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## Environmental Law—NEPA—Federalization of Proposed Joint Federal/Non-Federal Project—Homeowners Emergency Life Protection Committee v. Lynn, 541 F.2d 814 (9th Cir. 1976)

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ENVIRONMENTAL LAW—NEPA—FEDERALIZATION OF PROPOSED JOINT FEDERAL/NON-FEDERAL PROJECT—*Homeowners Emergency Life Protection Committee v. Lynn*, 541 F.2d 814 (9th Cir. 1976).

The 1971 earthquake in Southern California caused some legal tremors for the City of Los Angeles. In an unearthshaking opinion five years after the quake, the Ninth Circuit in *Homeowners Emergency Life Protection Committee v. Lynn*<sup>1</sup> held that the federal grant of disaster funds rendered the rebuilding of the Los Angeles Dam and Reservoir a “major federal action” under the National Environmental Policy Act of 1969 (NEPA).<sup>2</sup>

NEPA requires the preparation of an Environmental Impact Statement (EIS)<sup>3</sup> for any project with a sufficient federal connection to be included within the rubric “major federal action.” Injunctive relief is

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1. 541 F.2d 814 (9th Cir. 1976).

2. 42 U.S.C. §§ 4321-47 (1970 & Supp. V 1975).

3. The EIS is the core of NEPA. Often referred to as the “section 102 requirement,” the statute states that all federal agencies must:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which 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 which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C) (1970) (emphasis added).

The EIS has been variously described as “a major legal advance in society's quest for a better informed decision-making process,” ABA NATURAL RESOURCES LAW SECTION, INTERDEPENDENCE—THE LAW OF THE ENVIRONMENT 6 (1976), and by skeptical environmentalists as “advertisements rather than objective and comprehensive scientific studies,” *Preface* to R. BURCHELL & D. LISTOKIN, THE ENVIRONMENTAL IMPACT HANDBOOK at 1 (1975).

In either event, the EIS is the crux of NEPA and compliance with the procedures is the means of achieving the purposes of the Act. “NEPA does not require that a project be abandoned if the agency's study shows the project will have a net adverse impact.” D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 971 (1973).

Some courts have suggested that substantive review of the merits of an agency decision is appropriate. The Eighth Circuit Court of Appeals noted that “[t]he language of NEPA, as well as its legislative history make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking [*sic*].” *Environmental Defense Fund v. Corps of Eng'rs.*, 470 F.2d

available to assure compliance.<sup>4</sup> Plaintiffs sought to enjoin<sup>5</sup> the city's construction prior to the granting of funds on the theory that the city's pre-funding activities sufficiently federalized the project to require the preparation of an EIS.<sup>6</sup> The district court ruled against the injunction and, although plaintiffs appealed, the decision was delayed<sup>7</sup> long enough to render the issue of pre-funding activity moot.<sup>8</sup> Since construction had continued apace and the project was nearly completed,<sup>9</sup>

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289, 297 (8th Cir.), *cert. denied*, 412 U.S. 931 (1972). See Yarrington, *NEPA*, ENVIR. REP. (BNA), Monograph 17, 37-40 (1972) [hereinafter cited as Yarrington].

But most courts are reluctant to substitute their judgment for that of the agency. They will uphold the agency decision if environmental procedures have been met and there is substantial evidence to support the final decision.

4. An injunction will issue against the federal agency to assure compliance with federal law. In joint projects with state, local, or private parties, the federal party may be the only one subject to injunction. "If the role of the federal government is severed by injunction until an adequate EIS is prepared, the full directive of Congress will have been met." *City of Romulus v. County of Wayne*, 392 F. Supp. 578, 596 (E.D. Mich. 1975). However, when the federal agency works in concert with non-federal partners, the court can enjoin the non-federal party to the extent necessary to prevent subversion of the EIS process by those parties. See *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973).

