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STATE PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS FOR FEDERALLY AIDED HIGHWAY PROGRAMS

I. Introduction

The National Environmental Policy Act (NEPA),¹ passed by Congress in 1969, has been called "the broadest and perhaps most important of the recent statutes . . . [which attempt] . . . to control . . . the destructive engine of material progress."² Despite such plaudits, NEPA has been the target of much critical legal commentary³ and the source of much litigation in the federal courts.⁴ Considerable controversy has centered on what is considered the core of NEPA: the required filing of an environmental impact statement (EIS) by agencies undertaking "major Federal actions significantly affecting the quality of the human environment"⁵ NEPA's failure to specify the detail necessary for a satisfactory EIS and the party responsible for preparing it has led to considerable litigation,⁶ most of which has arisen from the construction of federally aided highways.⁷

1. 42 U.S.C. §§ 4321-47, as amended, 42 U.S.C.A. § 4332 (Supp. 1976).

2. *Clavert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

3. *Kross, Preparation of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81 (1972); *Leventhal, Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Note, *Major Federal Actions Under the National Environmental Policy Act*, 44 FORDHAM L. REV. 580, 590 & n.77-81 (1975).

4. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973); *Greene Cty. Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Comm. Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

5. 42 U.S.C. § 4332(2)(C) (1970). Almost every word and phrase of this passage, because of its broad and qualitative nature, has spawned a judicial history all its own. See Note, *supra* note 3, at 590.

6. *Cady v. Morton*, No. 74-1984 (9th Cir., June 19, 1975); *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975); *Greene Cty. Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

7. See *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *National Forest Preservation Group v. Volpe*, 352 F.Supp. 123 (D. Mont. 1972); *Daly v. Volpe*, 350 F.Supp. 252 (W.D. Wash. 1972); *Indian Lookout Alliance v. Volpe*, 345 F.Supp. 1167 (S.D. Iowa 1972), modified, 484 F.2d 11 (8th Cir. 1973); *Scherr v. Volpe*, 336 F.Supp. 886 (W.D. Wis. 1971).

The legislative history and judicial treatment of NEPA make it clear that federally aided highway construction falls within the ambit of NEPA.⁸ As of November, 1972, 47 percent (1,681) of 3,553 of all EISs submitted to the Council on Environmental Quality (CEQ) involved highway projects.⁹ In deciding the initial question of whether the particular project is a "major Federal action" warranting EIS preparation, a project is considered federal from the time of state application for federal funds, federal approval, or active federal agency involvement in project planning.¹⁰

Responsibility for preparing the EIS has not been so firmly established. NEPA required that the federal agencies make the EIS "available to the President, the CEQ and to the public"¹¹ but did not expressly forbid the delegation of the preparation of the statement. Thus the Federal Highway Administration (FHWA) of the Department of Transportation (DOT), at first by custom¹² and then by memorandum,¹³ delegated this responsibility to the individual states. This practice led to a conflict in the courts as to the permissible scope of the delegation.¹⁴ In order to resolve this controversy, Congress amended NEPA in 1975 to legalize the delegation and also

8. 115 CONG. REC. 40425 (1969)(remarks of Senators Muskie and Randolph); see *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972); *Scherr v. Volpe*, 336 F.Supp. 886 (W.D. Wis. 1971).

9. Talbott, *Prospect '73*, HIGHWAY USER, Jan., 1973, at 9. A major area of litigation concerned which projects were so far progressed that compliance with NEPA might be too impractical or too wasteful. See *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1330-34 (4th Cir. 1972); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613, 624 (3d Cir. 1971). See also 69 MICH. L. REV. 732.

10. CEQ Guidelines, 40 C.F.R. pt. 1500 (1976); see *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972); *Morningside-Lenox Park Ass'n v. Volpe*, 334 F.Supp. 132 (N.D. Ca. 1971). See also Annot., 11 A.L.R. Fed. 556 (1972).

11. 42 U.S.C. § 4332(2)(C) (1970).

12. Francis Turner, the Federal Highway Administrator of DOT, told the Senate Public Works Committee, Subcommittee on Roads, on August 25, 1970, that the sheer size of the highway program made such delegation inevitable. Reilly, *The National Environmental Policy Act and the Federal Highway Program: Merging Administrative Traffic*, 20 CATH. U. L. REV. 21, 35 (1970). Thus administrative weight was recognized early as the reason for the delegation to the states of the EIS preparation.

