACP v. Medical Center, Inc., 584 F.2d 619, 629 (3d Cir. 1978)].

[25] 808 F.2d 1039 (4th Cir. 1986).

[26] 781 F.2d 1176 (6th Cir. 1986), *cert. denied,* 497 U. S. 890 (1986).

[27] Sierra Club v. Stamm, 507 F.2d 788 (l0th Cir. 1974) (federal subsidies used for pesticide and herbicide spraying that polluted wells, but federal agency did not control use of subsidies). *See also* Landmark West v. United States Postal Service, 840 F. Supp. 994 (S.D.N.Y. 1993) (federal lending and contribution to nonfederal project with other contributory federal actions), *aff'd without opinion*, 41 F.3d 1500 (2d Cir. 1994).

[28] 23 U.S.C. § 111.

[29] 23 C.F.R. § 1.23.

[30] B.R.S. Land Investors, Inc. v. United States, 596 F.2d 353 (9th Cir. 1979) (impact statement not required on request for right-of-way over federal land); College Gardens Civic Ass'n, Inc. v. United States Dep't of Transp., 522 F. Supp. 377 (D. Md. 1981).

[31] 353 F. Supp. 520 (S.D. Ohio 1972).

[32] For example, NEPA would be triggered by federal access approvals for private or nonfederal toll roads, or by permits under § 404 of the Clean Water Act or by other federal permits.

the DOT's decision was nondiscretionary is also questionable. There is some authority under NEPA that the statute does not apply to nondiscretionary actions by a federal agency,[33] but the court's holding that the decision to approve access under the regulation is nondiscretionary is not correct. The federal agency may approve access only if this is in the "public interest," and this standard of review clearly contemplates the exercise of agency discretion.

ii. Planning and Regulatory Programs.—Another question that arises is whether NEPA applies when the federal agency does not approve a specific state action, but a federal statute authorizes a state permit approval or planning process in which a federal agency has a right to intervene. An example is the state and metropolitan transportation planning process required by the Federal-Aid Highway Act. FHWA can review this process to determine whether it complies with federal statutory requirements and with additional requirements established by FHWA regulations.

CEQ decided not to address this problem in its regulations,[34] but the courts have considered the question of NEPA's applicability in this type of situation in programs other than the highway program. For example, the EPA has the authority under the CWA to delegate to the states the authority to issue permits for new sources of pollution. EPA can revoke this delegated authority if a state does not comply with criteria for state permit programs that are specified in the federal statute. In *Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Bd.*,[35] EPA had delegated new source permit administration to the state. Plaintiff claimed the state was required to prepare an impact statement on a new source permit it issued. Plaintiff argued that the delegation of authority to the state provided "sufficient federal involvement" to make the state board an action of EPA.

The court disagreed. It noted that EPA's principal function was to approve the initial delegation of authority to a state. After this approval, the issuance of new source discharge permits by a state were "basically state matters" and were not federalized even by the heavy federal regulation of state permit authority.

There are also a number of federal programs in which the federal government provides financial assistance to the states, which carry out programs under state law that are approved under federal statutory criteria. The National Coastal Zone Management Program is an example. A federal agency makes grants to the states to develop and administer state coastal zone programs under state law. Initial and continuing federal assistance is based on continuing federal review and approval of the state programs. In *Save Our Dunes v. Pegues*,[36] the court held that federal funding of state coastal zone programs did not make them federal actions that require an impact statement under NEPA.[37]

The transportation planning programs required by the Federal-Aid Highway Act have received a similar judicial interpretation. The leading case is *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*.[38] The plaintiff claimed an impact statement was required on a Regional Development Plan (RDP) that provided a long-range transportation systems guide and land use plan for the Atlanta metropolitan area. Plaintiff claimed that federal participation had federalized the regional transportation planning process. The RDP made transportation projects eligible for federal funding, federal agencies reviewed the regional planning process and certified compliance with federal requirements, and federal funds were used in the preparation of the RDP.

The court held that an impact statement was not required. The federal presence had not become so pervasive that the regional planning process had become a federal action requiring an impact statement under NEPA. Federal funding was made available under a "fairly rigid formula" and federal certification was required only to ensure that the regional planning process met federal requirements. State and local officials made planning decisions in the regional planning process, the federal agency did not review the substance of these decisions, and the possible future funding of projects included in the RDP did not make the plan federal for NEPA purposes.

A related issue is whether actions taken by the federal agency in the review of state and metropolitan transportation plans come under NEPA. In identical provisions, TEA-21 states that NEPA does not apply to state or regional transportation planning under the federal highway act. These provisions state that "any decision by the Secretary concerning a plan or program described in this section [which authorizes planning]

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[33] State of South Dakota v. Andrus, 614 F.2d 1190 (8th Cir.) (issuance of mineral patent for mining claim in national forest), *cert. denied*, 449 U.S. 822 (1980). *See* NEPA LAW AND LITIGATION, *supra* note 7, § 8.05[2].

[34] See CEQ's Preamble to its final 1978 regulations implementing NEPA:

> [T]he Draft regulations addressed the issue of NEPA's application to Federal programs which are delegated or otherwise transferred to State and local government. Some commenter said that the application of NEPA in such circumstances is a highly complicated issue….The Council concurs and determined not to address this issue in this context at the present tune. This determination should not be interpreted as a decision one or the other on the merits of the issue. [43 Fed. Reg. 55978, 55989 (1978)].

[35] 453 F. Supp. 122 (E.D. Va. 1978). *Accord*, District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980).

[36] 642 F. Supp. 393 (M.D. Ala. 1985).

[37] *See also* National Organization for the Reform of Marijuana Laws v. Drug Enforcement Admin., 545 F. Supp. 981 (D.D.C. 1982) (impact statement not required on federal financial and technical assistance for state spraying program when state-controlled program and federal funds were not used in the program).

[38] 599 F.2d 1333 (5th Cir. 1979).

shall not be considered to be a Federal action which is subject to review under the National Environmental Policy Act of 1969."[39]

NEPA questions also arise when a federal agency has the authority to take action against a state agency but does not do so. An example in the highway program is a failure by FHWA to disapprove a state or metropolitan plan because it does not meet federal statutory requirements. Another example is a failure by FHWA to penalize a state for failing to adopt and implement an outdoor advertising control program, as required by the federal highway act. An argument can be made that an impact statement is required to evaluate the agency's failure to take action. But the cases hold differently: an impact statement is not required if an agency fails to take an action it is authorized to take under a statute.

Defenders of Wildlife v. Andrus [40] is a leading case. The Department of the Interior did not exercise whatever authority it might have to prohibit a wolf kill in Alaska. The court held that the Department's failure to act did not come under the plain meaning of NEPA, which requires an impact statement only for "proposals" for "actions." Nor did the federal agency make the state agency's action its own by "not inhibiting" the state action. This would require some "overt act" by the federal agency that furthered the state agency's project. The court also held that to require an impact statement for the agency's inaction would enfeeble and trivialize NEPA. Courts have reached the same result when a federal agency has refused to veto a state decision when the federal agency retained veto authority over a decision-making process it had delegated to the state.[41]

Sierra Club v. Hodel [42] distinguished the *Andrus* case. A county planned to widen a road in a wilderness study area. The federal agency approved the boundaries of the road but failed to take action, as required by statute, to determine whether the road would degrade adjacent wilderness areas. The court held that the agency's inaction required an impact statement because its duty, unlike the agency's duty in *Andrus*, was mandatory rather than discretionary. However, in *Airport Owners & Pilots Ass'n v. Hinson*,[43] the court held there was no duty to prepare an impact statement when the federal agency failed to enforce a debatable legal claim to prevent the closing of an airport.

d. Timing Problems: When is an Action a Proposal for Purposes of NEPA?

i. General Principles.–Although NEPA does not indicate the point of time in an agency's decision-making process when an impact statement is required, the courts have provided guidance on this problem. The leading Supreme Court case is *Kleppe v. Sierra Club*.[44] Plaintiffs brought suit requesting the court to order the preparation of a program impact statement on the development of coal mines by federal agencies throughout a multi-state Northern Great Plains Region. A program impact statement, sometimes called a "programmatic" impact statement, is an impact statement prepared on a group of related projects, rather than on a single project such as a discrete highway project.

The Supreme Court noted that NEPA requires an impact statement only if there is a report or "proposal" for a major federal action. It held the duty to prepare an impact statement that is imposed by NEPA is quite precise and that courts do not have the authority to depart from the statutory language to determine when an impact statement is required. The Court then found that a regional plan or program for coal mining was only contemplated and held that the mere contemplation of a program did not require the preparation of an impact statement. The Court also held that a regional impact statement on the coal mining program could not be prepared for "practical reasons." An impact statement requires a detailed environmental analysis, which would be impossible to undertake in the absence of an overall regional plan. An attempt to prepare an impact statement in the absence of a plan would be little more than a study of potential environmental impacts because it would not have a factual predicate.

Plaintiffs in *Kleppe* also claimed an impact statement was necessary on all coal mining projects in the region because they were intimately related. The Court agreed that a program impact statement is necessary when several proposals for actions that have "cumulative or synergistic" impact upon a region are pending concurrently before an agency. The Court held it would defer to an agency's decision on whether concurrently pending proposals require an impact statement, and upheld the agency's decision in this case that an impact statement was not necessary. CEQ regulations have codified the *Kleppe* decision.[45]

Kleppe leaves a number of questions unanswered. Although the Court held that the duty to prepare an impact statement is "precise," it did not define that term. The Court left open possibilities for a pragmatic interpretation of the "proposal" requirement by relying on practical reasons for not requiring an impact statement. Neither is *Kleppe's* application to highway projects entirely clear because the case considered a

[39] 23 U.S.C. §§ 134(o) (metropolitan planning), 135(i) (state planning).

[40] 627 F.2d 1238 (D.C. Cir. 1980).

[41] District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980).

[42] 848 F.2d 1068 (10th Cir. 1988).

[43] 102 F.3d 1421 (7th Cir. 1996).

[44] 427 U.S. 390 (1976). *See also* NEPA LAW AND LITIGATION, *supra* note 7, at § 8.03 [4].

[45] 40 C.F.R. § 1508.23.

request for a program impact statement, not a statement on a single federally funded project.

Kleppe has influenced the lower federal courts in most cases to hold that an impact statement is not necessary when the question is whether an impact statement should be prepared on an early stage of a project.[46] For example, in *Save Barton Creek Ass'n v. Federal Highway Admin*.[47] the court held the construction of an outer loop around Austin, Texas, was a contemplated action existing only as a concept in a long range plan subject to constant revision. There was no major federal action because there had been no federal approvals of the project of any kind.

ii. State and Regional Transportation Planning.—As noted earlier, TEA-21 requires a state and metropolitan transportation planning process and exempts state and regional transportation plans from NEPA.[48] Before this exemption was adopted, *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*[49] followed *Kleppe* to hold that an impact statement is not required on the Commission's Regional Development Plan (RDP) that provided the long-term transportation system's plan and land use guide for the Atlanta metropolitan area. The plaintiffs in *Atlanta Coalition* made the same argument the plaintiffs made in *Kleppe*—that the individual projects included in the RDP were so intimately related that they required the preparation of a program impact statement.

The court in *Atlanta Coalition* rejected this argument but was very careful to limit its holding to the argument that an impact statement was required on the entire RDP.[50] It admitted that the decision of a federal agency to fund individual projects included in the RDP would be a federal action when it was made, but that this time had not arrived. Many, if not most, of the transportation projects in the RDP were not "proposed" federal actions. Some might never be implemented and some might not be implemented for 10 or 20 years.

A similar problem arises when an impact statement is requested on planning for an entire highway system not limited to a metropolitan area. The court considered this problem in *Indian Lookout Alliance v. Volpe,*[51] where it held an impact statement was not necessary on an entire 1,878-mi state highway system. The court noted that planning for state highway systems was flexible and must be projected over a long period of time. The preparation of an impact statement on the system would cause disputes to arise on the environmental effects of highway locations and would make it impossible for the state to plan for the system.

These cases indicate that courts are not likely to require impact statements on regional or system highway plans. Plans are by their nature tentative and indicate possible highway corridors, not the location of right-of-way for specific projects. It is unlikely that a regional or system plan would include projects so firmly committed and accepted by federal, state, and local officials that the plan would require an impact statement.

iii. NEPA and Right-of-Way Decision-Making for Projects Planned to Become Federal Projects.—The court made it clear in footnote 2 of *Atlanta Coalition* that its decision did not cover project planning.[52] This section considers cases in which a state or local agency, without federal funding, takes a preliminary action to prepare or qualify a highway project for federal approval. The discussion also applies to other transportation projects. The question is whether these preliminary actions require an impact statement. CEQ regulations help provide an answer to this question. They provide that an impact statement is required only when an agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated."[53]

One option available to a state or local government is to preserve right-of-way for future acquisition through corridor preservation programs. The application of NEPA to these programs is discussed in Section 1.E.

A state transportation agency can acquire land for a highway project with state or local funds. A state highway agency may also take actions to qualify a highway project for federal funding. It can place the project on the federal system, program the project for federal aid through administrative action, or formally program a project as a federal project under federal procedures.

If FHWA has not in any way approved or authorized these state or local actions, an impact statement is not required because there is no federal action. Even if FHWA has taken an action prior to the time a state or local government engages in these qualifying activities, the question is whether these qualifying activities are a "proposal" that requires an impact statement.

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[46] NEPA LAW AND LITIGATION, *supra* note 7, at § 8.03[4].

[47] 950 F.2d 1129 (5th Cir. 1992). *See also* Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978) (impact statement not required on geothermal leases issued by federal agency in first-phase "casual use" leasing program). *But see* Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) (impact statement required on sale of oil lease without full mitigation stipulations), *cert. denied*, 489 U.S. 1012 (1989).

[48] *See* Section 1, Parts A-C, for a discussion of the transportation planning process.

[49] 599 F.2d 1333 (5th Cir. 1979). The federal holding in this decision is discussed in § 2C.2, *supra*.

[50] This analysis is repeated in footnote 17 of the decision.

[51] 484 F.2d 11 (8th Cir. 1973). *See also* Conservation Soc'y of S. Vt. v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974), *vacated and remanded*, 423 U.S. 809 (1975), 531 F.2d 637 (2d Cir. 1976) (impact statement not required on a 200-mi multi-state highway where there was no federal plan for the highway).

[52] The court quoted the Director of Planning and Programming for the Georgia Department of Transportation, who defined project planning as "that stage at which specific solutions to the needs identified at the system planning stage are found." 599 F.2d at 1337.

[53] 40 C.F.R. § 1508.23.

FHWA takes action on state highway projects in a series of successive stages. FHWA regulations provide that the completion of a project's environmental processing and compliance with statutory public hearing requirements are "considered acceptance of the general project location."[54] In the final stage the state agency submits the PS&E to FHWA. If it approves the PS&E, FHWA enters into a formal agreement with the state agency that is "deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project."[55]

The question is which federal approvals are necessary to make state actions that qualify a highway project for federal aid a "proposal" that requires an impact statement. Only a few decisions early in the history of NEPA addressed this issue, probably because the number of federal project grant programs in which this issue can arise has declined.

City of Boston v. Volpe[56] is an early leading case holding that tentative funding approval by a federal agency does not make a nonfederal project a "proposal" under NEPA. An airport authority requested a federal grant for a new airport taxiway, the federal agency made a "tentative allocation" of federal funds, and the authority then submitted a final funding application. The court held that the tentative funding decision was not enough to make the project a "proposal" under NEPA. The court gave weight to agency regulations providing that tentative funding was a preliminary decision prior to the final decision in which the project was given greater scrutiny.[57]

City of Boston distinguished NEPA cases decided under the Federal Highway Act holding that the location approval of a highway was subject to NEPA.[58] Location approval at that time was a requirement in the FHWA regulations that authorized FHWA to approve the location of a highway. The *City of Boston* court noted that location approval was a commitment of federal funds for a highway at the approved location, and that additional federal review focused only on design. The court also stated that highways received approval in a series of stages that could be compared to successive reviews of architect plans, so that it was acceptable to select one of the approval stages as a federal commitment. Airport development grants required only a single final approval, so that preliminary tentative funding was not enough to trigger NEPA.

The court's characterization of the federal highway approval process may no longer be correct, and the early highway cases decided when location approval was required may no longer apply. As noted earlier, FHWA regulations presently state that FHWA approval following NEPA compliance "is considered acceptance of the general project location." The regulation also states that this approval "does not commit the Administration to approve any future grant request to fund the preferred alternative."[59] A court could interpret this regulation to mean that location approval as now defined is not a federal commitment that is sufficient to trigger the application of NEPA.

e. Does NEPA Apply to Defederalized Projects?

Cases arise in the federal highway program in which a state transportation project becomes federalized, but the state then attempts to defederalize the project by withdrawing it from the federal program. The question is whether NEPA still applies. In an early leading case, *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dept. (I)*,[60] the state attempted to shift a highway under construction to state funding when an appeal had been taken on the state's failure to prepare an impact statement. The court held the highway was still subject to NEPA.

Scottsdale Mall v. State of Indiana[61] is another leading case that did not allow state defederalization of a highway. The highway had gone through design and preliminary engineering stages with federal funding. Suit was brought challenging the state's failure to prepare an impact statement when the state was about to begin right-of-way acquisition. When the federal district court ruled an impact statement was necessary, the state attempted to "deprogram" the project by refunding the amount received for this project and applying it to other projects. The court decided that federal approvals and the receipt of federal funds had so federalized the project that the state's attempted withdrawal did not make NEPA inapplicable.[62]

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[54] 23 C.F.R. § 771.113(b).

[55] 23 U.S.C.A. § 106(a). (Supp. 2001).

[56] 464 F.2d 254 (1st Cir. 1972). *Accord*, Friends of Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975) (approval of airport plan).

[57] Compare Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) (*contra* and City of Boston distinguished when federal housing department made federal mortgage insurance and subsidy commitment for private housing project).

[58] Lathan v. Volpe (I), 455 F.2d 1111 (9th Cir. 1971); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971). *aff'd on other grounds*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). *Contra*, Citizens for Balanced Env't & Transp. v. Volpe, 376 F. Supp. 806 (D. Conn.) (route revision approval and continued compliance to remain eligible for federal funding not enough to make NEPA applicable*), rev 'd on other grounds per curium*, 503 F.2d 601 (2d Cir. 1974), *cert. denied*, 423 U.S. 870 (1975). *See* Comment, *Environmental Attacks on Highway Planning Under NEPA? When is There 'Federal Action'?*, 7 CONN. L. REV. 733 (1975).

[59] 23 C.F.R. § 771.113(b). *See also* Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974) (neither route location nor design approval creates contractual obligation on the part of the federal government to reimburse the state for costs incurred in a federal-aid highway project).

[60] 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).

[61] 549 F.2d 484 (7th Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978). *See also* Ross v. Federal Highway Admin., 162 F.3d 1046 (10th Cir. 1998) (defederalization of highway not allowed when supplemental impact statement process has begun).