5. *Homeowners Emergency Life Protection Comm. v. Lynn*, 388 F. Supp. 971 (C.D. Cal. 1974), *aff'd on other grounds*, 541 F.2d 814 (9th Cir. 1976).

6. The project was uncontestedly subject to state environmental law. The California Environmental Quality Act of 1970 (CEQA), CAL. PUB. RES. CODE ANN. §§ 21000-176 (West Supp. 1976), requires a similar environmental inquiry and documentation, the Environmental Impact Report (EIR). As of January, 1975, thirty-two of the fifty states had State Environmental Policy Acts (SEPA), mini-NEPAs with similar provisions. See generally Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URB. L. ANN. 3 (1974); Tjossem, *The Environmental Policy Acts: Analysis and Application*, 10 WILLAMETTE L.J. 336 (1974); Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 ENVIR. L. REP. 50,090 (1973).

Though NEPA may "impose no duties on the states and operate only upon federal agencies," *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971), most state and local agencies must still meet environmental obligations imposed by the applicable SEPA. In California, the EIR requirement extends to private parties if a public agency has some minimal link with the proposed activity, either by direct proprietary interest or by permitting, regulating or funding private activity." *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 263, 502 P.2d 1049, 1059, 104 Cal. Rptr. 761, 771 (1972).

7. The Ninth Circuit heard appellate argument in November, 1975; the EIS was completed in January, 1976; the decision to fund the project was made by the Federal Disaster Assistance Administration (FDAA) in May, 1976; the court spoke in August, 1976. 541 F.2d 814, 816 (9th Cir. 1976).

8. The court said simply:

Inasmuch as the grant of federal funds unquestionably moves the activity in issue to the point of a federal-city partnership, the project is now a major federal action. . . . As a result, it is unnecessary for this court to determine whether the city appellees' request for federal funding and activities in connection with that request transformed the dam project into a major federal action.

541 F.2d at 817 (citations omitted).

9. At the time of trial in the district court, the project was less than half complete; at

the larger policy issue of the need for and the requirement of an adequate EIS was also moot<sup>10</sup> by the time the Ninth Circuit spoke. By delaying, the court was able to avoid the difficult issue of when a project becomes federal action in a case where a non-federal party proceeding on a project will inevitably be joined by a federal agency. By not finding federal action early enough, a court allows a non-federal party to subvert the policy behind NEPA, either by foreclosing options or by damaging the environment before a formal federal partnership materializes.

### I. FACTS OF THE CASE

In the wake of the 1971 earthquake, the Los Angeles Dam and Reservoir was declared a major disaster by the President pursuant to the Federal Disaster Relief Act of 1970.<sup>11</sup> The city applied for disaster relief funds to help in rebuilding the facility, which was planned for operation at half the capacity of the former reservoir on a more suitable seismic and geologic part of the 1600 acre city-owned site. For nearly three years, the city worked with federal agencies,<sup>12</sup> the controlling state

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the time of hearing on appeal, it was seventy percent complete; by the time of decision seven months later, it was ninety percent complete. Interview with K. W. Downey, attorney for City Appellees, in Los Angeles (Mar. 10, 1977). Courts have halted "ongoing projects" in the midst of construction. See, e.g., Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301 (1974); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972); Morningside-Lennox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971); Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971).

The Warm Springs Dam project was halted after more than \$35,000,000 had been spent. Enjoining further work until the court of appeals could consider the adequacy of the EIS, Justice Douglas spoke strongly about enforcing NEPA: "The tendency has been to downgrade this mandate of Congress, to use shortcuts to the desired end, and to present impact statements after a project has been started, when there is already such momentum that it is difficult to stop." Warm Springs Dam Task Force v. Gribble, *supra* at 1309.

But the economic hardship of an injunction and the degree to which resources have already been invested in a project affect the federal court's balancing of the equities in its decision to grant or deny such relief. "At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be 'possible' to change the project in accordance with Section 102." Arlington Coalition on Transp. v. Volpe, *supra* at 1331.

