Fordham Urban Law Journal

Volume 7 | Number 1 Article 6

1979

Environmental Considerations in Urban Highway Development: Westway- A Case in Point

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NOTES

ENVIRONMENTAL CONSIDERATIONS IN URBAN HIGHWAY DEVELOPMENT: WESTWAY—A CASE IN POINT

I. Introduction

On December 16, 1977, Commissioner Peter A. A. Berle of the New York State Department of Environmental Conservation (DEC) rejected an application by the West Side Highway Project for an air quality permit[1] which would have allowed the construction of New York's billion dollar Westway highway project.[2] Commissioner Berle denied the permit on the grounds that the applicant failed to show the accuracy of its predictions concerning induced traffic[3] for the completed project.[4]

In his decision the Commissioner said, "This proceeding represents only a small portion of the process from which will flow the

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1. A permit from the Commissioner of the Department of Environmental Conservation is required prior to the construction of an indirect source of air pollution. The permit will not issue unless the Commissioner determines that the completed facility will not cause a violation or aggravate an existing violation of the various state air pollution control plans. 6A N.Y.C.R.R. § 203.9 (1972). An indirect source of air pollution is one which, although it does not itself emit air pollution, attracts traffic which does. *Id.* § 203.2(a) (1972).

The application for Westway was made by the New York State Department of Transportation, and its agent, the West Side Highway Project.

2. In the Matter of the Application for an Indirect Source Permit, Decision of Peter A.A. Berle, Commissioner of the New York State Department of Environmental Conservation, December 16, 1977 [hereinafter cited as Comm'r Dec.]. Westway is the popular name used to designate the so-called "Modified Outboard" proposal for the construction of an interstate highway along the lower west side of Manhattan between the Brooklyn-Battery Tunnel and the Lincoln Tunnel. Westway would replace the former Miller Highway which was closed due to structural defects in 1974. Comm'r Dec., *supra* at 2.

Commissioner Berle based his decision on the findings of fact reported by hearing officer Professor Albert J. Rosenthal of Columbia University. The Commissioner was entitled to appoint a hearing officer under 6A N.Y.C.R.R. § 203(c), (e) (1972).

3. Induced traffic refers to vehicle trips which would otherwise not have been made, but which are generated by the construction of a new transportation facility. Comm'r Dec., *supra* note 2, at 6.

4. *Id.* at 11. The standard utilized by the Commissioner was proof by a preponderance of the evidence. Doubts as to whether the burden has been met are resolved against the applicant. *Id. See,* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 355, at 853 (2d ed. 1972); 1 G. MOTTLA, NEW YORK EVIDENCE PROOF OF CASES § 25, at 49 (2d ed. 1966).

ultimate decision of whether or not Westway will be built. The decision will involve a host of competing economic, social and political choices which have been, and will continue to be, debated at great length."[5] Berle futher stated that, "We are concerned here only with the very narrow and technical question of whether Westway meets the air quality criteria for the Permit set forth in Section 203.9 of Part 203 [of the Codes, Rules and Regulations of the State of New York]. By law, and as a matter of professional responsibility, this decision relates only to that question."[6]

The Commissioner did grant the applicant the opportunity to reopen the hearings in order to introduce further evidence about its induced traffic projections.[7] Should the applicant fail to attain a reversal, DEC will not issue a permit, and the construction of Westway would effectively be barred.

An approval by DEC of the air quality permit would not represent the final determination of Westway's future. The project must negotiate a complicated maze of administrative and judicial decisions before even preparation for construction can commence. A struggle continues between the anti-Westway group which opposes construction on environmental grounds, and the pro-Westway faction which claims that the project will beget a new era of urban redevelopment. The primary weapons utilized in this conflict are the interconnected, yet frequently contradictory, goals and mandates of the Federal-Aid Highways Act,[8] the National Evironmental Policy Act[9] and the Clean Air Act.[10] Proponents of each view have begun to question whether the current decision-making machinery represents the most efficatious means of determining the fate of projects of such significant import as Westway.[11]

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5. Comm'r Dec., *supra* note 2, at 3.
6. *Id.* at 5.
7. *Id.* at 18.
8. *See* note 13 *infra.*
9. *See* note 45 *infra.*
10. *See* note 65 *infra.*
11. One issue which has been raised for example, is whether it is in the best interest of the public to vest the power to annul a project like Westway in the hands of discreet participants. *See, e.g.*, the New York Times editorial "Spreading the Smog Over Westway" in which the highway decision making process is said to offer "a good example of how not to make public policy in realms that touch so many vital civic interests." N.Y. Times, Sept. 30, 1977, at 26, col. 1. The editorial continues, "How are we to measure decades of change and development? Westway offers the potential of parks, housing and jobs in an optimum design

The objective of this Note is to provide an overview of the major statutory law which currently controls urban highway construction. Special emphasis will be placed on the role environmental considerations play in the decision making process.[12] The evolution of the still unresolved Westway conflict, current to the time of this writing, will serve as an illustration of the involved statutory procedures upon which the fate of a Federal-aid highway rests.