[62] For a case containing a suggestion that a state's refunding of federal money already spent on construction

The court held the timing of the withdrawal was the significant factor, and that there was a point of no return beyond which defederalization of a highway project could not occur. The court did not have to decide when a highway becomes irrevocably federal. It held that under the facts in the case this point had been reached, especially because the federal government remained involved with the highway up to the point of right-of-way acquisition. Other cases refused to recognize attempts to defederalize transportation projects that occurred after federal funding had been authorized.[63]

Defederalization occurred in most of these cases after a court challenge was brought against the state for failure to comply with NEPA. For example, in *Scottsdale Mall*, the leading defederalization case, the court did not base its decision refusing to find defederalization on the state's intent to avoid NEPA compliance, but on the timing of the state's attempted withdrawal from the federal-aid highway program. However, the state's intent to avoid NEPA compliance may have been one of the factors behind the decision that defederalization had not occurred.

In *Macht v. Skinner*,[64] a court held a state could withdraw a request for federal funds for rolling stock for a light rail project because federal funding would delay the project by triggering NEPA. The court held the project was not federal because the state-funded part of the project had been properly segmented. These cases do not exhaust all the situations in which states may attempt to defederalize highway projects.

f. What is the Consequence of Failing to Apply NEPA in a Timely Fashion?

i. Availability of a Preliminary Injunction.—NEPA does not provide for preliminary injunctions or any other remedy, but there is extensive case law on the availability of preliminary injunctions under NEPA.[65] Plaintiffs in highway and other transportation project cases often seek a preliminary injunction to stop work on the project until an impact statement is prepared. Preliminary injunctions under NEPA are based on a multifactor rule the federal courts usually apply when they decide whether a preliminary injunction is necessary. This rule requires courts to consider the plaintiff's probability of success on the merits, a balancing of the harm to the plaintiff if an injunction is not granted against the harm to the defendant if an injunction is granted, and the public interest affected.[66]

In NEPA cases the most important issue courts have faced is to decide when the failure to grant a preliminary injunction will cause irreparable harm to a plaintiff. Some courts had adopted a NEPA exception to the irreparable harm requirement. This exception allowed a court to issue a preliminary injunction once a substantial violation of NEPA had been shown without detailed consideration of the usual equity principles required by the multifactor test.[67]

Supreme Court cases considering preliminary injunctions under other environmental statutes have cast doubt on the NEPA exception to the traditional multifactor test. These cases hold that an injunction is not available as of right under environmental statutes and that traditional equity principles apply.[68] The Supreme Court did say in one of these decisions that in most cases the "balance of harm" will usually favor an injunction under environmental statutes.[69] If applied to NEPA, the Supreme Court cases would make it more difficult to grant plaintiffs a preliminary injunction than it is under the NEPA exception cases.

The lower federal courts have not yet determined whether and to what extent the Supreme Court decisions affect the availability of preliminary injunctions in NEPA cases.[70] The Seventh Circuit, in a case that did not concern a highway project, held that the Supreme Court decisions require application of the traditional equity rules in NEPA eases.[71] A district court agreed in a NEPA highway case.[72] The First Circuit did not agree with this interpretation in a NEPA case that challenged an offshore drilling project.[73]

When a claim of irreparable harm is made, courts will find sufficient harm when a clear and tangible harm to the environment will occur if a preliminary injunction were not granted.[74] The courts have not found harm when the harm was minimal, or when an

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would defederalize it, see Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978).

[63] Highland Coop. v. City of Lansing, 492 F. Supp. 1372 (W.D. Mich. 1980) (federal funds authorized for land acquisition and state continued to submit plans to federal agency); Sierra Club v. Volpe, 351 F. Supp. 1002 (N.D. Cal. 1972) (state withdrew project after federal funding authorized and NEPA suit filed).

[64] 715 F. Supp. 1131 (D.D.C.), *aff'd without opinion*, 889 F.2d 291 (D.C. Cir. 1989).

[65] NEPA LAW AND LITIGATION, *supra* note 7, at § 4.10[2].

[66] NEPA LAW AND LITIGATION, *supra* note 7, at § 4.10[2][B].

[67] NEPA LAW AND LITIGATION, *supra* note 7, at § 4.10 [2][C]. For a case summarizing the NEPA exception, see State of Cal. v. Bergland, 483 F. Supp. 465, *aff'd, rev'd and remanded on other grounds sub nom.*, State of Cal. v. Block, 690 F.2d 753 (9th Cir. 1982). For an early highway case applying the exception, see Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975).

[68] Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987) (Alaska National Interest Lands Conservation Act); Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (Clean Water Act).

[69] Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987).

[70] *See* Rubenstein, *Injunctions under NEPA after Weinberger v. Romero-Barcelo and Amoco Production Co. v. Village of Gambell,* 5 WIS. ENVTL. L.J. 1 (1998).

[71] State of Wis. v. Weinberger, 745 F.2d 412 (7th Cir. 1984).

[72] Vine Street Concerned Citizens v. Dole, 604 F. Supp. 509 (E.D. Pa. 1985).

[73] Sierra Club v. Marsh, 872 F.2d 497 (lst Cir. 1989).

[74] Steubing v. Brinegar, 511 F.2d 489 (2nd Cir. 1975) (bridge); Ross v. Federal Highway Admin., 972 F. Supp. 552 (D. Kan. 1997) (highway).

action was in its preliminary or planning stage.[75] Harm to the defendant, especially when it arises from a delay in a project, may lead a court to refuse an injunction, but a court may hold that compliance with NEPA justifies any delay that might occur.[76] The "public interest" is the final factor courts consider when they decide whether to grant an injunction. For example, the need to correct a dangerous intersection may lead a court to deny an injunction in a highway case.[77] Other courts find a public interest in the implementation of NEPA that outweighs other factors they consider when they decide whether they should grant a preliminary injunction.[78]

ii. Remedy Granted by Preliminary Injunction.—If a court grants a preliminary injunction it will usually enjoin all work on a project until an adequate impact statement is prepared. A court may also specify schedules and timetables for the submission of an impact statement.[79] If a court cannot conclude that an impact statement is required, it may remand the case to the agency to correct deficiencies in the environmental analysis.[80]

An important issue in transportation project cases is whether a court will enjoin work on an entire project or grant a partial preliminary injunction that allows work on some of the project to continue while the agency is preparing an impact statement or revised environmental assessment. The courts will enjoin the entire project if they find a highway was planned as a single entity, and that the environmental impacts of the first stage of a highway project will affect the second.[81] They will grant a partial injunction if it is necessary to allow part of a project to proceed to remedy public safety problems or provide necessary access.[82]

[75] American Public Transit Ass'n v. Goldschmidt, 485 F. Supp. 811 (D.D.C. 1990) (regulations authorized preliminary planning and acquisition of buses for the handicapped).

[76] Ross v. Federal Highway Admin., 972 F. Supp. 552 (D. Kan. 1997) (highway).

[77] Public Interest Research Group of Michigan (PIRGIM) v. Brinegar, 517 F.2d 917 (6th Cir. 1975). *But see* Highland Coop. v. City of Lansing, 492 F. Supp. 1372 (W.D. Mich. 1980) (delay in constructing new boulevard may not be harmful).

[78] Provo River Coalition v. Pena, 925 F. Supp. 1518 (D. Utah 1996).

[79] NEPA LAW AND LITIGATION, *supra* note 7, at § 4.10[2][i]. *See* Lathan v. Volpe (I), 455 F.2d 1111 (9th Cir. 1971) (highway case).

[80] National Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997) (timber cutting; good discussion of remedy); Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985) (wetlands development).

[81] Highland Coop. v. City of Lansing, 492 F. Supp. 1372 (W.D. Mich. 1980).

[82] City of South Pasadena v. Volpe, 418 F. Supp. 854, as amended, 424 F. Supp. 626 (C.D. Cal. 1976) (public safety); Arkansas Community Org. for Reform Now v. Brinegar, 398 F. Supp. 685 (E.D. Ark. 1975) (access and need for freeway), *aff'd mem.*, 531 F.2d 864 (8th Cir. 1976); Society for Protection of New Hampshire Forests v. Brinegar, 381 F. Supp. 282 (D.N.H. 1974) (dangerous bridge).

3. The Environmental Assessment Process: When Must an Impact Statement Be Prepared?

a. Tests for Finding an Action "Major" and Determining Impacts to Be "Significant"

NEPA requires federal agencies to prepare impact statements on "major" federal actions that have a "significant" effect on the human environment. Some courts have adopted a "dual" standard that requires a finding that both the "major" federal action and significance requirements are met. Other courts have adopted a "unitary" standard that requires a finding that a federal action is "major" once a court has determined that it is significant.[83] CEQ adopted the unitary standard in its regulations.[84]

Courts that apply the dual standard have not been too helpful in providing a definition of what a "major" federal action is, as they have decided this question on a case-by-case basis. In the NEPA highway cases, one court held that a $14 million bridge with 60 percent federal funding was a major action,[85] while another court held that a replacement bridge was not a major action.[86] CEQ regulations allow federal agencies to adopt categorical exclusions from the impact statement requirement, and FHWA, like other federal agencies, has used this option to determine which actions are so minor that an impact statement is not required.[87]

The test for determining when a major federal action is significant was stated by the Supreme Court in *Marsh v. Oregon Natural Resources Council*.[88] The Court reviewed the failure of a federal agency to prepare a supplemental rather than an initial impact statement, but the decision clearly applies in both situations. The Court settled a conflict in the lower federal courts on the appropriate judicial review standard to apply to agency decisions that an impact statement is not necessary. The Court held that the "arbitrary and capricious" judicial review standard that requires deference to agency decisions was controlling because the significance question in the case was a factual dispute.

The dispute turned on the accuracy of new information brought to the agency's attention and whether it undermined the agency's initial environmental evaluation. Experts had expressed conflicting views on this question, and the Court held that in this situation the agency must have the

[83] NEPA LAW AND LITIGATION, *supra* note 7, at § 8.06[1]. Unitary standard: Minnesota Public Interest Research Group v. Butz (I), 498 F.2d 1314 (8th Cir. 1974) (wilderness area); City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975).

[84] 40 C.F.R. § 1508.18 ("major reinforces but does not have a meaning independent of significantly").

[85] Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972).

[86] Sierra Club v. Hassell, 636 F.2d 1095 (5th Cir. 1981).

[87] *See* § 2.A.3.c., *infra*.

[88] 490 U.S. 360 (1989). *See* Mandelker, *NEPA Alive and Well: The Supreme Court Takes Two*, 19 ENVTL. L. REP. 10385 (1989).

discretion to rely on the opinions of its own experts. But the Court added that "courts should not automatically defer" to the agency's decision without carefully reviewing the record and satisfying themselves that the agency had made a reasoned decision. This is a restatement of the view that courts in environmental cases should take a "hard look" at agency decision-making.[89]

Since *Marsh*, the federal courts have applied the arbitrary and capricious standard of judicial review when the question is whether an impact statement was necessary.[90] However, some courts have recognized the distinction between factual and legal questions noted in *Marsh*. Courts that applied a more rigorous "reasonableness" standard when reviewing a decision not to prepare an impact statement have continued to apply this standard to threshold legal questions that determine whether NEPA applies.[91]

Courts necessarily review agency findings on the significance of their actions on a case-by-case basis. In a number of cases, the courts have upheld agency findings that a highway project did not have a significant effect.[92] Other highway cases have reached a contrary conclusion.[93] For example, in *Joseph v. Adams*,[94] the court held that the extension of a highway in a rural area at the edge of a city had significant environmental effects. The court found that a number of environmental effects were not adequately discussed, including effects on natural habitats, wetlands, land use, and noise levels adjacent to the highway.

In *National Parks & Conservation Ass'n v. Federal Aviation Admin.*,[95] plaintiffs contended that the Federal Aviation Administration (FAA) had incorrectly determined the noise impact of the airport would have "no significant impact" on the surrounding environment even though they estimated that both the number of aircraft and the level of audibility would double. The court held:

> The FAA has substituted its subjective evaluation for that of recreational users instead of attempting to ascertain the actual impact on the users themselves. Given these circumstances, we cannot say that agency action was "rational" or "reasonable" in determining that the airport would have no significant impact from a noise standpoint on the surrounding recreational environment.[96]

b. Environmental Assessment Procedures

CEQ regulations establish a set of procedures federal agencies must follow to determine whether an impact statement is required. Agencies may adopt regulations specifying "categorical exclusions," which are actions that normally do not require the preparation of an impact statement. If an action is not a categorical exclusion, the agency must carry out an environmental assessment to determine whether an impact statement is necessary. If the agency decides an impact statement is unnecessary, it adopts a Finding of No Significance (FONSI).

Although NEPA refers only to the preparation of a single "statement," the regulations require the preparation of draft and final EISs if an impact statement is necessary.[97] Draft impact statements are sent to public agencies and the public for comment. The final impact statement is followed by a supplemental impact statement if substantial changes or "significant" new information or circumstances affect the proposed action or its environmental impact.[98] CEQ also requires the agency to prepare a Record of Decision.[99] The Record of Decision must state what the decision is, discuss alternatives, and state whether all "practicable means" to avoid or minimize environmental harm from the alternative have been adopted.

Whether FHWA could delegate the duty to prepare an impact statement to a state highway agency was an important issue in the early years of NEPA. Congress amended NEPA in 1975 to authorize a delegation to state highway agencies.[100] Although not limited to the highway program, the amendment was a response to a decision in the Second Circuit that made it difficult for

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[89] The Supreme Court reaffirmed the hard look doctrine in Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976), but has never defined what the hard look doctrine means in the context of NEPA cases.

[90] National Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997) (timber cutting; good review of judicial standards); Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990) (bridges); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990) (highway). *See* NEPA LAW AND LITIGATION, *supra* note 7, at § 8.02[4][c].

[91] Goos v. Interstate Commerce Comm'n, 911 F.2d 1283 (8th Cir. 1990).

[92] Committee to Preserve Boomer Lake Park v. DOT, 4 F.3d 1543 (10th Cir. 1993); Town of Rye v. Skinner, 907 F.2d 23 (2d Cir. 1990) (airport improvement), *cert. denied*, 498 U.S. 1024 (1991); Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987) (interstate highway); No East-West Highway Comm., Inc. v. Chandler, 767 F.2d 21 (1st Cir. 1985) (highway modernization project in small town); Lakes Region Legal Defense Fund v. Slater, 986 F. Supp. 1169, 1997 U.S. Dist. LEXIS 19053 (N.D. Iowa 1997); Falls Road Impact Comm. Inc. v. Dole, 581 F. Supp. 678 (E.D. Wis. 1984) (highway), *aff'd per curiam*, 737 F.2d 1476 (7th Cir. 1984); Mount Vernon Preservation Soc'y v. Clements, 415 F. Supp. 141 (D.N.H. 1976) (minor road reconstruction).

[93] Audubon Soc'y of Cent. Arkansas v. Dailey, 977 F.2d 428 (8th Cir. 1992) (bridge through park; third-party mitigation not effective); Citizens Advocates for Responsible Expansion v. Dole, 770 F.2d 423 (5th Cir. 1985).

[94] 467 F. Supp. 141 (E.D. Mich. 1978).

[95] 998 F.2d 1523 (10th Cir. 1993).

[96] *Id.* at 1533.

[97] 40 C.F.R. § 1502.9. For the comparable FHWA regulations see 23 C.F.R. §§ 771.123, 771.125.

[98] 40 C.F.R. § 1502.9(c). *See also* 23 C.F.R. § 771.130.

[99] 40 C.F.R. § 1505.2. *See also* 23 C.F.R. § 771.127.

[100] § 102(2)(D), 42 U.S.C. § 4332(2)(D), reproduced in Section 2A.1., *supra*. *See* Note, *State Preparation of Environmental Impact Statements for Federally Aided Highway Programs*, 4 FORDHAM URB. L.J. 597 (1976).

FHWA to delegate the preparation of impact statements to state highway agencies.[101] The critical provisions of the amendment authorize delegation to a "State agency or official" with statewide jurisdiction and responsibility if "the responsible Federal official" furnishes guidance, participates in, and independently evaluates a state-prepared impact statement.

The delegation amendment has received minimal judicial interpretation. A district court held that delegation is limited to state agencies, and did not include an impact statement prepared by a joint state-city highway agency that had jurisdiction only in a metropolitan area.[102] The courts have held in most cases that federal supervision of impact statement preparation satisfied the requirements of the amendment even though that participation was arguably minimal in some cases.[103]

TEA-21 provides in Title I Section 1205 that a state may contract with a consultant to provide environmental assessments and impact statements if "the State conducts a review that assesses the objectivity of the environmental assessment, environmental analysis, or environmental impact statement prior to its submission to the Secretary."[104]

c. Categorical Exclusions

Some projects may be so minor that an agency can conclude that they will never require the preparation of an impact statement. CEQ regulations recognize this possibility by authorizing agencies to determine under its NEPA procedures whether the environmental impacts of a particular type of action "normally" do not require either an environmental assessment or an impact statement.[105] CEQ has also suggested in a NEPA Guidance publication that agencies should adopt "broadly defined criteria" to identify categorical exclusions.[106] CEQ regulations also state that agency procedures for categorical exclusions "shall provide for extraordinary circumstances in which a normally excluded action may have significant environmental effects."[107]

The FHWA regulations implement CEQ regulations and guidance for categorical exclusions.[108] They are an example of the way in which federal agencies provide for categorical exclusions from NEPA compliance. The FHWA regulations create two categories of categorical exclusions. One category consists of a list of 20 categorical exclusions found to meet CEQ's categorical exclusion requirements.[109] Not all of these categorical exclusions apply to the highway program. The list includes the approval of utility installations along or across a highway facility and the instruction of bicycle and pedestrian lanes.

A second category includes actions that an applicant may propose for FHWA approval as a categorical exclusion.[110] The applicant must show the conditions or criteria for a proposed categorical exclusion are met and that significant environmental effects will not result. The regulations list 13 examples of actions that applicants may propose as categorical exclusions, although the regulations state that the list is not exhaustive. The list is not limited to highway projects, but includes highway modernization, highway safety or traffic operations improvement projects, and bridge rehabilitation. It also includes proposals for the joint use of right-of-way, which could include the development of airspace over highways. This part of the FHWA regulation implements NEPA Guidance that allows agencies to use broadly defined criteria to designate categorical exclusion.

Another FHWA regulation requires appropriate environmental studies to determine if a categorical exclusion is proper.[111] These studies must be carried out for "[a]ny action which normally would be classified as a CE but could involve unusual circumstances." Unusual circumstances include significant environmental impacts and substantial controversy on environmental grounds. The effect of the FHWA regulations is that the categorical exclusion decision can require a finding that the environmental impact of the exclusion is not significant. The significance finding is required as the basis for undertaking "appropriate environmental studies" to determine whether a categorical exclusion is proper and in determining whether FHWA should approve categorical exclusions proposed by state highway agencies. This significance finding is identical

[101] Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp. (I), 508 F.2d 927 (2d Cir. 1974), *vacated and remanded*, 423 U.S. 809 (1975).

[102] Greenspon v. Federal Highway Admin., 488 F. Supp. 1374 (D. Md. 1980).

[103] Lange v. Brinegar, 625 F.2d 812 (9th Cir. 1980); Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976); Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp. (II), 531 F.2d 637 (7th Cir. 1976). *But see* Sierra Club v. Corps of Eng'rs, 701 F.2d 1011 (2d Cir. 1983) (holding FHWA did not independently review critical environmental issues discussed in state impact statement); Essex County Preservation Ass'n v. Campbell, 536 F.2d 956 (1st Cir. 1976) (federal involvement must be serious and significant).