10. Although the legal battle continued, all practical recourse for plaintiffs had been foreclosed. The Ninth Circuit remanded the case for a determination of the adequacy of the EIS prepared by the FDAA. With the project near completion, the EIS could have little actual value to the plaintiffs.

11. 42 U.S.C. § 4401 *et seq.* (1970).

12. The City of Los Angeles had the technical assistance of the Army Corps of

agency,<sup>18</sup> and special consultants<sup>14</sup> to clear the project for its state permit. A construction contract was awarded by the city in late 1974 and construction began with local money and the hope of federal reimbursement.<sup>15</sup>

The owners of homes in the vicinity of the dam and reservoir brought suit in district court.<sup>16</sup> They argued that the city's application for federal assistance, work with federal technical consultants, and conformity of plans to federal agency specifications constituted a city-federal relationship sufficient to transform the local project into federal action. The city defendants argued, *inter alia*,<sup>17</sup> that the project was neither federalized by mere application for federal funds, nor by joint planning, nor by anything less than an actual commitment of funds. Until funds were committed, it was a local project, funded locally and not subject to federal environmental law.<sup>18</sup> The trial court adopted the defendants' argument and denied the injunction.<sup>19</sup>

Actual federal funding unquestionably federalizes an otherwise non-federal project.<sup>20</sup> What is unclear is whether actions taken by the federal government prior to that point can federalize a project for purposes of NEPA.<sup>21</sup> If so, what actions are sufficient? These unresolved questions, only partially disposed of by early cases on pre-

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Engineers and the United States Geological Survey. Brief for City Appellee at 10, Homeowners Emergency Life Protection Comm. v. Lynn, 541 F.2d 814, 815 (9th Cir. 1976).

13. The state agency responsible for construction of dams is the California State Department of Water Resources, Division of Safety of Dams. CAL. WATER CODE ANN. § 6000 *et seq.* (West 1971).

14. Charles A. Richter of the California Institute of Technology was one of the special consultants on the project. Brief for City Appellee at Exhibit K. Homeowners Emergency Life Protection Comm. v. Lynn, 541 F.2d 814 (9th Cir. 1976). The EIR was prepared pursuant to CEQA, CAL. PUB. RES. CODE ANN. § 21000 *et seq.* (West Supp. 1976).

15. The city contended throughout the litigation that the project would be funded through local revenue bonds if federal money was ultimately denied. Brief for City Appellee at 27, Homeowners Emergency Life Protection Comm. v. Lynn, 541 F.2d 814, 815 (9th Cir. 1976).

16. 388 F. Supp. 971 (C.D. Cal. 1974).

17. The defendants' second argument, retroactive application of an exemption under section 405 of the Federal Disaster Assistance Act of 1974, 42 U.S.C. § 5175 (Supp. V, 1975), was accepted by the trial court, 388 F. Supp. at 977, but was rejected by the appellate court, 541 F.2d at 817.

18. 388 F. Supp. at 980.

19. The court stated that "there can be only one point in the 'process' of Federal aid decision-making here at which a 'major Federal action' can be said to take place—at the point of actual allocation of funds. And there has been no such allocation here." *Id.* at 975.

20. 40 C.F.R. 1500.5(a)(2) (1976).

21. NEPA applies with equal force to a federal "lease, permit, license certificate or

partnership status,<sup>22</sup> and inadequately addressed by administrative guidelines,<sup>23</sup> affect the interests of the myriad state and private parties who enter into various relationships with the federal government.<sup>24</sup> It is an issue most likely to arise when federal aid is on a reimbursement system, because the non-federal party wants to proceed free of NEPA, yet later receive federal reimbursement for the outlay. Standards are needed to "provide for the reasonable expectations of the parties"<sup>25</sup> from the time the project first assumes discernible form through early phases of the planning process prior to funding.