13. Environmental Impact and Related Statements, PPM 90-1, 37 Fed. Reg. 21809, 21810 (1972) [hereinafter cited as PPM 90-1]. The states are delegated the responsibility for both a draft EIS and a final EIS, both of which must be made available to the public. See *Hearings on Red Tape Before the Subcomm. on Investigations and Oversight on the House Comm. on Public Works*, 92nd Cong., 1st Sess. 261-63 (1971).

14. See notes 67, 76 *infra* and accompanying text.

to provide certain procedural safeguards against possible adverse effects.¹⁵ Specifically, the amendment requires that the appropriate federal official furnish guidance and participation in the preparation of the statement, that he evaluate the statement prior to its approval and adoption, and that notification and solicitation be made to any other state or federal land management entity which may be affected by the action in question. This note will analyze the problems that these amendments (Act) addresses and evaluate its probable effectiveness.

II. Historical Background

The April 23, 1971, CEQ guidelines¹⁶ made clear that the federal agency had final responsibility for the EIS,¹⁷ but there was nothing mandating actual preparation by the agency or forbidding delegation to an applicant. A memorandum, issued by the CEQ in 1972, delegated primary responsibility for the initiation, planning, and construction of federally aided highways to state highway commissions.¹⁸ The same state highway commissions were explicitly made responsible for preparation of both a draft EIS and a final impact statement.¹⁹

There was an implicit danger, however, that state highway commissioners were not capable of the objectivity required for a sufficient EIS.²⁰ Since the EIS requires the inclusion of alternatives to the proposed action,²¹ the state highway commissions were faced with the situation of recommending other forms of transportation or canceling the project entirely.²²

The problems created by this delegation are complex and inter-

15. Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424 (codified at 42 U.S.C.A. §§ 4332(2)(D)-(I) (Supp. 1976)) [hereinafter cited as Act].

16. 40 C.F.R. pt. 1500 (1976). These final guidelines replaced the interim guidelines issued April 30, 1970. The interim and final guidelines are essentially the same. See text accompanying note 10 *supra*.

17. 40 C.F.R. § 1500.1 (1976); see *National Forest Preservation Group v. Volpe*, 352 F. Supp. 123, 125 (D. Mont. 1972).

18. PPM 90-1, § 3(e).

19. See note 13 *supra* and accompanying text.

20. See notes 53-75 *infra* and accompanying text.

21. 42 U.S.C. § 4332(2)(C)(iii) (1970).

22. The limitations on the use of the Highway Trust Fund, until recently, made the consideration of some alternatives of little practical significance. See notes 48-57 *infra* and accompanying text.

twined, but may be grouped into three areas: (1) whether the federal agency (FHWA) ultimately responsible for the EIS provides a degree of review and participation in the EIS preparation;²³ (2) whether state, rather than federal, preparation of the EIS precludes a sufficiently broad overview for a serious consideration of all the valid alternatives;²⁴ and (3) whether the state highway departments have certain inherent biases, which render them unable (or unwilling) to provide objective evaluation and make the potentially difficult sacrifices that NEPA requires.²⁵

III. FHWA Participation in the EIS Preparation

*Scherr v. Volpe*²⁶ established the principle of judicial review of FHWA actions in the highway construction area. In *Scherr*, the Wisconsin Department of Highways and FHWA concluded that an EIS was not required with respect to a certain 12 mile project. The court disagreed, finding it difficult to understand how the federal authority might have concluded that such a project was not sufficiently major to invoke the EIS requirement. It noted with disfavor the absence of an explanation by either the state or the FHWA.²⁷

Most of the "highway" cases following *Scherr* have not concerned this threshold question of whether the project came under NEPA. Rather, they involved the sufficiency of the impact statement. In *Daly v. Volpe*,²⁸ a state-prepared draft EIS was found to have been inadequately considered by the FHWA. The FHWA approval came on the day following receipt of the statement. The court directed that "[t]he statute [NEPA] contemplates more deliberation than the time required to use a rubber stamp."²⁹

In *Swain v. Brinegar*³⁰ the Court of Appeals for the Seventh Circuit found the design approval given to a project after a final EIS

23. See notes 26-38 *infra* and accompanying text.

24. See notes 39-52 *infra* and accompanying text.

25. See notes 53-75 *infra* and accompanying text.

26. 336 F. Supp. 886 (W.D. Wis. 1971).