[104] 23 U.S.C. § 112(g). *See* Associations Working for Aurora's Residential Envt. v. Colorado Dep't of Transp., 153 F.3d 1122 (10th Cir. 1998) (oversight held sufficient).

[105] 40 C.F.R. §§ 1501.4(a)(2), 1508.4.

[106] CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263 (1983).

[107] 40 C.F.R. §1508.4. *See* City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.) (in applying exception, agency need only consider excluded action, not entire project), *cert. denied*, 513 U.S. 1043 (1994).

[108] 23 C.F.R. § 771.117.

[109] 23 C.F.R. § 771.117(c).

[110] 23 C.F.R. § 771.117(d). *See* West v. Secretary of the Dep't of Transp., 206 F.3d 920 (9th Cir. 2000) (project not appropriate for documented categorical exclusion); Hell's Canyon Preservation Council v. Jacoby, 9 F. Supp. 2d 1216 (D. Or. 1998) (applying provision in regulation classifying modernization of road as categorical exclusion).

[111] 23 C.F.R. § 771.117(b).

to the finding an agency makes when it decides that an impact statement is not necessary.

The significance issue in categorical exclusion cases arose in *City of Alexandria v. Federal Highway Administration*.[112] The court reviewed a decision by FHWA to approve as a categorical exclusion a traffic management system proposed for a major interstate highway in the Washington, D.C., metropolitan area. The city objected to a ramp metering system, which was not then an action FHWA could approve as a categorical exclusion.[113] FHWA approved the ramp metering system under another categorical exclusion category then in effect. The city objected that FHWA's approval required additional environmental studies because the ramp metering system would divert traffic elsewhere. The court applied the arbitrary and capricious standard of judicial review to the FHWA approval and rejected the city's claim. It found the ramp metering system could be operated without traffic diversion. This case indicates that courts will apply to a significance decision for a categorical exclusion the same arbitrary and capricious judicial review standard the Supreme Court applies to decisions that the environmental impact of an action is not significant.[114]

d. Environmental Assessments and FONSI

As a basis on which to decide whether to prepare an impact statement, CEQ regulations authorize the preparation of an environmental assessment.[115] An environmental assessment is to "[b]riefly provide sufficient evidence and analysis for determining" whether to prepare an impact statement or a FONSI.[116] An environmental assessment must also discuss the need for the proposal, its alternatives, and its environmental impacts. An agency adopts a FONSI if it decides on the basis of the environmental assessment that an impact statement is not necessary.[117]

FHWA regulations elaborate on CEQ requirements. The regulations state that an environmental assessment must: "determine which aspects of the proposed action have potential for social, economic, or environmental impact; [and] identify alternatives and measures which might mitigate adverse environmental impacts…."[118] The FHWA regulations contemplate the possibility that mitigation measures contained in an environmental assessment may make the preparation of an impact statement unnecessary.

CEQ regulations do not authorize the discussion of mitigation measures in environmental assessments, but CEQ has indicated that agencies can rely on mitigation measures to find that an action does not have a significant effect. These measures must be imposed by regulation or submitted as part of the original proposal.[119] The courts have held that agencies may rely on mitigation measures as a basis for deciding that a project does not require an impact statement.[120] CEQ regulations do not require public review of an environmental assessment, but "to the extent practicable" the agency must include the public, as well as applicants and other federal agencies, in the environmental assessment preparation process.[121]

4. Scope and Content of an EIS

a. Scope of the Project That Must Be Considered

i. Program Impact Statements.—An agency may sometimes propose more than one project for approval, or may consider a plan or program that includes a number of individual projects the agency plans to implement after it adopts the plan or program. In this situation, the proper agency response is to consider the preparation of a program impact statement. NEPA does not require or authorize program impact statements, but NEPA practice recognizes them, and CEQ has confirmed that agencies must prepare program impact statements when they are appropriate in these situations.

An EIS must be included "in every recommendation or report on proposals for legislation or other major federal actions significantly affecting the quality of the human environment."[122] As noted earlier, *Kleppe v. Sierra Club*,[123] the leading Supreme Court case that interpreted the "proposal" requirement, also provided guidance on when agencies are required to prepare program impact statements. In *Kleppe,* the plaintiffs argued that a program impact statement was necessary

[112] 756 F.2d 1014 (4th Cir. 1985). *Accord* Hell's Canyon Preservation Council v. Jacoby, 9 F. Supp. 2d 1216 (D. Or. 1998) (applying provision on regulation classifying modernization of road as categorical exclusion).

[113] 23 C.F.R. § 771.117(d)(2).

[114] *See also* National Trust for Historic Preservation v. Dole, 828 F.2d 776 (D.C. Cir. 1987) (court applied arbitrary and capricious standard to uphold categorical exclusion of suicide prevention barrier on park bridge). *But see* Public Interest Research Group v. Federal Highway Admin., 884 F. Supp. 876 (N.J.) (applying reasonableness standard), *aff'd mem.*, 65 F.3d 163 (3d Cir. 1995); *See* Section C.1., *supra*.

[115] 40 C.F.R. §§ 1501.3, 1501.4(a)-(e). *See* Committee to Save Boomer Lake Park v. Department of Transp., 4 F.3d 1543 (10th Cir. 1993) (regulation does not mean an environmental assessment and FONSI are never appropriate if an agency normally requires an impact statement for a certain class of action).

[116] 40 C.F.R. § 1508.9. *See also* 23 C.F.R. § 771.119.

[117] 40 C.F.R. § 1501.4(e).

[118] 23 C.F.R. § 771.119(b).

[119] *CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, Question 40*, 46 Fed. Reg. 18026 (1981).

[120] A leading case is Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982) (exploratory drilling in wilderness area held mitigated). For a highway case see Joseph v. Adams, 467 F. Supp. 141 (E.D. Mich. 1977) (environmental effects of highway extension held not sufficiently mitigated).

[121] 40 C.F.R. § 1501.4(e)(2). *See* Committee to Preserve Boomer Lake Park v. DOT, 4 F.3d 1543 (10th Cir. 1993) (public review not required).

[122] NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(C).

[123] 427 U.S. 390 (1976); *see* § 2.B.4., *supra*.

for a regional coal mining plan. The Court held that a regional EIS is required only if the federal agency has actually made a proposal for a major federal action with respect to an entire region. Contemplation and an underlying study of a project that may be regional in nature do not necessarily result in a proposal for a major federal action. Simply because a federal agency conducts a study with the purpose of acquiring background environmental information to use in analyzing individual local projects does not mean that this study, by itself, is a proposal for a major federal action on a regional basis.

The courts have applied *Kleppe* to federal highway cases. *National Wildlife Federation v. Appalachia Regional Commission*[124] considered a network of highways designed to facilitate development within Appalachia. The original proposal, submitted in 1965, covered 13 states and more than 3,000 miles of road. The major issue was whether NEPA required a programmatic EIS for an ongoing but mostly completed federally-assisted highway development project. Because the development was 80 percent complete, it was clearly well beyond the planning stages. As a practical matter, the Court found that ongoing environmental evaluations would serve little useful purpose. The Court indicated that it would have required a program EIS at the time the project was first proposed.

National Wildlife, nonetheless, makes a number of general observations worthy of note. Regional EIS's should focus on choice of method, general locations, area-wide air quality, and the land use implications of alternate transportation systems.[125] A program impact statement should look forward and take into account "broad issues" relevant to program design.[126] To be effective and to serve its purpose, a program EIS must promote better decision-making.[127] "A multi-phase federal program like a highway regional project is a probable candidate for a programmatic EIS."[128] In light of the *National Wildlife* holding, the EIS must serve some useful purpose and does not have to be prepared for projects already substantially under way.

National Wildlife also indicates that an agency cannot avoid a program EIS by disguising a regional project as an accumulation of smaller unrelated projects.[129] Yet the case further suggests that an agency has discretion to decide whether a program EIS is required and will not be overturned by the courts unless there is a showing of capricious or arbitrary action.[130] *National Wildlife* states that the courts look at two considerations when reviewing an agency's decision: (1) is the program impact statement sufficiently forward-looking so as to make a contribution to the decision-making process, and (2) is the decision maker segmenting the overall program so as to constrict the original environmental evaluation?[131]

ii. Tiered Environmental Impact Statements.—Tiering refers to coverage of general matters in a broad EIS followed by a more narrow analysis. Under CEQ regulations, the subsequent analytical report incorporates by reference the general discussions and concentrates solely on issues specific to a later proposal.[132] Tiering is also appropriate in moving from a broad plan to one that is more narrow as well as from a site specific statement at one stage of a project to a supplemental statement at a later stage.[133] A clear purpose of tiering is to allow a lead agency to focus only on issues that are ripe for discussion and exclude extraneous issues.[134]

CEQ regulations encourage the tiering of EIS's. When an agency prepares a program EIS and later prepares a site-specific statement on a project included within the program impact statement, the site-specific statement may summarize the issues discussed in the program statement by reference. It should concentrate only on environmental issues specific to the subsequent action.[135]

Controversies arise over tiered EIS's when a federal agency adopts a program impact statement for a systemwide project. The question then arises whether the agency must develop a site-specific impact statement for each sub-unit of the systemwide project. *Save our Sycamore v. Metropolitan Atlanta Rapid Transit Authority*[136] holds that the answer to this problem turns on whether the relevant environmental information in the program impact statement parallels that of the subunit project.

Save our Sycamore considered an EIS prepared on an urban mass transit project for the Atlanta metropolitan area. The court concluded that the systemwide program EIS was adequate, and that the Transit Authority was not required to file an EIS in connection with each rapid transit station. *Save our Sycamore* is consistent with earlier decisions holding that a project does not require a site-specific impact statement if its impacts were adequately covered by an earlier program impact statement[137]

The court in *Save our Sycamore* listed four factors it felt were relevant when an agency decides whether to follow a program impact statement with a site-specific impact statement:

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[124] 677 F.2d 883 (D.C. Cir. 1981).

[125] National Wildlife, *supra* at 888 citing 44 Fed. Reg. 56,240 (1979) (DOT Order implementing CEQ's new NEPA regulations).

[126] *Id.* at 888.

[127] *Id.* at 888–90.

[128] *Id.* at 888.

[129] *Id.* at 890.

[130] *Id.* at 889.

[131] *Id.*

[132] 40 C.F.R. § 1508.28.

[133] *Id.*

[134] *Id. See also* Friends of Southeast's Future v. Morrison, 153 F.3d 1059 (9th Cir. 1998) (cannot do general programmatic analysis in site specific impact statement).

[135] 40 C.F.R. § 1502.20.

[136] 576 F.2d 573 (5th Cir. 1978).

[137] *See, e.g.*, Headwaters, Inc. v. Bureau of Land Mgt., 914 F.2d 1174 (9th Cir. 1990); Minn. Pub. Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974) (timber sale).

> 1. A comparison of the cost of the specific project with the cost of the overall project.
>
> 2. Whether the specific project creates environmental issues and problems different from those of the overall project.
>
> 3. Whether information relevant to the specific project parallels that of the project as a whole.
>
> 4. Whether the specific project, if viewed in isolation, would constitute a major federal action for which an environmental impact statement would have to be prepared.[138]

The court cautioned that a holding that a program impact statement adequately covers a later specific project does not necessarily mean that the environmental assessment of the specific project is adequate.

In *Ventling v. Bergland*,[139] property owners and conservation interests sought to enjoin construction of a road that was an element of a timber sale contract. The court held the program impact statement included a comprehensive analysis of the environmental impacts of timber management throughout the national forest, including transportation. The particular forest in question had no feature that would distinguish it from the rest of the forest so far as impacts caused by the building of a road were concerned, so a site-specific statement was not required[140] "[W]here the programmatic environmental impact statement is sufficiently detailed, and there is no change in circumstances or departure from policy in the programmatic environmental impact statement, no useful purpose would be served by requiring a site-specific environmental impact statement."[141]

City of Tenakee Springs v. Block[142] is a similar case in which the court reviewed a site-specific impact statement for a road in a national forest. The court noted that NEPA requires both a programmatic and site-specific impact statement when there are large-scale plans for regional development. A programmatic impact statement had been prepared for the forest, but the court held it was not site specific and did not indicate whether roads should be built. The court rejected the site-specific impact statement prepared for the agency. It held an agency may determine the scope of its actions that are covered by NEPA, but does not have the discretion to determine how specific an impact statement must be in order to comply with NEPA. This is a matter for the courts.

[138] 576 F.2d at 576.

[139] 479 F. Supp. 174 (D.S.D. 1979).

[140] *Id.* at 180.

[141] *Id.* at 180.

[142] 778 F.2d 1402 (9th Cir. 1985).

b. Content of an EIS

i. Is the Impact Statement Adequate? Judicial Review Standards.—Judicial review of the adequacy of an impact statement is known as procedural judicial review,[143] but the standard of review courts apply to the review of EIS's is not entirely clear. In *Marsh v. Oregon Natural Resources Council*,[144] the Supreme Court adopted the "arbitrary and capricious" standard of judicial review for cases in which an agency decides not to prepare an impact statement. The Court has not yet decided whether this standard applies to the judicial review of impact statement adequacy.

Some circuits follow *Marsh* and apply the arbitrary and capricious standard to the review of impact statements.[145] Other circuits continue to review impact statement adequacy by applying a "reasonableness" standard.[146] The Court rejected this standard in *Marsh* as inappropriate for the review of decisions whether to prepare an impact statement.[147] However, *Marsh* indicated that judicial review under the two standards does not differ notably.

Courts must also adopt criteria that define when an impact statement is adequate to assist them in deciding whether the agency was arbitrary and capricious or unreasonable in approving the impact statement. A number of pre-*Marsh* cases often described the rule applied to the review of impact statements as a "rule of reason,"[148] and courts continue to take this view.[149] An important highway case summarized the rules that apply to the review of impact statements:

> [T]he…[impact statement] must set forth sufficient information for the general public to make an informed evaluation, …and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action. [The impact statement gives] assurance that stubborn problems or serious criticisms have not been "swept under the rug."[150]

[143] *See* Note, George K. Posh, *NEPA: As Procedure it Stands, as Procedure it Falls*, 29 WILLAMETTE L. REV. 365 (1993).

[144] 490 U.S. 360 (1989). This case is discussed in Section 2.A.3.a, *supra*.

[145] *E.g.*, Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995) (national forests); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990) (highway).

[146] Or. Natural Resources Council v. Lowe, 109 F.3d 521 (9th Cir. 1997).

[147] *E.g.*, Or. Natural Resources Council v. Lowe, 109 F.3d 521 (9th Cir. 1997) (forest management plan).

[148] Highway cases: Druid Hills Civic Ass'n, Inc. v. FHA, 772 F.2d 700 (11th Cir. 1985); Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989); Sierra Club v. United States Army Corps of Engr's, 701 F.2d 1011 (2nd Cir. 1983); Iowa Citizens for Envtl. Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973).

[149] *E.g.*, Or. Natural Resources Council v. Lowe, 109 F.3d 521 (9th Cir. 1997) (forest management plan).

[150] Sierra Club, 701 F.2d at 1029 (citations omitted). For additional discussion *see* NEPA LAW AND LITIGATION, *supra* note 7, at § 10.05.

ii. Alternatives That Must Be Discussed, Including the Appropriate Level of Detail for Each Alternative.—CEQ has described the requirement that federal agencies discuss alternatives to their actions as the "heart" of the EIS.[151] CEQ regulations state that agencies are to consider the no-action alternative, other "reasonable courses of action," and mitigation measures not in the proposed action.[152] The leading Supreme Court case on an agency's duty to consider alternatives is *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[153] In a case involving proceedings for the licensing of nuclear power plants, the Court adopted a "rule of reason" for the consideration of alternatives that a court of appeals had adopted in an earlier case[154] and added:

> Common sense also teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable to the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.[155]

Section 102(2)(E) of NEPA, which is quoted at the beginning of this section, also requires agencies to consider alternatives to their actions.[156] This section applies even when an agency does not prepare an impact statement, and a leading case has held that it is "supplemental and more extensive" than the duty to consider alternatives in impact statements.[157]

An agency's definition of the purpose of its project can limit the alternatives it is required to discuss.[158] For example, the agency can define an airport project as an "airport expansion" project, and this definition can limit alternatives to those that will meet this need. The courts have usually required agencies to consider alternatives that would carry out the project in a different manner, such as an alternative that would require only a two-lane rather than a four-lane highway.[159] However, some cases do not require consideration of alternative sites or project modifications.[160] Courts have also refused to require consideration of an alternative that requires the abandonment of a proposed project,[161] or an alternative that is speculative or not feasible.[162] Neither must an agency always consider an alternative that would require new legislative or administrative action.[163]

CEQ regulations require the discussion of the no-action alternative, which contemplates that the proposed project will not be built at all.[164] However, in highway cases the courts have almost always upheld the rejection of a no-action alternative because it would not meet the needs the highway would serve.[165]

An agency's discussion of alternatives will be influenced by the range of alternatives it considers, and an agency can considerably narrow its assessment if it considers only a very narrow range of alternatives in addition to the one it proposes. Most courts have held that an agency's decision on the range of alternatives it would consider was reasonable.[166] *Fayetteville Area*

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[151] 40 C.F.R. § 1502.14.

[152] 40 C.F.R. § 1508.25(b).

[153] 435 U.S. 519 (1978).

[154] Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

[155] 435 U.S. at 551.

[156] National Wildlife Fed'n v. Snow, 561 F.2d 227 (D.C. Cir. 1976) (highway regulations).

[157] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123 (5th Cir. 1974). *Accord*, Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

[158] *See* City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999) (upholding transportation and safer objectives for new bridge and rejecting argument that agency should have prioritized environmental goals); Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686 (3d Cir. 1999) (upholding rejection of alignment for rebuilt bridge and building second bridge as alternatives to bridge improvement project); Associations Working for Aurora's Residential Envt. v. Colorado Dep't of Transp., 153 F.3d 1122 (10th Cir. 1998) (mass transit did not meet need of highway project properly defined as a project to relieve traffic congestion); City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir. 1994) (airport expansion); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.) (same), *cert. denied*, 502 U.S. 994 (1991); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990) (must consider alternative partially meeting need for highway project).

[159] Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980). *Accord*, I-291 Why? Ass'n v. Burns, 517 F.2d 1077 (2nd Cir. 1975) (alternative highway routes).

[160] Corridor H Alternatives, Inc. v. Slater, 166 F.3d 368 (D.C. Cir. 1998) (upheld decision to build four-lane highway alternatives; could not adequately address issues such as roadway deficiencies, safety considerations, and regional system linkage); Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569 (9th Cir. 1999) (rejection of alternative for airport enhancement that would have avoided Indian reservation); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.) (airport expansion), *cert. denied*, 502 U.S. 994 (1991); Sierra Club v. United States Dep't of Transp., 664 F. Supp. 1324 (N.D. Cal. 1987) (need not consider repair or alternative alignment for road).

[161] North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990) (need not consider a no build/transit alternative to highway project).

[162] Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426 (10th Cir. 1996) (airport runway expansion); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973) (same).

[163] Farmland Preservation Ass'n v. Goldschmidt, 611 F.2d 233 (8th Cir. 1979) (need not consider alternative that would require governor to withdraw highway from Interstate system).

[164] 40 C.F.R. § 1502.14(2).