II. The Federal-Aid Highways Act

The Congress stated its purpose in legislating the Federal-Aid Highways Act (FAHA)[13] to be the prompt completion of a unified, interconnecting system of national highways.[14] Underlying this goal is a commitment to a highway system which will meet the requirements of commerce and of national security.[15] To aid in financing this system, Congress simultaneously established a Highway Trust.[16] Funds are thereby allocated to the states to defray the cost of constructing highway sections which meet the requirements of "Federal-aid highways."[17] This Note will focus on the Interstate System, one of the four Federal-aid highway designations.[18]

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with the resources that are at hand. Commissioner Berle should insist on air quality safeguards, based on reasonable estimates of traffic twenty years hence. He should not, however, be the final judge of the wisdom or risks of the project as a whole." *Id.*

12. This Note will concentrate on the problems of compliance with the Clean Air Act in construction of urban highway systems. There are other federal environmental statutes, however, which also must be complied with prior to new highway construction. Among these statutes are the Noise Control Act of 1972, 42 U.S.C. §§ 4901-18 (Supp. V 1975), and, in the case of any construction which will infringe upon a navigable body of water, a permit is required under 33 U.S.C. § 1344 (Supp. V 1975). Unnecessary destruction of public parklands must also be reviewed under 23 U.S.C. § 138 (1976).

13. 23 U.S.C. §§ 101-56 (1976). Authority under Title 23 generally is delegated to the Federal Highway Administration pursuant to 49 C.F.R. § 1.48 (1977).

14. 23 U.S.C. § 101(b) (1976). In legislating the Federal-Aid Highways Act, the Congress was acting under the express authority to establish "post Roads" granted in Article I, section 8 of the United States Constitution. State Highway Comm'r v. Volpe, 479 F.2d 1099, 1111 (8th Cir. 1973).

15. 23 U.S.C. § 101(b) (1976). The word defense in this context refers to the efficient transportation of military equipment and personnel, and the rapid evacuation of the civilian population in the event of national attack. Schwartz, *Urban Freeways and the Interstate System*, 8 TRANSP. L.J. 167, 222 (1976).

16. 23 U.S.C. § 101(c), (d) (1976). The Federal-Aid Highways Act of 1976 sets 1990 as the final year for the allocation of the Highway Trust funds. *Id.* § 101(b).

17. *Id.* § 101(c), (d).

18. The three other designations of Federal-aid highways defined under section 103 are the primary system, the urban system and the secondary system. *Id.* § 103.

The Interstate System is defined under section 103 of the Act as selected roads, "so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense . . . ."[19] The initial responsibility for obtaining Interstate System designation lies with the state.[20] The state, through its highway department, must submit to the Secretary of the Department of Transportation[21] a proposal for a project formulated to meet the requirements of an Interstate System road.[22] When the Secretary determines that the proposal fulfills all the criteria of the Act, he issues a designation, thus entitling the project to funding from the Highway Trust.[23] In the case of an Interstate System highway, the state receives funding for up to ninety-five percent of the project cost.[24]

Prior to the submission of its application, the state must show compliance with a variety of prerequisites. The most elementary requirement is that the proposed Interstate System segment will connect at each end with other highways within the System.[25] Second, the proposal must evidence that the completed section will be adequate to meet present and probable future traffic flows "in a manner conducive to safety, durability, and economy of maintenance . . . ."[26] The standard mandated by the Act looks to twenty year projections for traffic type and volume.[27] In addition to these technical minimum requirements, the proposal must consider matters encompassing more than narrow traffic concerns.

Pursuant to section 109, the Secretary promulgated guidelines to insure that any proposed federal highway system take into account possible adverse economic, social and environmental effects.[28] The

19. *Id.* § 103(e)(1).

20. *Id.* § 105.

21. "Secretary" shall hereinafter refer to the Secretary of the United States Department of Transportation, unless otherwise noted.

22. 23 U.S.C. § 105(a) (1976).

23. *Id.* § 103(e), (f). The Secretary may not withhold his approval for reasons not contemplated in the Act. State Highway Comm'r v. Volpe, 479 F.2d 1099, 1114 (8th Cir. 1973).

24. 23 U.S.C. § 120(c) (1976).

25. *Id.* §§ 103(e)(1), 105.

26. *Id.* § 109(a).

27. *Id.* § 109(b).

28. *Id.* § 109(h). Social, economic, and environmental effects are defined as: "[T]he direct and indirect benefits or losses to the community and to highway users." 23 C.F.R. § 790.3(c) (1977). Taken into consideration are: (1) regular community growth and total transportation planning, (2) conservation and preservation, (3) public facilities and services, (4)

final decision on the project should represent the best overall public interest.