27. *Id.* at 88-89. Plaintiffs were residents of Hartland, Wisconsin and members of various conservation and environmental organizations, who contended that federal defendant Volpe and his subordinates failed to comply with NEPA by filing an impact statement for a certain project. *Id.*

28. 350 F. Supp. 252 (W.D. Wash. 1972).

29. *Id.* at 259. This "rubber stamping" phraseology became a watch-word in the delegation litigation and in the passage of the Act. See note 38 *infra*.

30. 517 F.2d 766 (7th Cir. 1975).

was submitted "in sum and substance . . . identical to the original state-prepared draft" ³¹ The Department of Interior had described the draft as lacking in specific information and inadequately treating the natural environmental resources. ³² The EPA had suggested that loss of farmland, ignored in the final EIS draft, could be considered an adverse effect. Only two small sentences were added, slighting the effects of the loss of over 700 acres of tillable land. Regardless of this result, the FHWA approved. ³³

One independent study found that of 76 final EISs filed through June, 1972, less than 25 percent received substantive comments by DOT. ³⁴ Because the memorandum makes no requirements of independent fact finding by FHWA or DOT, the danger is real that they will be unable "to pierce through the self-serving assumptions, generalities, and cliches upon which the impact statements may be based." ³⁵

The drafters of the Act were aware of this concern. State preparation of the EIS is now permitted, but the amendment mandates guidance and participation by the federal officials, ³⁶ as well as an independent evaluation of the statement prior to approval and adoption by the responsible federal official. ³⁷ The Act, however, does not provide minimal levels of guidance and participation. Furthermore, it fails to mandate specific procedures which might insure adequate supervision. The Senate Interior and Insular Affairs Committee recommended two such procedures: documentation of agency activities and maintenance of a highly trained interdisciplinary staff. ³⁸ Without these or similar requirements, it is conceivable that "rubber stamping" may still be a common practice.

31. *Id.* at 774-75.

32. *Id.* at 774 n.11.

33. *Id.* at 774-75.

34. Sullivan & Montgomery, *Surveying Highway Impact*, ENVIRONMENT, Nov., 1972, at 13.

35. *Id.* at 15.

36. 42 U.S.C.A. § 4332 (2)(D)(ii) (Supp. 1976).

37. *Id.* § 4332(2)(D)(iii).

38. In order to avoid the danger . . . of constant judicial testing of whether the degree of delegation of EIS preparation duties is permissible or impermissible, the Committee strongly urges the participation in the preparation, and their independent review, of the EIS. In particular, the Committee wishes to emphasize the necessity of maintaining in each Federal agency, and fully using during the preparation and evaluation of the EIS's, a highly trained and capable interdisciplinary staff. Both these steps—documentation of agency activities and maintenance of the interdisciplinary

IV. State Consideration of Alternatives

NEPA was intended to be broad and all inclusive in its concern for the environment.³⁹ Federal agencies are to apply its provisions to the "fullest extent possible."⁴⁰ Also expressly required is the recognition of the "worldwide and long-range character of environmental problems . . ."⁴¹ One of the specific elements to be studied in the EIS is "the relationship between local short-term uses of man's environment and the maintenance and enhancement of longterm productivity . . ."⁴² NEPA recognizes that "each 'limited' federal project is part of a large mosaic of thousands of similar projects and that cumulative effects can and must be considered on an ongoing basis."⁴³ Thus, an EIS should consider the relation of the particular project to the whole. Federal participation here is crucial, as state highway departments cannot be expected to go beyond their specific domains. The Seventh Circuit in *Swain* noted "state agencies simply are not in a position to evaluate environmental consequences of a national or worldwide scope."⁴⁴ Given the congressionally declared national environmental policy, *Swain* found it "odd that this central function [the EIS] should be delegated to state officials who have little means, motivation or indeed power to effectively coordinate such federal actions."⁴⁵

According to the Senate Committee of Interior and Insular Affairs, the Act would have answered this problem. As originally pro-

staff—are particularly important as a means of avoiding unnecessary litigation. When H.R. 3130's [Act] provisions are working best—when the data and draft EIS provided by the state agency or official are of high quality and require only modest changes by the Federal official—the appearance of "rubber-stamping" is greatest. Proper documentation and use of staff are the best means of reassuring those who might level the "rubber-stamping" charge, or, should the charge be made, of disproving it.