[165] *E.g*. North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990); Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943 (10th Cir. 1989); Farmland Preservation Ass'n v. Goldschmidt, 611 F.2d 233 (8th Cir. 1979); Monroe County Conservation Council, Inc. v. Adams, 566 F.2d 419 (2d Cir. 1977), *cert. denied*, 435 U.S. 1006.

[166] City of Carmel-by-the-Sea v. United States DOT, 95 F.3d 892 (9th Cir. 1996) (highway project); Laguna Greenbelt, Inc. v. United States DOT, 42 F.3d 517 (9th Cir. 1994) (tollway); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C.

Chamber of Commerce v. Volpe[167] summarizes the judicial view in these cases. It held that the agency had considered an adequate number of alternatives to the construction of a highway: "[A]n infinite variety of alternatives is permissible…[T]here must be an end to the process somewhere…. So long as there are unexplored and undiscussed alternatives that inventive minds can suggest, without a rule of reason, it will be technically impossible to prepare a literally correct environmental impact statement."[168]

The courts have on occasion held that an agency's examination of alternatives was inadequate. In *Swain v. Brinegar,* [169] the court found that a corridor selection process did not consider in detail any major alternatives. Mere review of the selection process was held inadequate as a consideration of alternatives.[170] Other cases have found that an agency cannot merely state that an alternative was investigated and found to be unsatisfactory. Details must be provided.[171]

However, NEPA does not require that all environmental concerns be discussed in exhaustive detail.[172] The only requirement is that alternatives be discussed in a reasonable manner so as to permit a reasonable choice.[173] For example, the requirement that an agency need not discuss speculative alternatives[174] means that a discussion of extreme possibilities is not necessary.[175] The courts note that requiring the consideration of remote and speculative purposes serves no purpose under NEPA.[176]

A discussion of alternatives should be presented in a straightforward, compact, and comprehensible manner capable of being understood by the reader. Extensive cross referencing should be avoided.[177] In most cases the courts have upheld an agency's discussion of alternatives that would require the abandonment of a project,[178] and of alternatives that would require the agency to carry out the project in a different manner.[179]

There is no requirement under NEPA that the discussion of alternatives cover a specified number of pages. All that is required is that an agency reasonably study, develop, and describe alternatives to the proposed action in a detailed statement.[180] However, one court has found that while quantity does not equal quality, an assessment of alternatives that only covered two pages raises a red flag that the alternatives have not been discussed in great enough detail.[181] Another court has stated that brevity alone does not mean that a discussion of alternatives in an EIS is inadequate.[182]

iii. Segmentation.—Segmentation problems usually arise when a federal agency plans a number of related actions but decides to prepare an EIS on each action individually. In these circumstances, courts must decide whether an agency's actions that significantly affect the environment have been improperly segmented from other related actions. The principal issue in these cases is whether a group of related actions constitutes a single action for purposes of filing an EIS.

Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without "significant" impact.[183] Courts can prohibit segmentation, or require a single EIS for two or more projects, if an agency has abused the underlying purposes of NEPA.[184] To prevent this abuse, a court may prohibit segmentation of a proposed action when those segmented actions have cumulative or synergistic environmental impacts.[185] This approach applies even when a project is still in the planning stage if it is connected to one the agency has formally proposed.[186]

CEQ regulations require "connected actions" to be considered together in a single EIS.[187] "Connected actions" are defined as actions that: "(i) Automatically

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Cir.) (airport expansion), *cert. denied*, 502 U.S. 994 (1991); Monroe County Conservation Council, Inc. v. Adams, 566 F.2d 419 (2d Cir. 1977) (highway), *cert. denied*, 435 U.S. 1006.

[167] 515 F.2d 1021 (4th Cir. 1975).

[168] *Id.* at 1027.

[169] 517 F.2d 766 (7th Cir. 1975).

[170] *Id.* at 775.

[171] Rankin v. Coleman, 394 F. Supp. 647 (E.D.N.C. 1975), *modified on other grounds*, 401 F. Supp. 664 (E.D.N.C. 1975) (alternative of improving existing road).

[172] Britt v. United States Army Corps of Engr's, 769 F.2d 84 (2d Cir. 1985). *See also* Monarch Chemical Works, Inc. v. Exxon, 466 F. Supp. 639 (D. Neb. 1979); State of Ohio, ex rel. Brown v. EPA, 460 F. Supp. 248 (S.D. Ohio 1978); City of New Haven v. Chandler, 446 F. Supp. 925 (D. Conn. 1978).

[173] Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

[174] National Indian Youth Council v. Watt, 664 F.2d 220 (10th Cir. 1981); Save Lake Washington v. Frank, 641 F.2d 1330 (9th Cir. 1981); Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir 1975).

[175] Carolina Envtl. Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975).

[176] Lake Erie Alliance for Protection of Coastal Corridor v. United States Army Corps of Engr's, 526 F. Supp. 1063 (W.D. Penn. 1981), *aff'd*, 707 F.2d 1392 (3rd Cir.), *cert. denied*, 464 U.S. 915 (1983).

[177] Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir. 1975).

[178] North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990) (highway); Suburban O'Hare Comm'n v. Dole, 787 F.2d 186 (7th Cir.) (airport), *cert. denied*, 479 U.S. 847 (1986); Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978) (highway).

[179] Corridor H Alternatives v. Slater, 166 F.3d 366 (D.C. Cir. 1999) (highway); Citizens Expressway Coalition v. Lewis, 523 F. Supp. 396 (E.D. Ark. 1981) (same).

[180] Conservation Council of N.C. v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972).

[181] Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105 (D.N.H. 1975).

[182] Woida v. United States, 446 F. Supp. 1377 (D. Minn. 1978).

[183] Coalition on Sensible Transp. (COST) v. Dole, 826 F.2d 60 (D.C. Cir. 1987); Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987).

[184] Environmental Defense Fund v. Marsh, 651 F.2d 983 at 999 (5th Cir. 1981), citing Kleppe, *supra*.

[185] *Id.*

[186] *Id.*

[187] 40 C.F.R. § 1508.25(a)(1).

trigger other actions which may require environmental impact statements; (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) Are interdependent parts of a larger action and depend on the larger action for their justification."[188]

Thomas v. Peterson[189] illustrates how these CEQ regulations are applied. The controversy in this case centered on a road to be built to a logging site. The issue was whether the road reconstruction and the timber sales were "connected actions." The court in *Thomas* discussed the factors it considered in determining whether these actions were connected:[190]

> 1. How is the road characterized? What is the reason for building the road?
>
> 2. What is the statement of purpose in the environmental assessment?
>
> 3. Why was the "no action alternative" rejected?
>
> 4. What is the "benefit" of the cost-benefit analysis?
>
> 5. Are there other benefits claimed?
>
> 6. Is the road project segmented to accommodate the connected act?

Applying these tests to the timber road, the Court found there was a clear nexus between the timber contracts and the improvements to be made to the road. The Court concluded that: "It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales."[191]

FHWA has adopted regulations for deciding when segmentation is appropriate.[192] These regulations incorporate factors adopted in the court decisions and authorize the segmentation of any project that:

> (1) connects logical termini and is of sufficient length to address environmental matters on a broad scope;
>
> (2) has independent utility or independent significance, i.e., is usable and a reasonable expenditure even if no additional transportation improvements in the area are accomplished; and
>
> (3) will not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.[193]

Highway segmentation cases hinge on the weight given each of these three criteria by the courts. "[I]n the context of a highway within a single metropolitan area—as opposed to projects joining major cities—the 'logical terminus' criterion is usually elusive"[194] because it is difficult to identify. Courts have usually assigned this factor only modest weight and have instead focused on whether a segment has independent utility.[195]

Segmentation is usually approved in cases that involve a network of highways within a metropolitan area. In these cases an EIS is usually not required on the entire system.[196] Impact statements may be prepared on individual segments of the metropolitan highway system unless the segmentation is clearly arbitrary.[197] The segment must also not irretrievably commit future resources.[198] The courts also uphold segmentation when the segment has independent utility, such as the relief of traffic congestion.[199] In a case concerning an airport enhancement project, the court held that different phases of the airport expansion were not improperly segmented.[200]

Where segmentation is disapproved in federal highway cases it is usually because of improper termini. In these cases, the project termini are usually illogical and often designated so that nondisruptive segments are created. But the construction of those nondisruptive segments then commits the agency to construction of a segment that might have adverse environmental impacts.[201]

In *Dickman v. City of Santa Fe*,[202] plaintiffs claimed that the City of Santa Fe, acting as a lead agency, improperly segmented a portion of a proposed highway to avoid an EIS as required by NEPA. The proposed highway was to be built in four stages, with only the first three to receive federal funding. The city did not consider the fourth phase as part of the same project

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[188] *Id.*, cited by Save the Yaak Comm. v. Block, 840 F.2d 715 (9th Cir. 1988).

[189] Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

[190] *Id.* at 758.

[191] *Id.* at 758. *But see* Airport Neighbors Alliance v. United States, 90 F.3d 426 (10th Cir. 1996) (airport expansion not related to other airport improvement projects); Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174 (9th Cir. 1990) (logging access road did not imply further development).

[192] 23 C.F.R. § 771.111(f) (1987).

[193] *Id.*

[194] COST, *supra* note 183, at 69.

[195] *Id.* at 69. *See also* Piedmont Heights Civic Club v. Moreland, 637 F.2d 430 (5th Cir. 1981).

[196] Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973).

[197] Daly v. Volpe, 514 F.2d 1106 (9th Cir. 1975).

[198] College Garden Civics Ass'n v. United States Dep't of Transp., 522 F. Supp. 377 (D. Md. 1981); River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D. Va. 1973); Movement Against Destruction v. Volpe, 361 F. Supp. 1360 (D. Md. 1973).

[199] Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs, 87 F.3d 1242 (11th Cir. 1996); Conservation Law Found. of New England v. FHA, 24 F.3d 1465 (1st Cir. 1994); Save Barton Creek Ass'n v. FHA, 950 F.2d 1129 (5th Cir.), *cert. denied*, 505 U.S. 1220 (1992); Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990) (bridge had logical terminus), *cert. denied*, 498 U.S. 1109 (1991); Coalition on Sensible Transp. v. Dole, 826 F.2d 60 (D.C. Cir. 1987); Adler v. Lewis, 675 F.2d 1085 (9th Cir. 1982). *See also* Lange v. Brinegar, 625 F.2d 812 (9th Cir. 1980); National Wildlife Fed'n v. Lewis, 519 F. Supp. 523 (D. Conn. 1981); Daly, *supra* note 197, at 1106.

[200] Morongo Bank of Mission Indians v. Federal Aviation Admin., 161 F.3d 569 (9th Cir. 1999).

[201] Swain, *supra* note 103, at 766. *See also* Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); Patterson v. Exon, 415 F. Supp. 1276 (D. Neb. 1976). *Cf.* Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985 (6th Cir. 1990).

[202] 724 F. Supp. 1341 (D.N.M. 1989).

and thus did not include it in the EIS. The court found that the evidence was "overwhelming" that the success of the first three phases depended on the completion of the fourth phase. The phases were "so interdependent that it would be unwise or irrational to complete one without the other."[203] In addition, the completion of the first three phases necessarily committed expenditure of funds for the fourth phase, or else the road would not serve any useful purpose.[204]

iv. Cumulative, Indirect, and Secondary Impacts.—An agency must also consider the cumulative impacts of its actions. This duty is different from the prohibition on improper segmentation of actions.[205] CEQ regulations define cumulative impacts as "the incremental impact of the action when added to past, present, and reasonably foreseeable future actions."[206] An agency must consider the cumulative impacts of other projects even if they are not projects that will be carried out or approved by the agency.

The Supreme Court case of *Kleppe v. Sierra Club*, discussed *supra*, presents a problem in the interpretation of an agency's duty to discuss cumulative impacts. That case held that an agency is required to prepare an impact statement only on final "proposals" for an action. The question that arises is whether an agency, in its cumulative impact analysis, must consider the cumulative impact of actions that are not yet final proposals. Most cases have answered this question in the negative.[207] The cases have also considered whether an agency's consideration of cumulative impacts was adequate.[208]

NEPA is also concerned with indirect as well as direct environmental effects.[209] Any agency should discuss secondary, or indirect, effects in impact statements and in environmental assessments that determine whether an EIS is necessary.[210] The indirect effects to be considered must, however, be reasonably foreseeable.[211] An agency is only required to reasonably forecast; speculation is not required.[212]

City of Davis v. Coleman [213] is a leading case that addresses the duty to consider the indirect and secondary effects of highway projects. The court held that an impact statement on a proposed highway interchange must consider the indirect impacts of the interchange, such as population growth and land development in the area. Other cases have considered the same issue.[214]

v. Mitigation.—NEPA requires that an agency must discuss "any adverse environmental effects that cannot be avoided should the proposal be implemented." This requirement means that an EIS must discuss measures that can mitigate harmful environmental impacts.[215] Mitigation, according to CEQ regulations, can be accomplished by five different means:[216]

1. Avoid the impact altogether by not taking action.

2. Minimize the impact by limiting the magnitude of the action.

3. Rectify the impact by repairing the affected environment.

4. Reduce the impact over time by appropriate maintenance operations during the life span of the action.

5. Compensate for the impact by replacing resources.

A look at the mitigation measures that could be taken in a project makes sense in light of the goals and purposes of NEPA, one of which is to force agencies to take a hard look at environmental consequences. A discussion of mitigation measures for projects covered by an EIS should most certainly help the agency make a more informed decision.

Problems often arise, however, in deciding what the duty to discuss mitigation measures means. Must mitigation measures be discussed in sufficient detail only for purposes of evaluation, or must a fully developed mitigation plan be laid out?

The Supreme Court in *Robertson v. Methow Valley Citizens Council*[217] adopted the former approach. In *Robertson*, citizens groups challenged a Forest Service

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[203] *Id.* at 1346, citing Park County Resource Council v. United States Dep't of Agriculture, 817 F.2d. 609, 623 (10th Cir. 1987).

[204] *Id.* at 1347.

[205] COST, 826 F.2d at 70.

[206] 40 C.F.R. § 1508.7. *See* Coalition on Sensible Transp. v. Dole, 826 F.2d 60, 70 (D.C. Cir. 1987) (interpreting regulation and holding that impact statement may incorporate prior studies on related projects).

[207] Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980) (road upgrading speculative); Clairton Sportsmen's Club v. Pennsylvania Turnpike Comm'n, 882 F. Supp. 455 (W.D. Pa. 1995) (highway not yet proposed). *But see* Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985) (*contra*). *See also* City of Carmel-by-the-Sea v. United States DOT, 95 F.3d 892 (9th Cir. 1996).

[208] Discussion held adequate: *E.g.*, Conservation Law Found. of New England v. FHA, 24 F.3d 1465 (1st Cir. 1994) (highway); Coalition on Sensible Transp. v. Dole, 826 F.2d 60 (D.C. Cir. 1987) (same).

Discussion held inadequate: *E.g.*, City of Carmel-by-the-Sea v. United States DOT, 95 F.3d 892 (9th Cir. 1996) (impact of highway project on natural resources).

[209] MPIRG v. Butz, 498 F.2d 1314 (8th Cir. 1974).

[210] Conservation Council of N.C. v. Costanzo, 398 F. Supp. 653 (E.D.N.C. 1975), *aff'd*, 528 F.2d 250 (4th Cir. 1975).

[211] Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973); State v. Andrus, 483 F. Supp. 255 (D.N.D. 1980). *See also* 40 C.F.R. § 1508.8.

[212] 483 F. Supp. at 260.

[213] 521 F.2d 661 (9th Cir. 1975).

[214] City of Carmel-by-the-Sea v. United States DOT, 95 F.3d 892 (9th Cir. 1996) (growth impacts adequately considered when highway required by existing development); Coalition on Sensible Transp. v. Dole, 826 F.2d 60 (D.C. Cir. 1987) (discussion of impact of highway on communities that relied on tourism held inadequate); Laguna Greenbelt, Inc. v. United States DOT, 42 F.3d 517 (9th Cir. 1994) (discussion of growth-inducing effect of tollroad held adequate); Mullin v. Skinner, 756 F. Supp. 904 (E.D.N.C. 1990) (must discuss growth-inducing effects of bridge).

[215] Robertson v. Methow Valley Citizens Council, *supra*.

[216] 40 C.F.R. § 1508.20.

[217] 490 U.S. 332 (1989).

special use permit for the development and operation of a ski resort on national forest land. The Forest Service prepared an EIS on the project, which included an outline of steps that might be taken to mitigate adverse environmental impacts. Mitigation procedures were intended primarily for local and state governments that controlled the land to be affected by these measures. Plaintiffs claimed that the Forest Service did not comply with NEPA because the impact statement did not provide a detailed mitigation action plan. In the alternative, they argued, the Forest Service had an obligation to provide a "worst case" analysis if it did not have enough information to make definite plans.

The Supreme Court, in a unanimous opinion, held that NEPA did not impose a substantive duty upon federal agencies to include in their EIS a fully developed mitigation plan. The Court rejected the claim that the agency had to prepare a mitigation plan by relying on the purposes and powers of NEPA: "[I]t would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act."[218] A federal agency is required to consider mitigation measures only to the extent that they enable the agency to make a reasoned and informed decision that properly considers all alternatives.

It probably comes as no surprise, then, that the Supreme Court also rejected the worst case analysis requirement. Earlier CEQ regulations did require that uncertain environmental harms be addressed by a worst case analysis, along with the probability or improbability of their occurrence.[219] In 1986, CEQ amended this regulation and required agencies only to provide a credible summary of scientific evidence relevant to evaluating the environmental impact.[220] The Court held that the new regulations better facilitated reasoned decision-making by requiring an evaluation of viable possibilities and by not overemphasizing highly speculative harms.[221]

Robertson also analyzed the interrelationship of federal, state, and local agencies when considering mitigation measures. In this case, environmental problems could not be mitigated unless nonfederal agencies took action.[222] If state and local government bodies have jurisdiction over the areas in which adverse effects must be mitigated, and if these same agencies have the authority to mitigate, a federal agency cannot be expected to act until these local agencies conclude which mitigation measures they deem appropriate. Furthermore, because NEPA places no substantive duty on federal agencies to develop mitigation measures, these agencies should not be required to obtain assurances from third parties that these measures will be taken.

Several cases have held impact statements inadequate because they did not contain or adequately discuss mitigation measures.[223] In a number of other cases the courts have held that mitigation measures included in an impact statement were adequate.[224] As the court held in *Laguna Greenbelt, Inc. v. United States DOT*,[225] a tollway case, "NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated."[226]

The court held that the discussion of mitigation measures was reasonably complete even though the measures might not be completely successful. For example, habitat regeneration might be difficult due to the large size of the impacted area and the poor likelihood of successful regeneration. Wetland projects in the area had not been established long enough to determine whether wetland mitigation measures would be successful. The court also held that assurances that mitigation measures would succeed need not be based on scientific evidence and studies.

Problems may arise if mitigation requirements contained in an impact statement are not implemented. The courts have universally held there is no implied private cause of action to enforce NEPA,[227] and have applied this rule to hold that a cause of action is not available to enforce mitigation requirements contained in impact statements.[228]

[218] *Id.* at 353.

[219] 40 C.F.R. § 1502.22 (1985).

[220] 40 C.F.R. § 1502.22(b) (1987).

[221] Robertson, *supra* note 215*,* at 355–56.

[222] *Id.* at 352 (off-site effects included impact on air quality and the habitat of a wild deer herd).