Public hearings concerning the proposal must be held by the state if the effected community manifests sufficient interest.[29] Through these hearings the plan attempts to incorporate to the maximum feasible extent relevant federal, state and local goals, thus leading to an amicable resolution of controversial issues.[30] The hearing process is two tiered. The first hearing, the "corridor public hearing," considers the need for, and possible location of, Federal-aid highways.[31] Phase two of the hearing process is the "highway design public hearing." This tribunal sits only after the appropriate state agency has approved the route location.[32] Its function is to promote comment on the social, economic and environmental impacts of specific alternative design proposals.[33] The state highway department is responsible for ensuring adequate public notice of, and participation in these hearings.[34] The state agency must then independently solicit the views of relevant federal, state and local agencies, officers and public groups for their opinions on alternative locations and designs, and on possible adverse effects resulting therefrom.[35]

Supplementing the community impact considerations of the hearing phase, section 134 of the Act details additional guidelines which are applicable to urban areas.[36] Under this section, the Secretary may not approve a project which will affect an urban area unless he determines that the proposal is part of a "continuing, comprehensive . . . planning process" coordinated to serve the transportation needs of local communities.[37] This so-called "3-C"

community cohesion, (5) displacement, (6) air, noise and water pollution under any relevant state or federal air quality standard, (7) aesthetic and other values. *Id.*

29. 23 U.S.C. § 128 (1976).

30. 23 C.F.R. § 790.1(a) (1977).

31. *Id.* § 790.3(a).

32. *Id.* § 790.3(b).

33. *Id.*

34. *Id.* § 790.7.

35. *Id.* § 790.4. Concerning the function of the public hearings, Justice Marshall wrote that they were "conducted by local officials for the purpose of informing the community about the proposed project and eliciting community views . . . ." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). *See generally* Curry, *"Administration" v. "Participation"? The Public Hearing in the Urban Transportation Decision Process*, 5 TRANSP. L.J. 45 (1973).

36. 23 U.S.C. § 134 (1976). Section 134 applies to urban areas with populations of greater than 50,000 people.

37. *Id.* § 134(a).

process must be reconciled with the Act's affirmative statement that it remains in the national interest to facilitate the flow of traffic into urban areas.[38]

These FAHA requirements do not comprise the sole criteria relevant to a Federal-aid highway proposal. The complexity of evaluating a proposed highway project is greatly augmented by the necessity of ensuring project compliance with the dictates of other federal regulatory statutes. Of special importance to the approval of a project are the environmental considerations and restrictions imposed by the Clean Air Act and the National Environmental Policy Act. The following sections will examine specific requirements of the Clean Air Act[39] and the National Environmental Policy Act[40] as they affect federal highway construction. It should be noted at this point, however, that the Federal Highway Works Administration (FHWA) and the Secretary have promulgated guidelines to ensure compliance by the states with the environmental goals of these Acts, both at the preliminary hearing level and in the final proposal.[41] Thus, acceptance for funding under FAHA indicates that it is the opinion of FHWA that the completed project will be consistent with the provisions of the Clean Air Act and the National Environmental Policy Act.[42]

A recent amendment of FAHA recognizes the growing urban commitment to the improvement of mass transit facilities as part of an effort to lure commuters from private automobile use. The amendment, known as the Interstate Transfer, authorizes the Secretary to withdraw Interstate System designation from an approved urban project upon the joint request of the governor and the local government.[43] Upon withdrawal, the state may apply to the federal government for alternative mass transit financing.[44]

Highway planners must consider the requirements of federal anti-pollution statutes from the commencement of project design.

38. *Id.* § 135.

39. *See* note 45 *infra.*

40. *See* note 65 *infra.*

41. 23 C.F.R. §§ 770, 771, 795 (1977). These sections relate to the promulgation of Air Quality Guidelines, Environmental Impact Statements and Environmental Action Plans.

42. *Id.* § 770.205.

43. 23 U.S.C. § 103(a)(4) (1976). The request procedures and FHWA criteria for withdrawal of approval are prescribed under 23 C.F.R. §§ 476.204 and 476.208 (1977).

44. 23 U.S.C. § 103(e)(4) (1976).

Early in the planning stage the National Environmental Policy Act will influence the decision-making process.

III. The National Environmental Policy Act

Congress, in legislating the National Environmental Policy Act (NEPA),[45] recognized that "it is the continuing policy of the Federal government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[46] This goal should be attained through integration with the goals and directives of other federal, state and local programs.[47]

The most significant provision under NEPA for the improvement of environmental quality is the Environmental Impact Statement (EIS) mandate. The Act requires that all federal agencies "include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action . . . ."[48] Under Environmental Protection Agency (EPA) promulgated regulations, the EIS must comprehensively analyze the proposal for federal action in seven designated areas, with special emphasis on both positive and negative, direct and indirect environmental consequences.[49]

45. 42 U.S.C. §§ 4321-47 (1970), *as amended*, 42 U.S.C. § 4332 (Supp. V 1975).