SEN. REP. No. 152, 94th Cong., 1st Sess. 10-11 (1975).

39. See text accompanying note 1 *supra*.

40. 42 U.S.C.A. § 4332 (Supp. 1976); see *Calvert Cliffs' Coordinating Comm., Inc., v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). This phrase has been extensively used in NEPA litigation, especially in the retroactivity cases. See *Morningside-Lenox Park Ass'n v. Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971), *citing* CONF. R. No. 765, 91st Cong., 1st Sess. (1969).

41. 42 U.S.C.A. § 4332(2)(F) (Supp. 1976).

42. 42 U.S.C. § 4332(2)(C)(iv) (1970).

43. 517 F.2d at 775.

44. *Id.* at 778 (footnote omitted).

45. *Id.* at 778 n.18.

posed, it required "the Federal official to prepare independently for the EIS the analysis of the impacts and alternatives of major interstate significance associated with the project or action which is the subject of the EIS."⁴⁶ However, the proviso which would have required such action was dropped from the final bill.⁴⁷

The breadth of alternatives which should be considered in the EIS is an area which is relatively unexplored.⁴⁸ Most EISs include, as they should, route alternatives and their various ramifications. But recent changes in the availability of the Highway Trust Fund⁴⁹ could turn the "alternatives" clause into a much more valuable aspect of the EIS. Until passage of the Federal Aid Highway Act of 1973,⁵⁰ the Trust Fund was restricted in its availability solely to the construction and maintenance of federal aid highways.⁵¹ Now limited amounts are available for urban mass transit; real alternatives here include, at the very least, bus and rail lines, neither of which would require further highway construction. When the alternatives to a highway project were limited to roadbuilding, the consideration of non-highway alternatives was little more than mental exercise and paper waste. But now, in keeping with the broad scope of NEPA's policy, inclusion of these new alternatives would increase the objectivity and scope, and consequently the value, of the EIS.⁵²

46. SEN. REP. NO. 152, *supra* note 38, at 2.

47. See note 15 *supra*.

48. See Note, *Environmental Impact Statements—A Duty of Independent Investigation by Federal Agencies*, 44 U. COLO. L. REV. 161, 165-66 (1973).

49. The Highway Trust Fund was created by the Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, § 209, 70 Stat. 374 (codified in scattered sections of 23 U.S.C.); it is funded by taxes on gasoline, motor oils, tires, and trucks. It was promulgated to help build a nationwide system of high speed, limited access highways and improved primary and secondary roads. For a discussion of its history and purpose and the controversy surrounding its use, see Note, *The Highway Trust Fund: Road to Anti-Pollution?*, 20 CATH. U. L. REV. 171 (1970). See also Comment, *The Preparation of Environmental Impact Statements by State Highway Commissions*, 58 IOWA L. REV. 1268, 1271 n.29 (1973).

50. Act of Aug. 13, 1973, Pub. L. No. 93-87, § 121(a), 87 Stat. 259. Trust funds allocated to the federal-aid urban system will be available for the construction of fixed rail facilities and the purchase of trains as well as buses for highway mass transit.

51. The Act restricted the use of the Fund to highway planning and construction, which has enabled it to provide the 90 percent share of the federal government in the interstate system and the lesser federal share of other federal-aid programs. See Note, *supra* note 49.

52. For a discussion of other methods of "Tinkering with the Financing Scheme," see Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. PA. L. REV. 1, 51 (1973).