[223] City of Carmel-by-the-Sea v. United States DOT, 123 F.3d 1142 (9th Cir. 1997) (wetlands mitigation).

[224] Laguna Greenbelt, Inc. v. United States DOT, 42 F.3d 517 (9th Cir. 1994) (tollway); Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir. 1992) (airport improvement); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.) (airport expansion), *cert. denied*, 502 U.S. 994 (1991); Provo River Coalition v. Pena, 925 F. Supp. 1518 (D. Utah 1996) (highway).

[225] 42 F.3d 517 (9th Cir. 1994).

[226] *Id.* at 528.

[227] Noe v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434 (5th Cir. 1981) (claim based on failure of system to stay within noise levels specified in impact statement).

[228] Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977) (failure to implement mitigation measure for dune stabilization). *See* RICHARD A. CHRISTOPHER & MARGARET L. HINES, ENFORCEMENT OF ENVIRONMENTAL MITIGATION COMMITMENTS IN TRANSPORTATION PROJECTS: A SURVEY OF FEDERAL AND STATE PRACTICE (NCHRP Legal Research Digest No. 42, 1999).

vi. Responses to Comments.—In order to ensure that an EIS is adequate, NEPA requires that "prior to making any detailed statement, the responsible official shall consult with and obtain the comments of a federal agency which has jurisdiction by law or special expertise with respect to the environmental impact involved."[229] "CEQ regulations extended this responsibility to include the duty to obtain comments from any interested agency and the public."[230]

Because federal agencies are required to assess environmental issues by taking a "hard look" at those issues, it should follow that they are required to obtain advice from other federal agencies on the environmental impact of a project if that agency has more expertise in the affected area. "The obvious purpose for requiring such considerations is to obtain views from interested agencies and to ensure an intelligent assessment of the 'significance' of the project's environmental impact."[231] Interagency contacts on major federal actions are also necessary under NEPA, and these contacts must be true consultations. Informal consultation is not adequate. Each agency with an area of expertise relevant to a proposal must submit in writing its view on environmental concerns regarding the proposed project.[232]

Once an agency consults with another agency and receives its comments, what is the sponsoring agency required to do with the comments it receives in order to comply with NEPA? Implicit in the obligation to obtain comments from other interested agencies is the obligation of the requesting agency to consider and respond to comments that it receives.[233] Yet, though NEPA requires a federal agency to consult with other agencies whose expertise may be greater than its own, it is not required to base its determinations of whether an EIS is needed solely on the comments of other agencies.[234] For example, an agency is not required to select an alternative a commentator might consider preferable.[235] However, the sponsoring agency must make an independent environmental assessment of the project, and agency comments must be reasonable, objective, and in good faith.[236] In several cases the courts have reviewed agency responses to comments and have found them adequate.[237]

The Fish and Wildlife Conservation Act (FWCA) also requires consultation procedures that are important to environmental reviews.[238] Federal agencies proposing or issuing permits for projects that affect streams, lakes, or other watercourses must consult with the U.S. Fish and Wildlife Service and other wildlife agencies before approving the project. CEQ has recommended that agencies integrate their NEPA studies with studies required by FWCA.[239] Cases have held that a failure to adequately consider comments by wildlife agencies makes an agency's action arbitrary.[240]

c. Remedies

The usual remedy if an agency does not prepare an adequate EIS is a preliminary injunction. The preliminary injunction remedy is discussed in Section 3.A.2.F., *supra*. This discussion reviews the orders a court can make when it remands the implementation of NEPA responsibilities to an agency, which will determine how the agency must comply with the NEPA process.

5. Supplemental EIS's

Although the text of NEPA makes no reference to supplemental EIS's, CEQ regulations require and the courts frequently hold that an agency can file a supplemental EIS. CEQ regulations require that agencies prepare supplements to draft or final EIS's if (1) the agency makes substantial changes in the proposed action, or (2) if there are significant new circumstances or information relevant to environmental concerns based upon the proposed action or its impacts.[241] Note that the regulations require a supplemental statement for "significant" new circumstances, but require a supplemental statement for "substantial changes" without indicating whether these changes must also be significant. "Significantly" as defined by CEQ requires a consideration of both context and intensity.[242] FHWA has also adopted regulations for the preparation of supplemental impact statements.[243]

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[229] 42 U.S.C. § 4332(2)(c). *See* Blumm & Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277 (1990).

[230] NEPA LAW AND LITIGATION, s*upra* note 7, at § 10.17, *citing* 40 C.F.R. § 1503.1(a)(3)(4).

[231] Simmans v. Grant, 370 F. Supp. 5, 19 (S.D. Tex. 1974); *see also* 40 C.F.R. § 1500.1(b).

[232] Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980).

[233] 40 C.F.R. § 1503.4(a).

[234] State of Cal. v. Block, 690 F.2d 753 (9th Cir. 1982); Save the Bay, Inc. v. United States Corps of Engr's, 610 F.2d 322 (5th Cir. 1980).

[235] Geer v. Federal Highway Admin., 975 F. Supp. 47 (D. Mass. 1997).

[236] Save the Bay, 610 F.2d at 325.

[237] State of N.C. v. Federal Aviation Admin., 957 F.2d 1125 (4th Cir. 1992); Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); Geer v. Federal Highway Admin., 975 F. Supp. 47 (D. Mass. 1997).

[238] 16 U.S.C. § 662(a).

[239] 40 C.F.R. §§ 1500.4(k); 1502.25.

[240] Sierra Club v. United States Army Corp of Eng'rs, 541 F. Supp. 1367 (S.D.N.Y. 1982).

[241] 40 C.F.R. § 1502.9(c)(l).

[242] 40 C.F.R. § 1508.27.

[243] 23 C.F R. § 771.135. *See* Price Road Neighborhood Ass'n v. United States Dep't of Transp., 113 F.3d 1505 (9th Cir. 1997) (upholding FHWA regulations requiring a reevaluation rather than an assessment as the basis for determining whether a supplemental statement is necessary).

"In *Marsh v. Oregon Natural Resources Council*,[244] the Supreme Court considered the duty of agencies to prepare supplemental impact statements." "The Court noted the parties' agreement that agencies should apply a 'rule of reason' to the decision to prepare a supplemental statement," and added that a supplemental statement is not needed every time "new information comes to light." "Yet agencies must give a 'hard look' at the environmental effects of their actions even after they have given initial approval to a proposal." "The Court held that the 'arbitrary and capricious' standard of judicial review applies to an agency's decision that a supplemental impact statement is not required." The Court then "decided that the new information presented to the agency in that case was not significant enough to require an impact statement."[245]

In a pre-*Marsh* case, *Essex County Preservation Ass'n v. Campbell*,[246] "the court held that a Governor's moratorium on the construction of a new highway was significant new information that required the preparation of a supplemental impact statement on a highway project." Another case applied *Marsh* "to hold that the listing of a historic area on the National Register of Historic Places was not new information requiring a supplemental impact statement on a highway that would go through the area. The court noted the historic character of the area was taken into account in the planning for the project, so its listing was not new information."[247]

"A court will not require a supplemental statement because of new circumstances when the circumstances claimed to be new were adequately discussed in the impact statement,[248] or when the environmental impacts of the new circumstances are minor or not significant."[249] For example, in *Laguna Greenbelt, Inc. v. United States DOT*,[250] the court held that the effect of wildfires on an area where a tollway was planned did not require a supplemental statement when the wildfires had been discussed in the original impact statement.

6. Administrative Record

a. Scope and Content

NEPA requires federal agencies to develop methods and procedures, in consultation with CEQ, to "insure that presently unquantified amenities and values may be given appropriate weight in decisionmaking along with economic and technical considerations."[251] The courts have also considered this issue. *City of Hanly v. Kleindienst*,[252] a leading case, required that "some rudimentary procedures be designed to assure a fair and informed preliminary decision" on whether an agency should prepare an EIS. If an adequate record is not prepared, an agency may frustrate the purposes of NEPA by merely declaring that an EIS is not necessary.[253]

NEPA does not require a public hearing, and *Hanly v. Kleindienst* held that a public hearing is not required, although it is desirable to ensure that community views are heard.[254] CEQ regulations require federal agencies to hold public hearings or meetings "whenever appropriate" or in accordance with applicable requirements.[255] Other courts have divided on whether public hearings or other forms of public participation are required.[256] If a hearing is held, it is neither "quasi-judicial" nor "quasi-legislative," so no reviewable record is made.[257]

CEQ regulations state that agencies must "[p]rovide notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected."[258] In instances when agencies have held public hearings, the courts have been generous in finding that the notice[259] and public participation[260] were adequate.

The Federal Highway Act requires a state to hold a public hearing on highway projects, and FHWA regulations combine this hearing with NEPA procedures.[261] The statute requires the state to submit a

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[244] 490 U.S. 360 (1989).

[245] This material quoted from NEPA LAW & LITIGATION, *supra* note 7, at § 10.18[1].

[246] 536 F.2d 956 (1st Cir. 1976).

[247] Hickory Neighborhood Defense League v. Skinner, 893 F.2d 58 (4th Cir. 1990). *See* NEPA LAW & LITIGATION, *supra* note 7, at § 10.18[2], p. 10-103 and § 10.18[3], p. 10-104.

[248] Laguna Greenbelt, Inc. v. United States DOT, 42 F.3d 517 (9th Cir. 1994); *See also* Village of Grand View v. Skinner, 947 F.2d 651 (2nd Cir. 1992) (effect of new bridge design on traffic); Corridor H Alternatives v. Slater, 982 F. Supp. 24 (D.D.C. 1997) (shift in alignment of highway).

[249] Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197 (1st Cir. 1999) (design changes in highway project); South Trenton Residents Against 29 v. Federal Highway Admin., 176 F.3d 658 (3d Cir. 1999) (same); Price Road Neighborhood Ass'n v. United States Dep't of Transp., 113 F.3d 1505 (9th Cir. 1997) (redesign of highway). NEPA LAW & LITIGATION, *supra* note 7, at § 10.18[3], p. 10-106.

[250] Laguna Greenbelt, Inc. v. United States DOT, 42 F.3d 517 (9th Cir. 1994).

[251] 42 U.S.C. § 4332(2)(b).

[252] 471 F.2d 823 (2d Cir. 1972).

[253] *Id.* at 835.

[254] *Accord* Cobble Hill Ass'n v. Adams, 470 F. Supp. 1077 (E.D.N.Y. 1979).

[255] 40 C.F.R. §§ 1506.6(c), 1606.6(c)(1)(2).

[256] *E.g.,* Kelly v. Selin, 42 F.3d 1501 (6th Cir.) (public participation in rule making held adequate), *cert. denied*, 515 U.S. 1195 (1995); Richland Park Homeowners Ass'n v. Pierce, 671 F.2d 935 (5th Cir. 1982) (*contra*).

[257] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Lathan v. Volpe, 350 F. Supp. 262 (W.D. Wa. 1972).

[258] 40 C.F.R. § 1506.6(b).

[259] Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci, 857 F.2d 505 (9th Cir. 1988).

[260] Price Road Neighborhood Ass'n, Inc. v. United States Dep't of Transp., 113 F.3d 1505 (9th Cir. 1997).

[261] 23 U.S.C. § 128; 23 C.F.R. §§ 771.111(h); 771.123(h). *See also* Lathan v. Brinegar, 506 F.2d 677 (9th. Cir. 1974).

transcript of the hearing to FHWA together with a certification and "a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered."[262] Typically, a draft impact statement is made available for public inspection at the hearing, and the transcript of the hearing, together with the state's response to public comments, becomes a part of the administrative record.

If the agency prepares an impact statement, it must also prepare a "concise public record of decision."[263] The record of decision must state what the decision was, discuss alternatives considered, and state whether all "practicable means" to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why not. The courts have also held that agencies must make an acceptable reviewable record in cases in which they decide that an impact statement is unnecessary and must provide a statement of reasons for their decision.[264]

b. To What Extent May Courts Supplement the Administrative Record for Purposes of Judicial Review?

"The agency decision-making process under NEPA that produces an administrative record is known as informal decision making."[265] "The informal record compiled by the agency can vary but usually contains the impact statement, if it is prepared, or an environmental assessment" if the agency does not prepare an impact statement. "The record may also contain supporting documents and studies."[266]

Plaintiffs in NEPA cases may seek to supplement the administrative record with additional testimony and may seek a full evidentiary hearing. In *Citizens to Preserve Overton Park v. Volpe*,[267] the Supreme Court considered the extent to which courts should allow plaintiffs to supplement an agency's administrative record.

The Court remanded for a new trial a decision by the Secretary of Transportation that a highway location in a public park did not violate Section 4(f) of the Department of Transportation Act. On remand, the district court was to engage in a "plenary review" of the Secretary's decision, "to be based on the full administrative record that was before the Secretary at the time he made his decision." In carrying out this plenary review, the Supreme Court stated that the district court could admit supplementary evidence to explain, but not to attack, the administrative record.

The lower federal courts have followed *Overton Park* and have allowed supplementation of the administrative record in order to explain it.[268] Courts also allow supplementation if the administrative record is incomplete,[269] and limited discovery is available to determine whether the record is complete.[270] *County of Suffolk v. Secretary of Interior* [271] is a leading case holding that supplementation is allowed when an agency does not raise an important environmental issue when it prepares an impact statement or decides not to prepare one. As the court stated, supplementation is permissible when there are allegations that the agency has swept "stubborn or serious problems under the rug." A number of cases have applied the *Suffolk* holding.[272]

7. The Lead Agency Problem

In many cases, more than one federal agency will be responsible for a proposed action. CEQ regulations cover the lead agency problem.[273] "If more than one agency 'proposes' or is 'involved' in an action, or there is a group of functionally or geographically related actions, the regulations provide for the designation of a lead agency,"[274] with the other agencies cooperating in the NEPA process. "If the agencies concerned cannot agree on the lead agency, they are to consider the following factors, listed by the regulation in order of descending importance; magnitude of involvement, project approval and disapproval authority, expertise on the action's environmental effects, duration of the agency's involvement, and the sequence of the agency's involvement. If the agencies concerned cannot agree on a lead agency, they may request CEQ to resolve the dispute."

The cases have given some but not extensive consideration to lead agency designations. One case held that the designation of the lead agency is committed to agency discretion and is not judicially reviewable."[275] Other cases that have reviewed the lead agency designation have generally required the designation of the agency with the major responsibility for the action as the lead agency.[276] In one highway case,

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[262] 23 U.S.C. § 128(a) (1994).

[263] 40 C.F.R. § 1505.2.

[264] Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974); Scientist's Institute for Public Information v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).

[265] NEPA LAW AND LITIGATION, *supra* note 7, at § 4.09 [i][a].

[266] *Id*., 40 C.F.R. pt 1505.

[267] 401 U.S. 402 (1971). *See also* Camp v. Pitts, 411 U.S. 138 (1972).

[268] Citizens Advocates for Responsible Expansion v. Dole, 770 F.3d 423 (5th Cir. 1985).

[269] National Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997) (good review of case law). *See also* Don't Ruin Our Park v. Stone, 749 F. Supp. 1388 (M.D. Pa. 1990) (record held complete), *aff'd mem.*, 931 F.2d 59 (3d Cir. 1991).

[270] Bar MK Ranches v. Yuetter, 994 F.2d 735 (10th Cir. 1993).

[271] 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

[272] *E.g*., National Audubon Soc'y v. United States Forest Serv., 46 F.3d 1437 (9th Cir. 1994).

[273] 40 C.F.R. § 1501.5.

[274] NEPA LAW AND LITIGATION, *supra* note 7, at § 7.2.

[275] *Id*., *citing* Sierra Club v. United States Army Corps of Engr's, 701 F.2d 1011 (2nd Cir. 1983).

[276] Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2nd Cir. 1975); Hanly v. Mitchell (I), 460 F.2d 640 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972).

a court held that an agency was not a necessary cooperating agency when it did not contribute federal funds.[277]

8. State "Little NEPAs"

a. Introduction

Fifteen states, the District of Columbia, and Puerto Rico have adopted environmental policy acts modeled on NEPA. Like NEPA, the state "little NEPAs" require government agencies to prepare impact statements on actions affecting the quality of the environment. Most of the state little NEPAs are either identical to or closely resemble NEPA, which has led the states to look to federal decisions interpreting NEPA as a guide to interpreting their legislation.[278] A few states, notably California and Washington, followed the NEPA model but added additional legislative guidance on issues such as the impact statement preparation process and standards for judicial review.

The state little NEPAs may apply only to state government agencies or may include local governments as well. When local governments are included, the legislation may require impact statements on planning and land use regulation as well as government projects. California, New York, and Washington are the principal states in which the little NEPA applies to planning and land use regulation. The state little NEPAs are summarized in the following table.

[277] North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990).

[278] *E.g.*, Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049 (Cal. 1972).

SUMMARY TABLE OF STATE ENVIRONMENTAL POLICY ACTS

State	Comments
CAL. PUB. RES. CODE §§ 21000-21177	Requires environmental impact report similar to federal statement and including mitigation measures and growth-inducing effects. Applies to state agencies and local governments. Detailed provisions governing preparation of impact report and judicial review. State agency to prepare guidelines. Statutory terms defined.
CONN. GEN. STAT. §§ 22a-1 to 22a -1h	State agencies to prepare environmental impact evaluations similar to federal impact statement and including mitigation measures and social and economic effects. Actions affecting environment defined.
D.C. CODE ANN. §§ 6-981 to 6-990	Mayor, district agencies, and officials to prepare impact statements on projects or activities undertaken or permitted by District. Impact statement to include mitigation and cumulative impact discussion. Action to be disapproved unless mitigation measures proposed or reasonable alternative substitute to avoid danger.
GA. CODE ANN. §§ 12-16-1 to 12-16-8	Applies to projects proposed by state agencies for which it is probable to expect significant effect on the natural environment. Limited primarily to land-disturbing activities and sale of state land. Decision on project not to create cause of action.
HAW. REV. STAT. §§ 343-1 to 343-8	State agencies and local governments to prepare impact statements on use of public land or funds and land uses in designated areas. Statements must be "accepted" by appropriate official. Judicial review procedures specified.
IND. CODE ANN. §§ 13-12-4-I to 13-12-4-10	Similar to NEPA. Applies to state agencies.
MD. CODE ANN., NAT. RES. §§ 1-301 to 1-305	State agencies to prepare environmental effects reports covering environmental effects of proposed appropriations and legislation, including mitigation measures and alternatives.
MASS. GEN. LAWS ANN. Ch. 30, §§ 61, 62-62H	State agencies and local authorities to prepare environmental impact reports covering environmental effects of actions, mitigation measures, and alternatives. Most specify feasible measures to avoid damage to environment or mitigate or minimize damage to maximum extent practicable.[279] State agencies and local authorities created by the legislature to prepare environmental impact reports covering environmental effects of actions, mitigation measures, and alternatives. State agencies and authorities to determine impacts based on environmental impact report and incorporate mitigation measures into decision action.
MINN. STAT. ANN. §§ 116D.01 to 116D.06	State agencies and local governments to prepare EIS's covering environmental effects of actions; mitigation measures; and economic, employment, and sociological effects. Procedures for preparation of statements and judicial review specified. State environmental quality board may reverse or modify state actions inconsistent with policy or standards of statute.
MONT. CODE ANN. §§ 75-1-101 to 75-1-105; 75-1-201 to 75-1-207	Similar to NEPA. Applies to state agencies.