46. 42 U.S.C. § 4331(a) (1970).

47. *Id.* § 4331(a), (b).

48. *Id.* § 4332(c). The FHWA in compliance with 42 U.S.C. § 4333 has promulgated regulations to assure that Administration projects are in accord with NEPA requirements for an EIS. 23 C.F.R. §§ 771.1-771.22 (1977). These regulations define a "major Federal action" pertaining to federal highway construction, as those actions in which the FHWA participates with substantial administration of funds or which will be likely to generate significant alterations in traffic volume, travel patterns, land use, etc. *Id.* §§ 771.3, 773.9(d).

49. 40 C.F.R. § 6.304(a)—6.304(g) (1977). The seven areas of EIS consideration are:

(a) the background and description of the proposed action;

(b) alternatives to the proposed action;

(c) the environmental impact of the proposed action;

(d) adverse impacts which cannot be avoided should the proposal be implemented and the steps taken to minimize them;

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

For Federal-aid highway construction, responsibility for preparing a draft EIS rests with the state and local highway departments.[50] The FHWA Division Administrator reviews the draft EIS and, if he agrees with it in scope and content, he must assume responsibility for it.[51] Subsequent to adoption by FHWA, the Division Administrator disperses the report to designated federal and state agencies,[52] and to concerned private groups and individuals.[53]

The draft EIS must also be made available to the general public at least thirty days before the the corridor/design public hearings are held for the proposed project.[54] The content of the EIS is one of the topics considered during such hearings,[55] and public comment is invited.[56] At this time FHWA revises the draft EIS to incorporate any substantive comments which federal and state agencies have returned.[57] This revised version, the Final Environmental Impact Statement (FEIS), represents the official FHWA position on the expected environmental impact of the completed project.

In an attack on the sufficiency of an EIS in a civil action under NEPA, the burden is on the plaintiff to establish by a preponderance of the evidence that the EIS is inadequate, and that the decision to proceed was arbitrary and capricious.[58] The EIS will be upheld if it contains sufficient information to enable the decision-

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(f) irreversible and irretrievable commitments of resources to the proposed action should it be implemented;

(g) problems and objections raised by other federal, state and local agencies and by interested persons in the review process. *Id.*

50. 23 C.F.R. § 771.12(a) (1977). Considerable litigation arose under NEPA as originally enacted concerning the precise allocation of responsibility between federal and state agencies in preparing the EIS. Several cases held that state preparation and subsequent FHWA approval of an EIS did not constitute federal preparation within the meaning of 42 U.S.C. § 4332. *See, e.g.*, Conservation Soc'y v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973).

In response to this problem a clarifying subsection was added to section 4332 which allows state preparation of an EIS as long as the federal agency furnishes guidance, participation and evaluation. 42 U.S.C. § 4332(2)(d) (Supp. V 1975) (amended 1975). *See* Note, *State Preparation of Environmental Impact Statements for Federally Funded Programs*, 4 FORDHAM URB. L.J. 597 (1976).

51. 23 C.F.R. § 771.12(a), (b) (1977).

52. A list of special agencies with jurisdiction by law or special expertise appears at 40 C.F.R. § 1500.14 (App. II 1977).

53. 23 C.F.R. § 771.12 (1977).

54. *Id.* § 771.12(c).

55. 40 C.F.R. § 1500.9(d) (1977).

56. 23 C.F.R. § 771.12(i) (1977).

57. *Id.* § 771.14(b).

58. Sierra Club v. Froehlke, 534 F.2d 1289, 1300 (8th Cir. 1976).

maker to fully consider the environmental issues involved and to make thereon a reasoned decision which balances harms and benefits.[59]

A second major contribution of NEPA was the creation of the Council on Environmental Policy (CEQ) under the auspices of the executive branch.[60] CEQ reviews federal programs and activities, and monitors the extent to which they are in compliance with the NEPA mandates.[61] However, CEQ is not entrusted with any decision making powers.[62] Its function is to advise the executive branch on the desirability of proceeding with a project.[63] NEPA also empowers the Council to consult with all federal agencies to ensure that the decision making process gives "appropriate consideration" to environmental "values."[64]

While NEPA provided a procedural framework for a national effort of environmental improvement, it was the Clean Air Act which furnished substantive standards for the implementation of this policy.

IV. The Clean Air Act

The Clean Air Act (CAA)[65] addresses the specific problem of improving the quality of the nation's air resources.[66] It provides a matrix where federal and state efforts converge in their endeavor to reduce pollution levels in the atmosphere. To this end, a variety of specific strategies are outlined under the Act.