Properly addressed, NEPA's requirement for analysis of alternatives to proposed

V. Objectivity of State Highway Commissions

The consideration of valid alternatives to highway building includes other modes of transportation and even the decision not to build.⁵³ Such choices are antithetical to state highway officials whose bias is toward highway construction. In several cases it was found that states treated the EIS as only a procedural formality preceding the assumed building of the highway.⁵⁴ In one case,⁵⁵ the Iowa Highway Commission was ordered to halt a project until an EIS was prepared.⁵⁶ Immediately after the decision and prior to the preparation, the chief engineer of the Highway Commission insisted that the highway would still be constructed, and emphasized that it would be built on the proposed route.⁵⁷ Further, the Highway Commission Chairman noted that EIS preparation would only delay the project, not force its abandonment.⁵⁸

Litigation leading directly to the passage of the Act⁵⁹ recognized the potential for bias on the part of the states. In a non-highway case, *Greene County Planning Board v. Federal Power Commission*,⁶⁰ the FPC had delegated its EIS obligation for a pro-

legislation, plans, programs, and projects should entail an exploration of the suitability of other modes of transportation to accommodate similar objectives with less environmental disruption. Practically, however, a mass transit or commuter rail alternative to an urban freeway is infeasible in the absence of comparable available funding. Reilly, *The National Environmental Policy Act and the Federal Highway Program: Merging Administrative Traffic*, 20 CATH. U. L. REV. 21, 24 (1970).

53. In *Environmental Defense Fund v. Corps of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971), an injunction was granted in the construction of a dam across the Cossatot River. The reason for the action was failure to comply with NEPA. In discussing the "alternatives" treatment of the inadequate EIS, the court said: "The most glaring deficiency in this respect is the failure to set forth and fully describe the alternative of leaving the Cossatot alone." *Id.* at 761. See *Udall v. FPC*, 387 U.S. 428 (1967).

54. *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); *No East-West Highway Comm., Inc. v. Whitaker*, 403 F. Supp. 260 (D.N.H. 1975).

55. *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167 (S.D. Iowa 1972). This was another case of piecemealing. A 14 mile project was split into 7 mile segments and an EIS prepared for only one of the two. The court's decision called for a new EIS considering the entire project. See Comment, *supra* note 49, at 1276-82.

56. 345 F. Supp. at 1172-73.

57. Comment, *supra* note 49, at 1278.

58. *Id.*

59. See SEN. REP. NO. 152, *supra* note 38, at 1-2.

60. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); see Note, *supra* note 48.

posed nuclear power plant to the Power Authority of the State of New York (PASNY), arguing that its own statement was not required until its final decision.⁶¹ Stating that NEPA was a "mandate to consider environmental values 'at every distinctive and comprehensive stage of the [agency's] process,'" ⁶² the Second Circuit declared that the FPC had:⁶³

[A]bdicated a significant part of its responsibility by substituting the statement of PASNY for its own This danger of the procedure, and one obvious shortcoming, is the potential, if not the likelihood, that the applicant's statement will be based upon self-serving assumptions. . . .

. . . .

NEPA places the onus of formulating the statement solely on the [Federal Power] Commission.

In applying the *Greene County* rationale, the court in *Committee to Stop Route 7 v. Volpe*⁶⁴ noted the same danger of bias and found the same self-serving assumptions. The Connecticut DOT had already concluded in its draft EIS that the project would not significantly affect the quality of man's environment, even though the proposal was for a segment of a new four-lane 31 mile expressway through virgin woods.⁶⁵

In *Conservation Society v. Secretary of Transportation*⁶⁶ the district court found an inherent bias in favor of the proposed highway construction and in derogation of environmental considerations. The Court of Appeals for the Second Circuit affirmed, saying that delegating the duty to prepare an EIS is "unlikely to result in as dispassionate an appraisal . . . as the federal agency itself could produce."⁶⁷ A theme mentioned several times was that the state agency (Vermont Highway Department) was established to "pursue defined state goals,"⁶⁸ which might conflict with an objective assessment of environmental consequences. This theme was also developed in *No East-West Highway Committee, Inc. v.*

61. 455 F.2d at 418-19.

62. *Id.* at 420.

63. *Id.* at 420, 423.

64. 346 F. Supp. 731 (D. Conn. 1972).

65. *Id.* at 741.

66. 362 F. Supp. 627 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974).

67. 508 F.2d at 931.

68. 508 F.2d at 931; 362 F. Supp. at 633.