[279] For discussion of the law, see R.J. LYMAN, MEPA REVIEW IN MASSACHUSETTS ENVIRONMENTAL LAW ch. 23 (Supp. 1999); Lyman, *Permit Streamlining in Massachusetts*, 22 ZONING & PLAN. L. REP. 41 (1999).

SUMMARY TABLE OF STATE ENVIRONMENTAL POLICY ACTS

State	Comments
N.Y. ENVT. CONSERV. LAW §§ 8-0101 to 8-0117	State agencies and local governments to prepare impact statements similar to federal impact statement and including mitigation measures and growth-inducing and energy impacts. Procedures for preparing statement specified. State agency to adopt regulations on designated topics.
N.C. GEN. STAT. §§ 113A-1 to 113A-13	Similar to NEPA. Applies to state agencies. Local governments may also require special-purpose governments and private developers of major development projects to submit impact statement on major developments. Certain permits and public facility lines exempted.
P.R. LAWS ANN., tit. 12, §§ 1121-1127	Similar to NEPA. Applies to Commonwealth agencies and political subdivisions.
S.D. CODIFIED LAWS ANN. §§ 34A-9-1 to 34A-9-13	State agencies "may" prepare EIS's similar to federal impact statement and adding mitigation measures and growth-inducing "aspects." Statutory terms defined. Ministerial and environmental regulatory measures exempt.
VA. CODE §§ 3.1-18.8, 10.1-1200 to 10.1-1212	Similar to NEPA. Applies to state agencies for major state projects. Impact statements also to consider mitigation measures and impact on farmlands.
WASH. REV. CODE §§ 43.21C.010 to 43.21C.910	State agencies and local governments to prepare impact statements identical to federal statement but limited to "natural" and "built" environment. Proposal may be denied if it has significant impacts or mitigation measures insufficient. Judicial review procedures specified. State agency to adopt regulations on designated topics.
WIS. STAT. ANN. §§ 1.11	Similar to NEPA. Applies to state agencies. Statements also to consider beneficial aspects and economic advantages and disadvantages of proposals.

Source: Daniel R. Mandelker, *NEPA Law and Litigation*, 2d ed. (West Group, 1992), 12-4 to 12-7. Used by permission of the publisher.

b. Judicial Review and Remedies

The failure of a public agency to comply with a state environmental policy act has generally been held subject to judicial review. Unlike NEPA, several of the state acts expressly authorize judicial review of agency decisions claimed not to be in compliance with the act.[280] Some state courts hold that an agency's compliance with an environmental policy act is reviewable under the state administrative procedure act's judicial review provisions.[281] Judicial review may also be available through the remedies of injunction and declaratory judgment.[282]

When agency environmental policy act decisions are challenged under a state administrative procedure act, they are reviewable under the judicial review standards provided by that act.[283] Other state environmental policy acts expressly provide a standard of judicial review.[284] Where statutory review is not available or invoked, the standard of judicial review may be determined by the judicial remedy, such as certiorari, which is used to review the agency decision.[285]

Some state courts apply the "arbitrary and capricious" judicial review standard adopted by the Supreme Court for NEPA cases.[286] Other state courts may apply a less deferential "clearly erroneous"[287] or "reasonableness"[288] standard when they review an

[280] *E.g.*, CAL. PUB. RES. CODE §§ 21168, 21168.5; N.C. GEN. STAT. § 113A-13.

[281] McGlone v. Inaba, 636 P.2d 158 (Haw. 1981) (state agency); Wisconsin's Envtl. Decade v. Public Serv. Comm'n (II*)*, 255 N.W.2d 917 (Wis. 1977) (same).

[282] Villages Dev. Co. v. Secretary of Executive Office of Envtl. Affairs, 571 N.E.2d 361 (Mass. 1991). *See* NEPA LAW AND LITIGATION, *supra* note 7, at § 12.03 [i][a].

[283] Minn. Public Interest Research Group v. Minn. Envtl. Quality Council, 237 N.W.2d 375 (Minn. 1975).

[284] CAL. PUB. RES. CODE § 21168.

[285] Shriner's Hosp. for Crippled Children v. Boston Redev. Auth., 353 N.E.2d 778 (Mass. App. 1976) (review by certiorari is on errors of law).

[286] Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429 (N.Y. 1986).

[287] Norway Hill Preservation & Protection Ass'n v. King County Council, 552 P.2d 674 (Wash. 1976).

[288] Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n, 256 N.W.2d 149 (Wis. 1977).

agency's decision that an impact statement is not necessary.

c. Actions and Projects Included

Several state environmental policy acts follow NEPA in using the term "major action" to designate the agency decisions that require an impact statement. Other acts use different terminology. The California act requires public agencies to prepare impact reports on "any project the agency proposes to carry out or approve."[289] Unlike NEPA, the California act does not require "projects" covered by the act to be "major" projects. Some of the state acts apply only to a narrowly defined set of projects.[290]

State-funded highway and transportation projects are clearly covered by the state acts, although they must be "major" projects in states that have this requirement. Some of the state statutes contain exemptions, and these may apply to transportation projects. Emergency repairs for public facilities are an example.[291] The state statutes may also authorize regulations designating categorical exclusions that, as under the federal law, do not require an impact statement because they do not have significant environmental effects. Courts have upheld categorical exclusions, such as exclusions for the replacement of public facilities,[292] the maintenance and repair of existing roads,[293] and the acquisition of property through eminent domain.[294]

Like NEPA, some state environmental policy acts require impact statements only on "proposals" for action.[295] The Wisconsin Supreme Court applied the Supreme Court's reasoning in *Kleppe* to decide when there is a proposal that requires an impact statement.[296] Some of the state cases differ with *Kleppe*. The California Supreme Court held the final approval of a project is not required before an agency must prepare an impact report because post hoc rationalization of a project after it is approved would violate the statute.[297]

d. The Significance Determination

Like NEPA, the state environmental policy acts require the preparation of an impact statement on actions that "significantly" affect the quality of the environment. Whether an action is significant is known as the threshold decision. Some state courts have adopted a lower threshold for the significance decision than the federal courts because they view this decision as critically important to the implementation of the statute.[298] The Connecticut Supreme Court, for example, requires an impact statement whenever a project "will arguably damage the environment" and subjects threshold decisions to a de novo standard of judicial review.[299] State statutes may also require an impact statement whenever an action "may" significantly affect the environment, a qualification not contained in NEPA.[300]

e. Scope of the Impact Statement

Program statements have not been extensively considered under the state environmental policy acts,[301] but the courts have considered the duty to include cumulative impacts in an environmental analysis. The California statute requires the consideration of cumulative impacts,[302] and the state courts have considered the adequacy of cumulative impact analysis in a number of cases.[303] The segmentation question has also arisen under the state acts. A California court of appeal applied the factors the federal courts use in NEPA cases to allow the segmentation of a highway project.[304] Other state courts have considered segmentation problems without applying the NEPA factors, including cases in which the segmentation of highway projects was at issue.[305]

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[289] CAL. PUB. RES. CODE § 21100.

[290] Mayor & City Council of Baltimore v. State, 378 A.2d 1326 (Md. 1977) (statute applies only to requests for appropriations and legislation and not to projects funded by the state).

[291] CAL. PUB. RES. CODE § 21080(b)(2).

[292] Bloom v. McGuire, 31 Cal. Rptr. 2d 914 (Cal. App. 1994) (medical waste treatment facility).

[293] Erven v. Riverside County Bd. of Supervisors, 126 Cal. Rptr. 285 (Cal. App. 1975).

[294] Petition of Port of Grays Harbor, 638 P.2d 633 (Wash. App. 1982).

[295] WASH. REV. CODE § 43.21C.030.

[296] Wisconsin's Envtl. Decade, Inc. v. State Dep't of Natural Resources, 288 N.W.2d 168 (Wis. 1979).

[297] Laurel Heights Improvement Ass'n of San Francisco v. Regents of Univ. of Cal., 764 P.2d 278 (Cal. 1988).

[298] HOMES, Inc. v. N.Y. State Urb. Dev. Corp., 418 N.Y.S.2d 827 (App. Div. 1979); Norway Hill Preservation & Protective Ass'n v. King County Council, 552 P.2d 674 (Wash. 1976); Wisconsin's Envtl. Decade v. Public Serv. Comm'n (II), 256 N.W.2d 149 (Wis. 1977).

[299] Manchester Envtl. Coalition v. Stockton, 441 A.2d 68 (Conn. 1981).

[300] CAL. PUB. RES. CODE § 21100. *See* No Oil, Inc. v. City of Los Angeles, 529 P.2d 66 (Cal. 1975).

[301] Klickitat County Citizens Against Imported Waste v. Klickitat County, 860 P.2d 390 (Wash. 1993) (adequacy of program impact statement). *See* CAL. PUB. RES. CODE ch. 4.5 (authorizing "master environmental impact report" for, e.g., projects to be carried out in stages).

[302] CAL. PUB. RES. CODE § 21083(b). *See* San Franciscans for Reasonable Growth v. City & County of San Francisco, 198 Cal. Rptr. 634 (Cal. App. 1984) (must consider cumulative impact of similar projects under environmental review though not yet approved).

[303] Del Mar Terrace Conservancy, Inc. v. City Council, 12 Cal. Rptr. 2d 785 (Cal. App. 1992) (highway).

[304] Del Mar Terrace Conservancy, Inc. v. City Council, 12 Cal. Rptr. 2d 785 (Cal. App. 1992). *Accord* Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources, 288 N.W.2d 168 (Wis. 1979) (sewer project).

[305] Village of Westbury v. Department of Transp., 549 N.E.2d 1166 (N.Y. 1989) (interchange construction must be considered together with nearby highway widening projects); Cheney v. City of Mountlake Terrace, 552 P.2d 184 (Wash. 1976) (allowing segmentation of highway project from private condominium project planned on adjacent land).

f. Alternatives

Like NEPA, the state environmental policy acts require impact statements to consider alternatives.[306] The state courts have required the consideration of alternatives such as a mass transit alternative to a highway,[307] and an alternative route for a transmission line.[308] Although the California Supreme Court has insisted on full compliance with the alternatives requirement,[309] it also held that environmental analysis under its little NEPA does not have to duplicate what is contained in a comprehensive plan. A comprehensive plan had addressed the critical land use issues in that case, and the court held that an environmental impact report should not ordinarily reconsider or overhaul fundamental land use policy.[310]

g. Adequacy and Effect of an Impact Statement

The state courts have applied the "rule of reason" adopted by the federal courts when reviewing the adequacy of impact statements.[311] In some states, however, the courts have reviewed the adequacy of impact statements more rigorously than they are reviewed in the federal courts. For example, New York's highest court held that its statute did not require an agency to reach a "particular result," but also held that it imposed "far more" action-forcing and substantive requirements than the federal law.[312] However, courts in that state may not second guess an agency's choice, which may be overturned only if arbitrary, capricious, or unsupported by substantial evidence.[313]

The California little NEPA provides that an agency may not approve a project if there are feasible alternatives or mitigation measures that will substantially lessen the significant environmental effects of the project. The statute also requires agencies to incorporate changes or alterations that will mitigate a project's significant environmental effects.[314] These provisions give the impact report in California some substantive effect. The Washington Supreme Court upheld an agency's authority to deny a project based on environmental effects identified in an impact statement.[315] The state courts have held that EIS's were adequate in most of the cases they have considered, including those involving impact statements for highway projects.[316]

h. Supplemental Impact Statements

State little NEPAs may require the preparation of supplemental EIS's. Like the CEQ regulations under NEPA, the California statute requires the preparation of a supplemental statement when there are substantial changes or new information.[317] California courts have considered whether supplemental impact statements were necessary in a number of cases, including cases involving highway projects.[318] The New York courts also apply the criteria in the federal regulations to determine when a supplemental impact statement is necessary,[319] as do the Washington courts.[320]

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[306] *E.g.*, WASH. REV. CODE § 43.21C.030(c)(iii).

[307] Manchester Envtl. Coalition v. Stockton, 441 A.2d 68 (Conn. 1981). *But see* Bowman v. City of Petaluma, 230 Cal. Rptr. 413 (Cal. App. 1 Dist. 1986) (need not discuss ring road as method of traffic reduction).

[308] People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council, 266 N.W.2d 858 (Minn. 1978).

[309] Laurel Heights Imp. Ass'n v. Regents of Univ. of Cal., 764 P.2d 278 (Cal. 1988).

[310] Citizens of Goleta Valley v. Board of Supervisors of County of Santa Barbara, 801 P.2d 1161 (Cal. 1990).

[311] Price v. Obayashi Haw. Corp., 914 P.2d 1364 (Haw. 1996); Leschi Improv. Council v. Wash. State Highway Comm'n, 525 P.2d 774 (Wash. 1974).

[312] Jackson v. N.Y. State Urb. Dev. Corp., 494 N.E.2d 429 (N.Y. 1986).

[313] WEOK Broadcasting Corp. v. Planning Board, 592 N.E.2d 778 (N.Y. 1992).

[314] CAL. PUB. RES. CODE §§ 21002, 21081. The Massachusetts statute also contains this requirement.

[315] Polygon Corp. v. City of Seattle, 578 P.2d 1309 (Wash. 1978). *See* WASH. REV. CODE § 43.21C.060 (requiring agencies to find that a proposal would have significant environmental impact that cannot be mitigated before they can deny a proposal based on environmental effects contained in an impact statement). *But see* Save Our Rural Environment v. Snohomish County, 662 P.2d 816 (Wash. 1983) (court may not rely on impact statement to disapprove agency action).

[316] *See e.g.* City of Carmel-by-the-Sea v. United States Dep't of Transp., 123 F.3d 1142 (9th Cir. 1997) (highway; applying state law); Laurel Heights Imp. Ass'n v. Regents of Univ. of Cal., 764 P.2d 278 (Cal. 1988) (research center); Akpan v. Koch, 554 N.E.2d 53 (N.Y. 1990) (urban renewal project); Organization to Preserve Agricultural Lands v. Adams County, 913 P.2d 793 (Wash. 1996) (landfill project); Frye Inv. Co. v. City of Seattle, 544 P.2d 125 (Wash. App. 1976 (effect of street on property access)).

[317] CAL. PUB. RES. CODE § 21166.

[318] Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass'n, 727 P.2d 1029 (Cal. 1986) (increase in project size and noise effects were substantial); Bowman v. City of Petaluma, 230 Cal. Rptr. 413 (Cal. App. 1986) (change in project's road access resulting in 17 percent more daily trips on adjacent road was not a substantial change); Mira Monte Homeowners Ass'n v. San Buenaventura County, 212 Cal. Rptr. 127 (Cal. App. 1985) (discovery that street in project would pave over a wetland was new circumstance).

[319] Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 453 N.Y.S.2d 732 (App. Div. 1982) (holding supplemental statement required on condominium project). *But see* Neville v. Koch, 593 N.E.2d 256 (N.Y. (1992) (rezoning; upholding agency decision not to prepare an impact statement)).

[320] Harris v. Hornbaker, 658 P.2d 1219 (Wash. 1983) (passage of time and change in interchange site sufficient to require agency to determine whether supplemental statement was necessary); Barrie v. Kitsap County Boundary Review Bd., 643 P.2d 433 (Wash. 1982) (new information did not require impact statement on shopping center).

B. SECTION 4(F) OF THE DEPARTMENT OF TRANSPORTATION ACT*

Section 4(f) of the Transportation Act of 1968[321] requires the transportation secretary to consider the environmental impact of highways, transit, and other federally-funded transportation projects on parks, historic sites, recreation, and wildlife areas:

> [T]he Secretary [of the Department of Transportation] may approve a transportation program or project requiring the use (other than any project for a park or parkway)…of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from the use.

The background of Section 4(f), its implementation by FHWA, and the court decisions that have augmented its scope and force are examined in this section. The Section 4(f) review is to be carried out as part of the environmental review under NEPA. Agency regulations provide for consultation with the officials that have jurisdiction over the protected resource and with interested federal agencies.[322] Courts have played an instrumental role in creating a formidable set of substantive requirements under Section 4(f), particularly by imposing a "constructive use" doctrine and the requirement of a "no action" alternative analysis.

1. What is "Use" Under Section 4(f)?

Section 4(f) is triggered by a proposed transportation project that will require the actual or constructive use of a publicly owned park, recreation area, wildlife or waterfowl refuge, or historic site. There are several judicial and administrative interpretations of these two threshold requirements.

a. Actual Use of Protected Land

It is beyond dispute that Section 4(f) applies to any transportation project that proposes a physical taking of any portion of protected land. For example, in *Louisiana Environmental Society, Inc. v. Coleman*,[323] the Fifth Circuit held that the statute did not call for any consideration of whether a proposed actual use would be substantial. Rather, the Court concluded, Congress intended Section 4(f) to apply whenever park land was to be used, and therefore "[a]ny park use, regardless of its degree, invokes § 4(f)."[324] FHWA regulations recognize that for Section 4(f) purposes "use" occurs "(i) When land is permanently incorporated into a transportation facility; (ii) When there is a temporary occupancy of land that is adverse in terms of the statute's preservationist purposes…or (iii) When there is a constructive use of land."[325]

b. Constructive Use of Protected Land

More contentious than the issue of what constitutes actual use of park land are the circumstances under which a transportation project amounts to "constructive use" of the protected lands sufficient to trigger Section 4(f). Constructive use occurs when there is no actual taking of park lands, but the proposed project will nonetheless cause adverse impacts on neighboring property protected by Section 4(f). The constructive use doctrine initially emerged out of judicial decisions that broadly interpreted the statute's "use" requirement by applying Section 4(f) to projects that bordered on protected lands.[326] Since that time, FHWA has incorporated the doctrine into its Section 4(f) regulations[327] and the courts have expanded it further.

The FHWA regulations recognize constructive use as occurring where "the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under § 4(f) are substantially impaired."[328] The regulations mean that there must be "substantial impairment"[329] by a nonphysical taking of park land to trigger the statute.

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* This section is based on, with an update, as applicable, information and analysis in MICHAEL C. BLUMM, HIGHWAYS AND THE ENVIRONMENT: RESOURCE PROTECTION AND THE FEDERAL HIGHWAY PROGRAM 1–7 (NCHRP Legal Research Digest No. 29, 1994).

[321] 49 U.S.C. § 303(c). An almost identical provision is contained in the Federal Highway Act. 23 U.S.C. § 138. Although the original § 4(f) was slightly revised when it was recodified, Congress did not intend any change in the law. *See* DOT Act of 1983, Pub. L. No. 97-449, § 1(a), 96 Stat. 2413 (1983) (stating that the recodification was made without substantive change).

[322] 23 C.F.R. § 771.135. *See generally* Corridor H Alternatives, Inc. v. Slater, 166 F.3d 368 (D.C. Cir. 1999).

[323] 537 F.2d 79 (5th Cir. 1976).

[324] *Id.* at 84.

[325] 23 C.F.R. § 771.135(p).

[326] *See, e.g.,* Brooks v. Volpe, 460 F.2d 1193 (9th Cir. 1972) (encirclement of public campground by a highway is a "use"); Conservation Soc'y v. Secretary of Transp., 362 F. Supp. 627, 639 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974) (highway bordered on protected area).

[327] 23 C.F.R. § 771.135(p).

[328] *Id.* at § 771.135(p)(2).