The CAA requires compilation and publication of national primary and secondary Ambient Air Quality Standards by the Administrator of EPA.[67] The primary standards set the concentration levels in the atmosphere for particular pollutants above which levels the public health is endangered.[68] The secondary standards perform

59. Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 1238 (1978) (No. 77-685).

60. 42 U.S.C. § 4342 (1970).

61. *Id.* § 4344(3).

62. Task Force v. Gribble, 565 F.2d 549, 554 (9th Cir. 1977).

63. *Id.*

64. 40 C.F.R. § 1500.1(b) (1977).

65. 42 U.S.C. § 1857 (1970).

66. *Id.* § 1857(b)(1) (1970).

67. *Id.* § 1857c-4(a)(1)(A). EPA was created to effectively coordinate government control of pollution. The Agency was granted control over the Clean Air Act by section 109 of the Act. 40 C.F.R. § 1.3 (1977).

68. 42 U.S.C. § 1857c-4(b)(1) (1970).

an identical function for those pollutants which affect the public welfare.[69] To date, EPA has set standards for seven individual pollutants and classes of pollutants.[70]

The CAA places primary responsibility for air quality control on the states.[71] The Act instructs each state to devise and submit to EPA an Air Quality Implementation Plan (AQIP) which would assure the reduction of air pollution to acceptable levels or, if no violation presently exists, continued compliance.[72] The state must have held public hearings on the proposed AQIP prior to submission.[73] If the Administrator found that the AQIP was formulated to achieve the national standards within the timetable set forth in the Act, he approved the plan.[74] Responsibility for implementation of the plan then passed to the states. Implementation is reviewed by EPA to ensure compliance.[75] Failure by the state to submit an AQIP or a determination by the Administrator that the proposed plan was inadequate to expeditiously achieve the required standards empowered EPA to prepare an AQIP for the state.[76] A conclusion by the Administrator that a state is not adequately enforcing an approved implementation plan requires that he so notify the state. If after thirty days the state remains in violation, EPA may assume responsibility for enforcement.[77] The Administrator is further empowered to commence a civil action against any person alleged to be in violation of any requirement of an applicable implementation plan.[78]

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69. *Id.* § 1857c-4(b)(2).

70. EPA has set primary and secondary air quality standards for: sulfur dioxide, particulate matter, carbon monoxide and hydrocarbons. 40 C.F.R. § 50.4-50.11 (1977). Part 50 of 40 C.F.R. contains technical appendices which outline the complicated calibration procedures for measuring the levels of these pollutants in the atmosphere.

71. 42 U.S.C. § 1857c-2(a) (1970). For a discussion of the allocation of responsibility between federal and state agencies in implementing the Clean Air Act, see Luneburg, *Federal-State Interaction under the Clean Air Act Amendments of 1970,* 14 B.C. INDUS. & COM. L. REV. 637 (1973).

72. 42 U.S.C. § 1857c-5(a)(1) (1970).

73. *Id.*

74. *Id.* § 1857c-5(a)(2). The Administrator's action in approving an implementation plan was reviewable by the court of appeals for the District of Columbia. 42 U.S.C. § 1857h-5(b)(1) (1970). However, any such attack on the adequacy of the plan must have been brought within thirty days after the approval. *Id.*

75. *Id.* § 1857c-8(a).

76. *Id.* § 1857c-5(c).

77. *Id.* § 1857c-8(a)(2).

78. *Id.* § 1857c-8(b).

Pursuant to FAHA mandate,[79] the Secretary of the Department of Transportation, after consultation with EPA, promulgated guidelines to assure that any proposed Federal-aid highway construction will be consistent with the relevant state implementation plan.[80] A new source of pollution which is likely to result in a violation of an implementation plan must be reviewed under these guidelines, and upon ascertainment that a violation will occur, construction will be prohibited.[81]

An EIS for a proposed highway project must naturally examine the problem of compliance with the local AQIP under its analysis of environmental impacts.[82] Therefore, upon a determination that the contemplated alternative for a highway section will impede the attainment or jeopardize the maintainance of National Air Quality Standards, the FHWA may not adopt the FEIS for that project.[83]

The CAA authorizes the EPA Administrator to review the environmental impact of newly authorized federal construction projects including projects commenced by the states under FAHA.[84] Upon a determination by the Administrator that the action will generate an unsatisfactory effect on the environment, he must publish his findings and refer the matter to CEQ for investigation.[85] The Administrator is granted broad authority in determining a project to be environmentally unsatisfactory. His findings represent an exercise of his discretionary authority and may be attacked only on the basis of an "arbitrary and capricious" standard.[86] EPA is also empowered to commence a civil action against any person alleged to be in violation of any requirement of an implementation plan.[87]