Whitaker,⁶⁹ in which New Hampshire's highway department repeatedly denied the existence of plans to construct a certain major highway, after completing the first four of ten seriatim steps on the way to such construction. The court stated that accepting this denial as proof of the non-existence of a plan would be a *reductio ad absurdum* and would make a "'mockery of' NEPA."⁷⁰

An independent study⁷¹ which examined EISs prepared by state and local authorities concluded that the main inadequacy was the lack of data being collected at the local level on social, economic, and environmental issues.⁷² The authors found the repetition of identical phrases, paragraphs, and even pages in impact statements for different urban highway projects, and pointed to the inadequacy of almost all the statements.⁷³

This "objectivity" issue was the real basis for the *Conservation Society* and *Swain* decisions.⁷⁴ However, the impetus for the passage of the Act, which was intended to overrule them, were the more practical considerations of loss of significant employment due to

69. 403 F. Supp. 260 (D. N.H. 1975).

70. *Id.* at 271. Senator Edmund Muskie and former Secretary of Transportation John Volpe have voiced similar doubts. Muskie, referring to his own experience with the Maine Highway Commission while Governor, said:

I am concerned as to whether or not, in their responses to these procedures, the State highway departments would be in a position to truly take into account—from an informed point of view—the environmental questions that are involved . . . I am recalling my own experience as Governor. The highway planning that is done at the State level, I suspect, will make it difficult—with the best of good will—to provide an environmental input to State planning which will adequately surface environmental questions for the benefit of national policy here in Washington.

Hearings on the NEPA Relative to Highways Before the Subcomm. on Roads of the Senate Comm. on Public Works, 91st Cong., 2d Sess. 14 (1970).

71. See Sullivan & Montgomery, *Surveying Highway Impact*, ENVIRONMENT, Nov., 1972, at 13.

72. *Id.* at 15.

73. *Id.*

74. In so deciding, these two circuits disagreed with four other circuit courts, which failed to find the same dangers, instead approving the delegation procedure. *Movement Against Destruction v. Volpe*, 500 F.2d 29 (4th Cir. 1974); *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849 (8th Cir. 1973); *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974); *Citizens Environmental Council v. Volpe*, 484 F.2d 870 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). *Conservation Soc'y* has been reconsidered by the Second Circuit in the light of the Act. Over a strong dissent, it was decided that the EIS which had been submitted complied with the procedure allowed by the Act. *Conservation Soc'y, Inc. v. Volpe*, No. 73-2629, (2d Cir. Feb. 18, 1976). The remaining circuits have not decided the issue.

Conservation Society and the administrative confusion which resulted when the two courts chose to require independent federal EIS preparation.⁷⁵ By permitting state EIS preparation Congress risks the same dangers that motivated the *Conservation Society* and *Swain* courts to decide as they did. Objectivity of the state agencies is an aspect not very susceptible to control and will require ever-vigilant federal officials.

VI. Conclusion

The Act has already had, and will continue to have, an important streamlining effect in the EIS preparation procedure. However, the courts and interested citizens' groups must exercise continued care that this streamlining is not at the expense of environmental circumspection. Federal responsibility and the need for Federal participation have been strongly reemphasized, but that reemphasis itself should serve as a warning signal.

By allowing, and almost assuring, increased federal-state interplay in the EIS process, the Act should result in an increased amount of local-level government and citizen input. This should prove environmentally and governmentally healthy.

With the Highway Act of 1973, wider and more in-depth consideration of alternatives should be demanded of highway planners, not only as to minor cosmetics and routing of their projects, but also as to alternative modes of moving goods and people.

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75. SEN. REP. NO. 152, *supra* note 38. Because of the question whether the opinion in *Conservation Soc'y* changed the law for preparation of EISs in the three Second Circuit states or found that the facts in the case did not support the generally accepted legal requirements, the FHWA stopped the processing of major highway projects in New York, Connecticut and Vermont. *Id.* "More than \$2.3 billion in highway construction and nearly 215,000 potential jobs were frozen." HIGHWAY USERS FEDERATION REPORTER, May, 1975, at 3. Congressmen from the affected district, concerned about unemployment in an already suffering construction industry, introduced legislation to clarify the procedure. The original proposal, H.R. 3787, was directed particularly at the DOT, the highway industry and the three Second Circuit states; it died because of these limitations. The subsequent *Swain* decision, agreeing with *Conservation Soc'y* and mandating independent federal preparation of the EIS for the Seventh Circuit states, required its expansion. So, to foreclose further judicial intervention on the delegation issue and to quell uncertainties which might sacrifice employment opportunities, Act was passed.