[329] The regulations provide:

> Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes

FHWA has identified certain situations under which the constructive use doctrine of Section 4(f) categorically does or does not occur.[330] The regulations define constructive use as including the "substantial impairment" of resources protected by Section 4(f) as a result of noise levels, vibration impact, restrictions on access, or "ecological intrusion."[331] The regulations also identify numerous situations where presumptively there is no constructive use. These include situations where (1) noise impacts would not exceed certain specified levels, (2) a project is approved or a right-of-way acquired before the affected property is designated to be protected by Section 4(f), or (3) a proposed project is concurrently planned with a park or recreation area.[332]

The courts have also provided guidelines on when there is a constructive use that triggers the application of Section 4(f). As the District of Columbia Court of Appeal noted: "[A] project which respects a park's territorial integrity may still, by means of noise, air pollution and general unsightliness, dissipate its aesthetic value, crush its wildlife, defoliate its vegetation, and "take" it in every practical sense."[333]

The Ninth Circuit held that "constructive use of park land occurs when a road significantly and adversely affects park land even though the road does not physically use the park."[334]

A number of courts have applied the constructive use doctrine to a variety of situations where there would be no actual physical intrusion of protected land by the proposed highway project. For example, in *Monroe County Conservation Council v. Adams*,[335] the Second Circuit ruled that a proposed six-lane highway that would adjoin a public park constituted constructive use because the park would become "subject to the unpleasantness which accompanies the heavy flow of surface traffic," and because access to the park would become more difficult and hazardous.[336]

In a number of other cases, federal courts have found constructive uses of park lands and historic sites based on impairment of access,[337] general unsightliness,[338] and other proximity impacts significant enough to "substantially impair" the protected resources.[339] Cases are divided where constructive use is claimed based on an increase in noise levels. Some cases have found constructive use based on increased noise,[340] but in a number of other cases the courts held that noise levels were not serious enough to cause an impairment of a protected resource.[341]

The Ninth Circuit has held that the constructive use doctrine does not apply where the construction of a new highway and a new park are jointly planned on a single parcel of land. In *Sierra Club v. Department of Transportation*,[342] the court held that a planned highway did not "use" a park where the highway and the park were to be developed concurrently. Looking at the legislative history of Section 4(f), the court determined that because Congress contemplated the possibility of joint development of parks and roads, it intended Section 4(f) to protect only already established parks and recreation areas.[343]

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of the resource are substantially diminished. (771.135 (p)(2)).

[330] *Id.* at §§ 771.135(p)(4) (constructive use occurs), (p)(5), constructive use does not occur.

[331] *Id.* at §§ 771.135(p)(4)(i) to (v).

[332] *Id.* at §§ 771.135(p)(5)(i) to (ix).

[333] District of Columbia Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1239 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972).

[334] Sierra Club v. Department of Transp., 948 F.2d 568, 573 (9th Cir. 1991).

[335] 566 F.2d 419 (2d Cir. 1977).

[336] *Id.* at 424.

[337] Monroe County Conservation Council v. Adams, 566 F.2d 419, 424 (2d Cir. 1977); Brooks v. Volpe, 460 F.2d 1193, 1194 (9th Cir. 1972). *But see* Falls Road Impact Comm., Inc. v. Dole, 581 F. Supp. 678 (E.D. Wis. 1984) (temporary limitation on access not constructive use).

[338] Coalition Against a Raised Expressway v. Dole, 835 F.2d 803, 812 (11th Cir. 1988) (view impairment and noise); Citizens Advocates for Responsible Expansion, Inc. v. Dole, 770 F.2d 423, 439 (5th Cir. 1985) (tremendous aesthetic and visual intrusion); Louisiana Envtl. Soc'y, Inc. v. Coleman, 537 F.2d 79, 85 (5th Cir. 1976) (view of lake blocked from nearby homes).

[339] Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.) (constructive use of historic site), *cert. denied*, 429 U.S. 999 (1976), Mullin v. Skinner, 756 F. Supp. 904, 924–25 (E.D.N.C. 1990) (high-rise bridge project would constructively use beach by causing high-rise development); Conservation Soc'y of Southern Vt., Inc. v. Secretary of Transp., 362 F. Supp. 627, 639 (D. Vt. 1973) (protested highway would border protected woodland), *aff'd*, 508 F.2d 927 (2d Cir. 1974). *But see* Laguna Greenbelt v. United States Dep't of Transp., 42 F.3d 517 (9th Cir. 1994) (minor improvements did not affect park); Citizens for Scenic Severn River Bridge, Inc. v. Skinner, 802 F. Supp. 1325 (bridge did not affect scenic overlook), *aff'd without opinion*, 972 F.2d 338 (4th Cir. 1992).

[340] *See, e.g.,* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 202-03 (D.C. Cir. 1991); Coalition Against a Raised Expressway, Inc. v. Dole, 835 F.2d 803, 811–12 (llth Cir. 1988); Monroe County Conservation Council v. Adams, 566 F.2d 419, 424 (2d Cir. 1977).

[341] City of Bridgeton v. Slater, 212 F.3d 448 (8th Cir. 2000) (noise from airport expansion not a constructive use), *cert. denied*, 121 S. Ct. 855 (2001); Communities, Inc. v. Busey, 956 F.2d 619, 624 (6th Cir.) (noise from passing aircraft did not affect historic neighborhoods), *cert. denied*, 506 U.S. 953 (1992); Allison v. Department of Transp., 908 F.2d 1024 (D.C. Cir. 1990) (noise from airport several miles away; reliance on inapplicable FAA regulations not fatal); Sierra Club v. United States Dep't of Transp., 753 F.2d 120, 130 (D.C. Cir. 1985) (increased airplane noise from airport expansion); Arkansas Org. for Community Reform Now v. Brinegar, 398 F. Supp. 685, 693 (E.D. Ark. 1975) (park uses not affected by increased noise from adjacent highway), *aff'd*, 531 F.2d 864 (8th Cir. 1976).

[342] 948 F.2d 568 (9th Cir. 1991).

[343] *Id.* at 574.

2. Resources Protected by Section 4(f)[344]

a. Public Parks, Recreation Areas, and Refuges

The language of Section 4(f) restricts the use for a transportation project of a publicly owned park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance, or land of an historic site of national, state, or local significance (as determined by the federal, state, or local official's jurisdiction over the park, area, refuge, or site).[345]

The statute potentially applies to all historic sites, but only to publicly owned parks, recreation areas, and refuges. Section 4(f) does not apply where parks, recreation areas, and refuges are owned by private individuals.[346] This is true even where the land is held by a public interest group for the benefit of the public.[347] However, if a governmental body has any proprietary interest in the land at issue (such as fee ownership, a drainage easement, or a wetland easement), that land may be considered publicly owned.[348]

Where land is publicly owned, it can qualify for protection under Section 4(f) only if it is actually designated or administered[349] for "significant" park, recreation, or wildlife purposes.[350] When making this threshold determination, courts have held that the Secretary "may properly rely on, and indeed should consider…local officials' views."[351] For example, in *Concerned Citizens on I-190 v. Secretary of Transp.*, the First Circuit held that the Secretary was not required to make an independent determination on whether the state lands involved in a highway project constituted "significant…recreation lands." He could, instead, rely on the conclusion of a local commission that no such land would be used by the highway.[352] The FHWA regulations reflect this holding. They state that consideration under Section 4(f) is not required where the officials with jurisdiction over the area determine that "the entire site is not significant."[353] If no such determination is made, the regulations presume the Section 4(f) land is significant. The regulations also require that FHWA review the significance determination to ensure its reasonableness.[354]

i. Multiple-Use Land Holdings.—Special problems may arise where land needed for a highway project is managed for several different purposes, including a use protected by Section 4(f). Where multiple-use lands are involved, FHWA has determined that Section 4(f) will apply only to those portions that "function for, or are designated in the management plans of the administering agency as being for significant park, recreation, or wildlife and waterfowl purposes."[355] Where multiple-use public lands do not have current management plans, Section 4(f) applies only to those areas that function primarily for purposes protected by Section 4(f).[356] The federal, state, or local officials with jurisdiction over the land in question are responsible for determining which areas function as or are designated for purposes protected by Section 4(f), subject to FHWA oversight to ensure "reasonableness."[357]

ii. Bodies of Water.—Because most of the land under navigable waters of the United States is owned by the states, any such waters designated or used for significant park, recreational, or refuge purposes will qualify for protection under Section 4(f) because the underlying land is publicly owned.[358] Section 4(f) applies only to those portions of lakes that function primarily for park, recreation, or refuge purposes, or are so designated by the appropriate officials.[359] Rivers are generally not subject to Section 4(f) requirements, unless they are contained within the boundaries of a park or refuge to which Section 4(f) otherwise applies. However, federally designated wild and scenic rivers are protected by Section 4(f), and publicly owned lands

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[344] For cases reviewing determinations concerning the applicability of § 4(f) to resource areas, see Corridor H Alternatives, Inc. v. Slater, 166 F.3d 368 (D.C. Cir. 1999) (statute violated when agency made final decision before identifying historic resource); Hatmaker v. Georgia Dep't of Transp., 973 F. Supp. 1058 (M.D. Ga. 1997) (upholding decision not to consider tree as historic resource protected by § 4(f)).

[345] 9 U.S.C. § 303(c).

[346] National Wildlife Fed'n v. Coleman, 529 F.2d 359, 370 (5th Cir. 1976). *See also* UNITED STATES DEP'T OF TRANSP., FEDERAL HIGHWAY ADMIN., MEMORANDUM: SECTION 4(f) POLICY PAPER 3 (1987 & rev. 1989) (policy is to strongly encourage preservation of privately-owned land although § 4(f) does not apply), hereinafter cited as "Policy Paper."

[347] National Wildlife Fed'n v. Coleman, 529 F.2d 359, 370 (5th Cir. 1976) (land acquired by Nature Conservancy for future use as wildlife refuge).

[348] Policy Paper, *supra* note 346, at 3.

[349] *See* Mullin v. Skinner, 756 F. Supp. 904 (E.D.N.C. 1990) (ocean-front beaches declared by state supreme court to be held in public trust were not "designated or administered" for purposes of § 4(f)).

[350] *See* Concerned Citizens on I-190 v. Secretary of Transp., 641 F.2d 1, 7 (1st Cir. 1981) (whether recreational lands are "significant" is threshold question under § 4(f)).

[351] *See* Concerned Citizens on I-190 v. Secretary of Transp., 641 F.2d 1, 7 (1st Cir. 1981). *See also* Pa. Envtl. Council, Inc. v. Bartlett, 454 F.2d 613, 623 (3d Cir. 1971).

[352] 641 F.2d at 7.

[353] 23 C.F.R. § 771.135(c).

[354] *Id.*

[355] *Id.* at § 771.135(d). *See also* Policy Paper, *supra* note 346, at 214.

[356] Policy Paper, *supra* note 346, at 14.

[357] 23 C.F.R. § 771.135(d). For a case upholding an FHWA determination concerning the applicability of § 4(f) to multiple-use land, see Geer v. Federal Highway Admin., 975 F. Supp. 47 (D. Mass. 1997).

[358] Edward V.A. Kussy, *Wetland and Floodplain Protection and the Federal-Aid Highway Program*, 13 ENVTL. L. 161, 245–46 (1982), points out that the federal government's navigational servitude over navigable waters may also give federal officials jurisdiction to make determinations of significance under § 4(f).

[359] Policy Paper, *supra* note 346, at 16.

in the immediate proximity of such rivers may also be protected, depending on how those lands are administered under the management plans required by the Wild and Scenic Rivers Act.[360] Where the management plan specifically designates the adjacent lands for recreational or other Section 4(f) purposes, or where the primary function of the area is for significant Section 4(f) activities, Section 4(f) will apply.[361]

b. Historic Sites

Unlike park lands, historic sites need not be publicly owned to qualify for protection under Section 4(f). However, the site must be "of national, state, or local significance (as determined by the Federal, State or local officials having jurisdiction over the…site)."[362] Where historic sites will be affected as the result of a proposed highway project, the National Historic Preservation Act (NHPA)[363] works along with Section 4(f) to require avoidance or minimization of harmful impacts to historic sites. For example, under FHWA regulations, the "significance" of a historic site for § 4(f) purposes generally is determined by whether the site is on or eligible for the National Register of Historic Places.[364] Because the National Register comprises many different types of historic resources,[365] courts have also applied Section 4(f) to a wide variety of historic sites.[366] If a particular site is not on or eligible for the National Register, Section 4(f) may still apply if FHWA determines that the application of the statute is "otherwise appropriate."[367]

The regulations require that FHWA must consult with the state's historic preservation officer, in cooperation with the state highway agency, to determine whether a site affected by a project is on or eligible for the National Register.[368] If it is not, then Section 4(f) most likely does not apply.[369] However, the site may still be protected under the statute if it is of local significance, as determined by local officials having jurisdiction over the site.[370] FHWA has indicated that Section 4(f) applies when a local official (e.g., the mayor or the president of the local historical society) provides information indicating that a site not eligible for the National Register is nonetheless of local significance.[371]

Once a determination has been made that a site is eligible for inclusion on the National Register, Section 4(f) applies even if state or local officials with jurisdiction over the area assert that the site is not "significant" to them. For example, in *Stop H-3 Association v. Coleman*,[372] the Ninth Circuit held that a finding by a state review board that the Moanalua Valley in Oahu was only of "marginal" local significance was inconsequential for Section 4(f) purposes, because the Secretary of the Interior had determined earlier that the valley "may be eligible" for inclusion in the National Register.[373] The court also ruled the Secretary acted within his authority under the NHPA Act when he made the eligibility determination on his own initiative, without the concurrence of state or local officials.[374]

FHWA regulations recognize that Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction. The regulations provide for an expedited Section 4(f) process in such circumstances.[375] The regulations also carve out an exception from the Section 4(f) requirements where FHWA determines that the archeological resource involved "has minimal value

[360] *Id.* at 15.

[361] *Id.*

[362] 49 U.S.C. § 303(c). *See* Corridor H. Alternatives, Inc. v. Slater, 166 F.3d 368 (D.C. Cir. 1999) (agency must make resource determination under § 4(f) before issuing Record of Decision under NEPA); Lakes Region Legal Defense Fund v. Slater, 986 F. Supp. 1169 (N.D. Iowa 1997) (historic structure not protected if not on national register).

[363] 16 U.S.C. § 470 *et seq*. The NHPA authorizes the Secretary of the Interior to maintain a National Register of Historic Places and authorizes states to designate a state historic preservation officer to inventory the state's historic sites and to nominate eligible properties for the National Register. *See* ADVISORY COUNCIL ON HISTORIC PRESERVATION, FEDERAL HISTORIC PRESERVATION LAW (1985). *See* Section 3.E.1 *infra*.

[364] 23 C.F.R. § 771.135(e).

[365] The NHPA provides that the National Register should contain "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." 16 U.S.C. § 470a(a)(1)(A).

[366] *See* Communities, Inc. v. Busey, 956 F.2d 619, 624 (6th Cir.) (applying § 4(f) to Old Louisville, an area of architectural and historic significance), *cert. denied*, 506 U.S. 953 (1992); Coalition Against a Raised Expressway v. Dole, 835 F.2d 80-3,811 (11th Cir. 1988) (city hall and railroad terminal); Arizona Past & Future Foundation, Inc. v. Lewis, 722 F.2d 1423, 1425 (9th Cir. 1983) (archeological sites); Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784, 788 (9th Cir. 1983) (historic bridge); Nashvillians Against I-440 v. Lewis, 524 F. Supp. 962, 980 (M.D. Tenn. 1981 (historic roadway); Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 445–46 (9th Cir. 1976) (Hawaiian petroglyph rock).

[367] 23 C.F.R. § 771.135(e).

[368] *Id. See also* 36 C.F.R. § 800.4 (regulations under NHPA § 106 requiring consultation with state historic preservation officer where federal undertaking will "potentially affect" a historic site).

[369] 23 C.F.R. § 771.135(e).

[370] 49 U.S.C. § 303(c).

[371] Policy Paper, *supra* note 346, at 11.

[372] 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976).

[373] *Id.* at 440–45.

[374] *Id.* at 444. For a detailed discussion of the *Stop H-3* case that is highly critical of the powers afforded by "small opposition groups" by § 4(f), see Note, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 257–62 (1990).

[375] 23 C.F.R. § 771.135(g).

for preservation in place" and can be relocated without diminishing the significance of the resource.[376]

3. Substantive Requirements of Section 4(f)

Once it is established that a proposed project will actually or constructively use a resource protected under Section 4(f), the Secretary of Transportation may approve the project only if (1) there is no "feasible and prudent alternative" to the use of such land and (2) the project includes "all possible planning to minimize harm" to the protected property.[377] The Supreme Court gave these requirements a critical reading in *Citizens to Preserve Overton Park v. Volpe*.[378]

a. The Overton Park Case

In the *Overton Park* case, a major east-west expressway in Memphis, Tennessee, was planned across Overton Park, a major public park in the city. Right-of-way for the highway inside the park had been acquired, but the Secretary had not made the required Section 4(f) findings. Plaintiffs argued that it would be "feasible and prudent" to route the highway around the park. This requirement is in Section 4(f)(1). Even if alternative routes were not "feasible and prudent," they argued, the project did not include all "possible methods" for minimizing harm to the park. The highway could be built under the park or depressed below ground level. This requirement is in Section 4(f)(2).

The Secretary argued that the "feasible and prudent" requirement for deciding whether there was an alternative authorized him to engage in a wide-ranging balancing of competing interests that was exempt from judicial review as "agency action committed to agency discretion" under the Administrative Procedure Act.[379] In this balancing process, he argued, he could weigh any harm to the park against the cost of other routes, safety factors, and other considerations. He could then determine the importance of these factors and decide whether alternative routes were feasible and prudent.

The Court rejected this argument. Finding that "no such wide-ranging endeavor was intended," it held that Congress did not intend to prohibit judicial review, and that Section 4(f) contained "law to apply":

> But…[§4(f)] indicates that the protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.[380]

As interpreted by the Court, Section 4(f) creates a presumption that the public parks, natural resource areas, and historic sites protected by this section may not be used for highways unless truly compelling reasons indicate that no alternative route is possible.[381]

b. Feasible and Prudent Alternatives

Since *Overton Park*, the Supreme Court has not decided another Section 4(f) case, leaving the courts of appeal to further define the broad directives set out by the Court for applying the feasible and prudent alternatives requirement in Section 4(f)(1). The Court in *Overton Park* stated, however, that an alternative is "feasible" unless "as a matter of sound engineering" it should not be built.[382]

Some courts adopt a strict reading of *Overton Park*. They overrule a rejection of alternate routes even where costs and community disruptions would be somewhat severe.[383] These cases apply the guiding principle in

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[376] *Id.* at § (g)(2). *See* Town of Belmont v. Dole, 766 F.2d 28, 31-33 (1st Cir. 1985) (upholding FHWA'S "archeological regulation" as consistent with the preservationist purposes of § 4(f)).

[377] 49 U.S.C. § 303(c).

[378] 401 U.S. 402 (1971), *on remand*, Citizens to Preserve Overton Park v. Brinegar, 494 F.2d 1212 (6th Cir. 1974) (Secretary not required to select feasible and prudent route if he rejected proposed route).

[379] 5 U.S.C. § 701.