The authority of the EPA Administrator to object to a proposed construction project is not exclusive. Under the citizen's suit provision of CAA any person may commence a civil action on his own behalf against any person or governmental agency alleged to be in violation of a schedule of compliance under an applicable imple-

79. 23 U.S.C. § 109(j) (1976).
80. These regulations are contained in 23 C.F.R. §§ 770.200-770.206 (1977).
81. 40 C.F.R. § 51.18 (1977).
82. *Id.* § 6.200.
83. 23 C.F.R. § 771.18(i)(iv)(C) (1977).
84. 42 U.S.C. § 1857h-7(a) (1970).
85. *Id.* § 1857h-7(b).
86. Sierra Club v. Morton, 379 F. Supp. 1254, 1262-63 (D. Colo. 1974).
87. 42 U.S.C. § 1857c-8 (1970).

mentation plan.[88] The Second Circuit has stated that citizens groups are to be treated as "welcomed participants in the vindication of environmental interests."[89] However, a mere bald assertion that a proposed construction will result in the failure to meet National Ambient Air Standards does not state a cognizable claim under this section.[90] The complaint must allege a clear cut violation of the Act, or must seek enforcement of a specific requirement.[91] Similarly, a claim that the plaintiff desires to compel enforcement of an Implementation Plan is limited to enforcement of specific Plan strategies.

The history of the Westway project will offer some insight into the mechanics of intergrating the Federal Aid Highways Act, the National Environmental Policy Act and the Clean Air Act in an actual proposed highway project.

V. The History of Westway

The controversial history of the Westway project began as early as 1971. By that time the Miller Highway (now the West Side Highway) was incapable of accomodating current traffic demands, and, in addition, portions of the raised roadbed had become structurally unsound.[93] In an effort to remedy this situation, New York State, New York City and the Federal Highway Administration jointly agreed to designate the West Side Highway as part of New York's Interstate System, thereby making federal funding available for reconstruction.[94] In June and September of 1974, the State held public hearings to consider plans for the various highway designs and transit alternatives.[95] Finally, on March 7, 1975, Governor Carey and Mayor Beame gave the decisive approvals to the Modified Out-

88. *Id.* § 1857h-2(a), (f) (1970).

89. Friends of Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977).

90. Citizens Ass'n v. Washington, 383 F. Supp. 136 (D.D.C. 1974), *aff'd*, 535 F.2d 1318 (1976).

91. Philadelphia Council v. Coleman, 437 F. Supp. 1341, 1370 (E.D. Pa. 1977).

92. *Id.*

93. Final Envirnomental Impact Statement for the West Side Highway Project, Federal Highway Administration, at 11 (FHWA-NY-EIS-74-03-F) [hereinafter cited as FEIS].

94. *Id.* at 12. This was accomplished through an amendment of the New York Highway Law. 1971 N.Y. Laws, ch. 470, § 5 (codified at N.Y. HIGHWAY LAW § 340-a (McKinney Supp. 1977)).

95. FEIS, *supra* note 91, at 21. These hearings were held in accordance with 23 U.S.C. § 128 (1976).

board Alternative—the current Westway plan.[96]

The New York State Department of Environmental Conservation granted preliminary approval to a draft EIS for the Modified Outboard.[97] This review[98] indicated that the proposed facility would be consistent with the State Implementation Plan (SIP) and would not interfere with the attainment or maintenance of National Ambient Air Quality Standards.[99] The opinion stressed that the review was solely for air quality impacts and did not address social, economic or other environmental issues.[100] DEC mandated that public hearings be held in response to the strong public interest in the project.[101] Final approval of the project was conditioned upon the introduction of no technical information at the hearings which would alter the preliminary determination.[102]

Following this DEC approval, Governor Carey and Mayor Beame sent letters to William Coleman, then Secretary of Transportation, to reaffirm the continued commitment of both the City and the State to the Westway project.[103] On January 4, 1977, Secretary Coleman, joined by the Federal Highway Administrator, issued a decision approving the West Side Highway Project for Federal-aid highway fund participation.[104] The Secretary noted that in reaching this decision he had, "considered . . . policy and statutory guidelines concerning transportation development, environmental protection and Federal/State/local relations and community participation."[105]

The Environmental Protection Agency swiftly registered its disa-

96. FEIS, *supra* note 91, at 23-24. The Modified Outboard, as described in the FEIS, would consist of a 4.2 mile limited access highway along the Hudson River. There are three lanes, plus a breakdown lane in each direction. A major part of the highway would be built on landfill and for the greater part of its length would run underground. Plans for the utilization of the landfill include parks, residential housing, commercial development and a container port. *Id.* at 28-31.

97. Letter from H. Hovey, Jr., Director, Division of Air Resources, New York State Department of Environmental Conservation to E. Hourigan, Project Manager, West Side Highway Project (Dec. 3, 1976).