[380] 401 U.S. at 412. For discussion of the judicial review standard adopted in *Overton Park*, see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

[381] It is not clear whether the "arbitrary and capricious" standard of judicial review applies to determinations by the Secretary that § 4(f) does not apply. Some circuits had applied a less deferential reasonableness test to the review of these decisions. *See* Coalition Against a Raised Expressway v. Dole, 835 F.2d 803, 810–11 (11th Cir. 1988); Citizen Advocates for Responsible Expansion v. Dole, 770 F.2d 423, 441 (5th Cir. 1985); Adler v. Lewis, 675 F.2d 1085, 1092–93 (9th Cir. 1982). This test was based by analogy on the test used to determine whether an impact statement must be prepared under NEPA. The Supreme Court has now repudiated this test, Marsh v. Oregon Natural Resources Council, 490 US. 360 (1989), and applies the arbitrary and capricious standard to agency decisions on whether to prepare an impact statement.

The choice of test may not be significant, as the Court indicated in *Marsh* that the two tests are very similar. However, *Marsh* left open the possibility that the reasonableness test may still apply to the review of questions of law. Courts could conclude that the decision on whether § 4(f) applies is a question of law if it turns on an interpretation of the statute. *See also* § 2.A.3.a, *supra*.

[382] 401 U.S. at 411.

[383] *See, e.g.,* Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1451–52 (9th Cir. 1984) (alternate route requiring dislocation of 1 church, 4 businesses, and 31 residences, as well as an additional expense of $42 million, did not amount to cost or community disruption of extraordinary magnitude), *cert. denied*, 471 U.S. 1108 (1985); *Louisiana Envtl. Soc'y Inc. v. Coleman*, 537 F.2d 79, 97 (5th Cir. 1976) (no cost or community disruption of extraordinary magnitude where alternative would require displacement of 377 families, 1508 persons, 32 businesses, and 2 churches); Coalition for Responsible Regional Dev. v. Brinegar, 518 F.2d 522, 526 (4th Cir. 1975) (alternative site for bridge not rendered imprudent solely because of state's potential inability to finance the alternative site).

Overton Park that "cost is a subsidiary factor in all but the most exceptional cases when alternatives to the taking of protected land are considered."[384] Indeed, the Ninth Circuit requires an agency to identify "unique problems or truly unusual factors" before it can reject an alternative.[385]

However, most of the lower federal court cases upheld agency decisions to reject alternatives for highways and other transportation projects because they were not feasible and prudent, as required by the statute.[386] One important factor the courts consider is that an alternative is imprudent if it does not meet the purpose or the transportation needs of the project.[387] For example, an alternative is not prudent if it does not accommodate existing traffic volumes,[388] does not solve existing traffic problems,[389] or does not fulfill the purpose of providing a new highway through a community.[390] One court rejected an alternative to airport expansion that would have located an airport in another city.[391] An alternative route that has an impact on parts or other protected sites is not an alternative that must be considered.[392]

A court may elevate the importance of cost considerations in the Section4(f) analysis. For example, *Eagle Foundation v. Dole* [393] considered a proposed four-lane expressway that would run through both a wildlife refuge and a historical site. The agency rejected as imprudent each of 10 alternative routes that would have avoided the refuge because of the "cumulative drawbacks presented by those routes," finding that all of the alternatives would be longer and more expensive to build.[394]

Judge Easterbrook for the Seventh Circuit upheld this determination, first noting that the Secretary's decision required deferential review. He then explained that in *Overton Park* the Supreme Court was merely being "emphatic" when it used the word "unique" to define the type of problems that must be present for an alternative to be imprudent.[395] What the Supreme Court really meant, according to Judge Easterbrook, was that the reasons for using the protected land have to be good and pressing ones, and well thought out.[396]

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[384] Coalition for Responsible Regional Dev., 518 F.2d at 526.

[385] Stop H-3 Ass'n v. Dole, 740 F.2d 1442 (9th Cir. 1984). *But see* Alaska Center for the Envt. v. Armbrister, 131 F.3d 1285 (9th Cir. 1997) (rule does not apply if alternative does not meet purpose of project), *cert. denied*, 118 S. Ct. 1802 (1998).

[386] City of Bridgeton v. Slater, 212 F.3d. 448 (8th Cir. 2000) (upholding rejection of alternatives to airport expansion project), *cert. denied*, 121 S. Ct. 855 (2001); Committee to Preserve Boomer Lake Park v. Department of Transp., 4 F.3d 1543 (10th Cir. 1993); Citizens Against Burlington, Inc., v. Busey, 938 F.2d 190 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) (upholding rejection of alternative); Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159 (4th Cir. 1990) (upholding rejection of alternative to highway widening in historic district); Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943 (10th Cir. 1989) (upholding rejection of alternative); Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987) (same); Ringsred v. Dole, 828 F.2d 1300 (8th Cir. 1987) (same), Eagle Foundation, Inc. v. Dole, 813 F. d 798 (7th Cir. 1987) (same); Druid Hills Civic Ass'n Inc. v. Federal Highway Admin., 772 F.2d 700 (11th Cir. 1985) (same), *on remand*, 650 F. Supp. 1368 (N.D. Ga. 1986) (rejection of alternative again upheld); Lakes Region Legal Defense Fund v. Slater, 986 F. Supp. 1169 (N.D. Iowa 1997) (upholding rejection; some alternatives threatened increased environmental impact); Conservation Law Found. v. Federal Highway Admin., 827 F. Supp. 871 (D. R.I. 1993) (upholding rejection of alternative), *aff'd on basis of district court opinion*, 24 F.3d 1465 (1st Cir. 1994); Citizens for Scenic Severn River Bridge, Inc. v. Skinner, 802 F. Supp. 1325 (D. Md. 1991) (same), *aff'd mem.*, 972 F.2d 339 (4th Cir. 1992); Town of Fenton v. Dole, 636 F. Supp. 557 (N.D.N.Y. 1986) (same; may rely on recommendation by regional highway planning organization), *aff'd per curiam*, 792 F.2d 44 (2d Cir. 1986); County of Bergen v. Dole, 620 F. Supp. 1009 (D.N.J. 1985) (same), *aff'd mem.* 800 F.2d 1130 (3rd Cir. 1986); Ashwood Manor Civic Ass'n v. Dole, 619 F. Supp. 52 (E.D. Pa. 1985) (same), *aff'd mem.*, 779 F.2d 41 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); Association Concerned About Tomorrow, Inc. (ACT) v. Dole, 610 F. Supp. 1101 (N.D. Tex. 1985) (contra); Wade v. Lewis, 561 Supp. 913 (N.D. Ill. 1983) (same); Md. Wildlife Fed'n v. Lewis, 560 F. Supp. 466 (D. Md. 1983) (rejection of alternative upheld), *aff'd. sub nom*. Md. Wildlife Fed'n v. Dole, 747 F.2d 229 (4th Cir. 1984); Marple Township v. Lewis, 21 Envtl. Rep. Cas. 1010 (E.D. Pa. 1982) (contra).

See also Annot., *Construction and Application of § 4(f) of Department of Transportation Act of 1966 as Amended and § 18 (a) of Federal -Aid Highway Act of 1968 Requiring Secretary of Transportation to Determine that All Possible Planning for Highways Has Been Done to Minimize Harm to Public Park and Recreation Lands,* 19 A.L.R. FED. 904 (1974).

[387] Associations Working for Aurora's Residential Envt. v. Colo. Dep't of Transp., 153 F.3d 1122 (10th Cir. 1998) (mass transit did not meet need of highway project properly defined as a project to relieve traffic congestion); *see, e.g.,* Alaska Center for the Envt. v. Armbrister, 131 F.3d 1285 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1802 (1998); Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159 (4th Cir. 1990); Druid Hills Civic Ass'n, Inc. v. Federal Highway Admin., 772 F.2d 700 (11th Cir. 1985); Lakes Region Legal Defense Fund v. Slater, 986 F. Supp. 1169 (N.D. Iowa 1997).

[388] Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943 (10th Cir. 1989).

[389] Associations Working for Aurora's Residential Envt. v. Colo. Dep't of Transp., 153 F.3d 1122 (10th Cir. 1998); Alaska Center for the Envt. v. Armbrister, 131 F.3d 1285 (9th Cir. 1997); Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 164 (4th Cir. 1990).

[390] Committee to Preserve Boomer Lake Park v. United States Dep't of Transp., 4 F.3d 1543 (10th Cir. 1993).

[391] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

[392] Louisiana Envtl. Society, Inc. v. Coleman, 537 F.2d 79 (5th Cir. 1976).

[393] 813 F.2d 798 (7th Cir. 1987).

[394] *Id.* at 803. *See also* Committee to Preserve Boomer Park v. Department of Transp., 4 F.3d 1543, 1550 (10th Cir. 1993); Hickory Neighborhood Defense, 910 F.2d at 163.

[395] Eagle Foundation, 813 F.2d at 804.

[396] *Id.* at 805.

Despite the *Overton Park* dictum that costs are a factor in the Section 4(f) alternatives analysis only when they reach "extraordinary magnitudes," the *Eagle Foundation* court held that "[a] prudent judgment by an agency is one that takes into account everything important that matters."[397] Because every other alternative would cost at least $8 million more than the park land route, the court concluded that the Secretary "could ask intelligently whether it is worth $8 million to build around the Hollow, in light of the other benefits and drawbacks of each course of action."[398] Although an additional $8 million would represent only a small fraction of the total cost of the highway, the court upheld the Secretary's determination that the additional costs of the alternatives, when combined with other drawbacks—such as safety, aesthetic, and wildlife concerns—were sufficient to make them imprudent under Section 4(f).[399]

The "cumulative drawbacks" approach upheld in *Eagle Foundation* and in other cases[400] is part of FHWA's official Section 4(f) policy. An FHWA policy paper states: "When making a finding that an alternative is not feasible and prudent, it is not necessary to show that any single factor presents unique problems. Adverse factors such as environmental impacts, safety and geometric problems, decreased traffic service, increased costs, and any other factors may be considered collectively."[401]

Similarly, in *Hickory Neighborhood Defense League v. Skinner*,[402] the Fourth Circuit adopted the Seventh Circuit's interpretation of *Overton Park*, explaining that the Supreme Court in that case used the word "unique" only for emphasis and "not as a substitute for the statutory word 'prudent.'"[403] The Skinner case held that courts should uphold the Secretary's decision to use Section 4(f) land as long as there is a "strong" or "powerful" reason to do so. The agency need not expressly find "unique problems," as long as the record supports the conclusion that there were "compelling reasons" for rejecting the proposed alternatives.[404]

The courts also differ on what range of alternatives the Secretary must consider when assessing whether or not "feasible and prudent" alternatives exist. The Ninth Circuit takes an expansive view of the alternatives analysis, usually requiring consideration of a no-build alternative, as well as other alternatives that might be very different than the proposed project.[405] For example, in *Stop H-3 Association v. Dole*,[406] the Ninth Circuit overruled the Secretary's rejection of a no-build alternative. It held that the agency did not automatically prove that the option of not building the highway was imprudent under *Overton Park* simply because it demonstrated an established transportation need. The Secretary still had to demonstrate that the no-build alternative presented truly unusual factors or would result in cost and community disruption of extraordinary magnitudes.[407] Other courts, however, appear more inclined to accept a decision by the Secretary that only certain, limited alternatives will meet the goals of the agency. These courts have ruled that the no-build alternative is an inherently imprudent alternative to achieving those goals.[408]

c. All Possible Planning to Minimize Harm

The Section 4(f)(2) process requires the Secretary to undertake "all possible planning to minimize harm" to park land or other protected resources before the project may be approved by the Secretary of Transportation.[409] The Secretary must address this requirement once he has determined that a proposed project will actively or constructively use protected property, and that there are no feasible and prudent alternatives to such use. At this point, Section 4(f)(2) requires the Secretary to reconsider the route through the protected land and to undertake planning to minimize its adverse impacts. The Supreme Court did not consider this statutory requirement in *Overton Park*.

The courts have recognized that the "all possible planning" requirement places an affirmative duty on the Secretary to minimize the damage to Section 4(f) property before approving any route using such

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[397] *Id.*

[398] *Id.* at 808.

[399] *Id.* at 803.

[400] *See* Committee to Preserve Boomer Lake Park v. United States Dep't of Transp., 4 F.3d 1543 (10th Cir. 1993).

[401] Policy Paper, *supra* note 346, at 4.

[402] 910 F.2d 159 (4th Cir. 1990).

[403] *Id.* at 163.

[404] *Id.*

[405] *See, e.g.,* Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1455–56 (9th Cir. 1984) (requiring full consideration of a no-build alternative, including possibility of increasing bus transit on existing highway rather than constructing new Interstate), *cert. denied*, 471 U.S. 1108 (1985); Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784, 789–90 (9th Cir. 1983) (requiring consideration of rehabilitating an historic bridge for a bicycle trail as an alternative to its destruction); Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 785 (9th Cir. 1980) (requiring consideration of an improved two-lane road as an alternative to a four-lane highway).

[406] 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

[407] *Id.* at 1455.

[408] *See, e.g.,* Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 164 (4th Cir. 1990) (alternatives not fulfilling transportation needs of project properly rejected as imprudent); Ringsred v. Dole, 828 F.2d 1300, 1304 (8th Cir. 1987) (parkway not prudent alternative to freeway because would not effectuate purposes of project and so was "by definition, unreasonable"); Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700, 715 (11th Cir. 1985) (upholding rejection of no-build option for failure to meet need for highway project); La. Envtl. Soc'y v. Coleman, 537 F.2d 79, 85 (5th Cir. 1976) (finding no-build alternative to destruction of historic bridge imprudent because would not fill need for new highway).

[409] 49 U.S.C. § 303(c).

property.[410] A leading Fifth Circuit case describing this duty under Section 4(f)(2) is *Louisiana Environmental Society v. Coleman*.[411] A bridge was planned that would cross a lake. The court held that prudent or feasible alternatives to the lake crossing were not available. It then held that Section 4(f)(2) required consideration of another alternative for crossing the lake if it would minimize harm. This determination required a "simple balancing process which would total the harm to the recreational area of each alternate route and select the route which does the least total harm."[412]

Under this analysis, the Secretary must first determine the amount of harm each alternative route inflicts on Section 4(f) property. Similar to the "feasible and prudent alternatives" directive of Section 4(f)(1), the agency must then consider alternatives that would minimize harm to the protected property the agency will use. However, courts have emphasized the differences between subsections (1) and (2) of Section 4(f). They uniformly hold that considerations that might make an alternative imprudent under subsection (l)—such as the displacement of persons or businesses or failure to satisfy the project's purpose—are "simply not relevant" to the minimization requirement of subsection (2).[413] Rather, "the only relevant factor in making a determination whether an alternative route minimizes harm is the quantum of harm to the park or historic site caused by the alternative."[414]

After assessing the amount of harm that would be caused by each alternative route through the park land, the Secretary must select the route that does the least total harm to that property.[415] The Secretary may reject any alternative that does not minimize harm.[416] The Secretary is also free to choose between alternatives that are determined to cause "equal damage"[417] and he may also choose between alternative routes when the damage is "substantially equal."[418] Although the goal is to adopt the least damaging route, the Fifth Circuit in *Louisiana Environmental Society* made clear that the Secretary may still reject a route that would minimize harm to Section 4(f) property, but "only for truly unusual factors other than its effect on the recreational area."[419] To reach this conclusion, the court held that Section 4(f)(2) contains an implied "feasible and prudent" exception like that found in Section 4(f)(1):

> Since the statute allows rejection of a route which completely bypasses the recreational area if it is unfeasible or imprudent, it is totally reasonable to assume that Congress intended that a route which used the recreational area but had a less adverse impact could be rejected for the same reason.[420]

In a number of cases the courts have held that the harm to a protected resource was sufficiently minimized under Section 4(f)(2), or that the Secretary properly rejected an alternative route as imprudent.[421] *Druid Hills Civic Association v. Federal Highway Administration*[422] indicates when agency findings under Section 4(f)(2) are inadequate. The Secretary approved the construction of a highway in Atlanta that would use park lands and historic sites, rejecting three alternatives for failing to minimize harm to Section 4(f) property. The Eleventh Circuit held the administrative record was "significantly deficient" because it did not consider the types of impacts the rejected alternatives would cause, the characteristics of the property that would be affected, or the degree of harm that would occur.[423] Because the record contained only generalized and conclusory statements that the rejected alternatives would "adversely affect" certain historic districts, the court held that the Secretary did not have sufficient information to make an informed comparison of the relative harms that would be imposed by the various alternatives.[424]

The court remanded the case to the Secretary for more intensive consideration of the alternative impacts on the Section 4(f) properties at issue. It directed the

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[410] Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 701 (2d Cir. 1972).

[411] 537 F.2d 79 (5th Cir. 1976).

[412] *Id.* at 86.

[413] Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700, 716 (11th Cir. 1985); Adler v. Lewis, 675 F.2d 1085, 1095 (9th Cir. 1982).

[414] Druid Hills, 772 F.2d at 716.

[415] Louisiana Envtl. Soc'y at 85.

[416] *Id. See also* Md. Wildlife Fed'n v. Dole, 747 F.2d 229, 236 (4th Cir. 1984) (judiciary should not read a conclusion of "equal harm" into Secretary's weighing process when record does not indicate such a finding).

[417] Md. Wildlife Fed'n, 747 F.2d at 236.

[418] Louisiana Envtl. Soc'y v. Coleman, 537 F.2d 79, 86 (5th Cir. 1976).

[419] Louisiana Envtl. Soc'y, 537 F.2d at 86. *See* Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700, 716 (11th Cir. 1985).

[420] *Id.*

[421] Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686 (3rd Cir. 1999) (bridge alignment through historic district). Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) (upholding mitigation plan); Hickory Neighborhood Defense League v. Skinner, 893 F.2d 58 (4th Cir. 1990) (Secretary may reject alternative as not prudent even though it does not minimize harm); Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987) (harm minimized); Eagle Foundation, Inc. v. Dole, 813 F.2d 798 (7th Cir. 1987) (same); Druid Hills Civic Ass'n Inc. v. Federal Highway Admin., 772 F.2d 700 (11th Cir. 1985), *on remand*, 650 F. Supp. 1368 (N.D. Ca. 1986) (same); Adler v. Lewis, 675 F.2d 1085 (9th Cir. 1982); Town of Fenton v. Dole, 636 F. Supp. 557 (N.D.N.Y. 1986) (same); Ashwood Manor Civic Ass'n v. Dole, 619 F. Supp. 52 (E.D. Pa. 1985) (same) *aff'd mem.* 779 F.2d 41 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149 (D. Haw. 1982), *aff'd sub nom.* Stop H-3 Ass'n v. Dole, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471, U.S. 1108 (1985).

[422] 772 F.2d 700 (11th Cir. 1985).

[423] *Id.* at 718.

[424] *Id.* at 717.

Secretary to assess the characteristics of the property that would be affected, the extent of any previous commercial development impacts on the historic districts, and the nature and quantity of harm that would accrue to the park or historic site that was affected.[425] On remand, the district court held that the analysis was sufficient to satisfy Section 4(f)(2).[426]

[425] *Id.* at 718.

[426] 650 F. Supp. 1368 (N.D. Ga. 1986), *aff'd on other grounds*, 833 F.2d 1545 (11th Cir. 1987), *cert. denied*, 488 U.S. 819 (1988).