98. *See* note 1 *supra.*

99. Letter from H. Hovey, Jr. *supra* note 95, at 1.

100. *Id.*

101. *Id.*

102. *Id.*

103. Letter from Governor Hugh Carey to the Hon. William Coleman (Dec. 30, 1976); Letter from Mayor Abraham Beame to the Hon. William Coleman (Dec. 29, 1976).

104. Secretary's Decision on Interstate Highway 478, Department of Transportation, City of New York (Jan. 4, 1977) (press release).

105. *Id.* at 3.

greement with the Secretary's decision.[106] The Agency, while stating its appreciation of the need for the West Side Highway Project in some form, concluded that the Modified Outboard alternative was incompatible with the attainment of National Ambient Air Quality Standards and would be in conflict with the New York Implementation Plan.[107] EPA contended that the projected facility would increase traffic flow and, therefore, would be inconsistent with the Transportation Control Plan of New York's SIP, premised in part upon a reduction of the vehicle miles travelled in New York City.[108] Pursuant to section 309 of the Clean Air Act,[109] EPA referred its objections to the Council on Environmental Quality for action.[110]

While these federal exchanges occurred, proceedings by the State of New York continued. The public hearings requested by DEC were scheduled in two formats, "general" and "panel" hearings.[111] At the general hearings members of the public "were invited to express their opinions concerning any aspect of the project that were of interest to them."[112] The panel hearings were directed to the technical effects of the project relating to air quality, and in particular, with compliance with the indirect source permit requirements.[113] Hearings were commenced in April 1977 and were declared closed on July 18, 1977.[114]

On the basis of the fact-findings made during the panel hearings, DEC declined to issue an indirect source permit under section 203 for Westway.[115] The Commissioner granted the applicant permission, however, to reopen the hearings and reargue its induced traffic

106. Letter from John Quarles, Acting Administrator, Environmental Protection Agency to the Hon. Brock Adams, Secretary of the United States Department of Transportation (Feb. 14, 1977).

107. *Id.* at 1.

108. *Id.* at 2. EPA also noted that the Second Circuit had called for rigorous enforcement of the TCP in Friends of Earth v. Carey, 535 F.2d 165 (2d Cir. 1976). *Id. See* Comment, *Enforcing Transportation Control Plans: The Environmental Protection Agency v. the States*, 6 FORDHAM URB. L.J. 553 (1978).

109. 42 U.S.C. § 1857h-7(b) (1970).

110. Letter from John Quarles, *supra* note 106, at 3.

111. Report to the Commissioner of DEC by Albert Rosenthal, Hearing Officer, In the Matter of the Application of the West Side Highway Project, at 2 (Sept. 13, 1977).

112. *Id.*

113. *Id.*

114. *Id.* at 2-3.

115. *See* notes 1-6 *supra* and accompanying text.

predictions for the project.[116] The Commissioner seemed optimistic about the ability of the applicant to meet its burden of proof of compliance with section 203.[117] The applicant availed itself of the opportunity to reopen, and reargument is underway.[118]

Westway remained an issue of political contention even as Commissioner Berle rendered his initial decision. Mayoral candidate Edward Koch's campaign position favored the exercise of the Interstate Transfer provision rather than proceeding with the Westway project, a stand he reiterated after his election.[119] Subsequently, Koch's adament disapproval waivered. He first announced that in view of Governor Carey's continued support of Westway, the highway would probably be built.[120] Finally, in April 1978, Koch formally withdrew his opposition to the project upon a commitment from the Governor to maintain the fifty cent transit fare through 1980.[121] The response to the Mayor's reversal was immediate. The continuation of strong opposition was voiced by several prominent City politicians including Manhattan Borough President Andrew Stein, Congressman Theodore White and nine members of the City Council.[122] In addition, a resolution was recently passed by the New York City Board of Estimate which purports to divest Mayor Koch of his sole authority in approving Westway for the City.[123] Koch contends that the Council did not have the power under the city charter to pass the resolution, and a court battle is likely to ensue.[124]

Even if the agency and political conflicts swirling around Westway are resolved, the possibility of extensive civil litigation under the citizen's suit provision of the Clean Air Act remains. One such suit, *Action for Rational Transit v. Carey*,[125] has been stayed pending final determination by DEC. The number, grounds and outcome of such suits, should the project ultimately be approved, is presently uncertain.

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116. Comm'r Dec., *supra* note 2, at 18.
117. *Id.* at 12.
118. The hearings were reopened on August 30, 1978.
119. N.Y. Times, Nov. 2, 1977, at A20, col. 1; *id.*, Nov. 14, 1977, 1, col. 6.
120. N.Y. Post, Apr. 13, 1978, at 1, col. 2.
121. N.Y. Times, Apr. 20, 1978, at A1, col. 5.
122. *Id.*
123. N.Y. Daily Metro, Sept. 15, 1978, at 42, col. 1 [the *Daily Metro* was an interim newspaper published during the New York City newspaper strike].
124. *Id.*
125. 74 Civ. 5572 (S.D.N.Y., filed Dec. 19, 1974).

VI. Critique

The Federal-Aid Highways Act, the National Environmental policy Act and the Clean Air Act jointly represent an attempt by Congress to deal with the development of transportation, and the environmental considerations which attend such development. In the abstract, the Acts create a comprehensive system for the evaluation of proposed federal highway construction with particular reference to strategies for air quality improvement. In reality, however, tremendous confusion has arisen as to the precise application of national pollution standards to particular construction projects.

This confusion is the result of many factors. The environmental bases upon which a proposed construction project may be attacked are quite strict.[126] The operation of NEPA is merely procedural. Its function is to assure that the responsible federal authorities have given reasonably thorough consideration to probable environmental effects.[127] The validity of attempting to enjoin *in futuro* violations by a project under the substantive provisions of the Clean Air Act, however, is questionable.[128] The suit provisions are addressed to polluters *in violation* at the commencement of the suit.[129] A plaintiff challenging federal departmental approval under general federal jurisdiction[130] is confronted with the extreme difficulty of proving arbitrary and capricious action.[131] There can also be no general assertion that the Implementation Plan governing the proposed project is inadequate to expeditiously achieve national Ambient Air Quality Standards since such an attack on plan strategies must have been brought within thirty days of EPA approval.[132]

In view of the difficulty of a challenge on the federal level, the only bases upon which a concerned environmentalist may be able to proceed is on the state level under the applicable state implementation plan. The New York Plan under which Westway is currently being examined offers an example of a provision specifically formulated for the review of *in futuro* violations by a proposed project.[133]

126. *See* notes 88-92 *supra* and accompanying text.
127. *See* notes 48-49 *supra* and accompanying text.
128. Philadelphia Council v. Coleman, 437 F. Supp. 1341, 1370 (E.D. Pa. 1977).
129. *See* notes 78 & 88 *supra* and accompanying text.
130. 28 U.S.C. § 1331(a) (1970).
131. *See* notes 58-59 *supra* and accompanying text.
132. *See* note 74 *supra.*
133. *See* note 1 *supra.*

Even where statute does permit attacks on future violations, the difficulty remains of attempting to quantify air pollution data for a project which is merely in the planning stage. This air predictive methodology is at best an inexact science,[134] and one in which statistics can easily be distorted in interpretation.[135] Argument can quickly devolve into a battle of experts.[135]

Finally, notice must be taken of the differing objectives within each agency involved in the highway planning and approval process. It is to be expected that while FHWA will favor new construction, EPA will oppose such plans as environmentally unsound. One federal district court noted that neither agency can be expected to be "subjectively impartial," and that only a good faith determination can be required.[136] As Westway indicates, good faith determinations can lead to vastly differing results.

VII. Conclusion

The ultimate desirability of Westway is not the significant question. The progression of the project has been utilized as an illustration of the enormously complex issues which confront highway planners and environmental conservationists in the area of urban highway development. In the case of Westway, proponents of the project speak of a potential economic and community renaissance on Manhattan's lower West side. Opponents, however, predict vastly increased pollution and neighborhood dislocation in an already ailing city. Each side presents extremely cogent arguments.

The confusion as to the application of the National Environmental Policy Act and the Clean Air Act to the Federal-Aid Highways Act evidence the necessity of re-drafting these statutes to more precisely define the environmental standards under which proposed highway construction will be evaluated. The existence of standing to challenge *in futuro* violations must be delineated. If such standing does exist, the parties to whom it accrues must be specified. Such changes would then have to be intergrated into the federal-

134. Comm'r Dec., *supra* note 2, at 12.

135. In *Movement Against Destruction v. Trainor* the court noted that it was not its role to determine which methodology was more scientifically correct, but to examine whether the methodologies utilized were not mere justifications of preconceived results. 400 F. Supp. 533, 574 (D. Md. 1975).

136. *Id.* at 547.

state implementation proceess. The initiative for a clarification of the review standards must come from Congress.

Once the statutory standards have been clarified, the review process itself must also be modified. Commissioner Berle, in rejecting Westway's initial application for an indirect source permit, recognized that, "[i]n light of the many and complex issues surrounding Westway, this proceeding puts the regulatory process to an extreme test."[137] The question must arise whether the decision-making process as it currently exists is conducive to an integrated evaluation of the multi-faceted problems. A reasonable alternative seems to lie in the examination of proposed projects by a committee composed of representatives of the relevant state and federal agencies, rather than in FHWA, DOT and EPA all acting with relative independence. Cooperative action would conceivably result in less myopic decisions in an area which potentially affects the lives of millions of citizens.

Ralph B. Gilmartin

137. Comm'r Dec., *supra* note 2, at 4.