This casenote will examine case law on what constitutes a federal project, the pre-federal joint project problem that the Ninth Circuit avoided, and alternative resolutions the court might have reached.

## II. BACKGROUND—NEPA LITIGATION

### A. *Early Cases Develop a NEPA Common Law*

NEPA applies to "major Federal actions significantly affecting the quality of the human environment,"<sup>26</sup> but the terms *major* and *federal* and *action* are not precise. The Supreme Court has characterized the

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other entitlement for use." 40 C.F.R. § 1500.5(a)(2) (1976). For a discussion of types of federal activity to which NEPA applies, see F. ANDERSON, *NEPA IN THE COURTS* 57-61 (1973) [hereinafter cited as ANDERSON].

22. See *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973); *Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972).

23. The Council on Environmental Quality (CEQ) issued guidelines in 1973 which direct the agencies to "include in their procedures provisions limiting actions which an applicant is permitted to take prior to completion and review of the final statement with respect to his application." 40 C.F.R. § 1500.7(a) (1976). This is sound administrative advice in response to the plea for status quo regulations in *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973). However, by the language of the guidelines, reluctant agencies cannot be forced to issue such regulations.

24. To gain perspective on the number of such relationships under the new federalism, consider the combined effect of all federal aid, all leases on federally owned lands and all permits granted under direct federal regulatory power. All such activities, if deemed *major* and *action significantly affecting the environment*, would be deemed *federal*. NEPA may not reach the other party prior to federal approval. *Gage v. Commonwealth Edison Co.*, 356 F. Supp. 80 (N.D. Ill. 1972). NEPA, however, does reach the other party at some point during the development of the relationship. The particular problem in an aid context is that the recipient is reimbursed for his outlay after the project is underway or completed. Damage may already have been wrought or options foreclosed before NEPA is deemed to apply. This is the problem posed by *Homeowners*, *Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972), and the highway cases. See text accompanying notes 63-94 *infra*.

25. *Silva v. Romney*, 473 F.2d 287, 291 (1st Cir. 1973).

26. 42 U.S.C. § 4332(C) (1970).

statute as "a catalyst for development of a 'common law' of NEPA."<sup>27</sup>

A rigorous reading of congressional intent<sup>28</sup> in early NEPA cases<sup>29</sup> accounts for the fact that most actions challenged as coming within the purview of the Act have been held to be major and federal and actions with significant environmental effects.<sup>30</sup> In the voluminous environmental litigation since 1970,<sup>31</sup> the courts have made it clear that provisions of the Act "establish a strict standard of compliance"<sup>32</sup> and that an injunction is the method of enforcing the standard.<sup>33</sup>

### B. *The Finding of Federal Status—The Easy Cases*

The Act by its own terms applies to "every recommendation or report on proposals for legislation and other major Federal actions . . . ."<sup>34</sup> The regulations define "actions" as including, but not limited to, projects "[d]irectly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants . . . ; or involving a Federal lease, permit, license certificate or other entitlement for use."<sup>35</sup>

When a federal agency directly undertakes its own construction activity, a federal action is most easily found.<sup>36</sup> NEPA has also been

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27. *Kleppe v. Sierra Club*, 96 S. Ct. 2718, 2735 (1976).

28. The House conference on NEPA said that "it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102." H.R. REP. No. 765, 91st Cong., 1st Sess. 9-10 (1969).

29. *See, e.g.*, *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

30. *Yarrington*, *supra* note 3, at 22-23.

31. For a summary of the 231 decisions as of September 1, 1973, see *NEPA Court Decisions*, 102 MONITOR, Oct. 1973, at 2.

32. *See Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

33. "[F]ailure to comply [with NEPA] . . . is basis for an injunction." *Bradford Township v. Illinois State Toll Highway Auth.*, 463 F.2d 537, 539 (7th Cir.), *cert. denied*, 409 U.S. 1047 (1972). For a discussion of the application of injunctions and exceptions to the issuing of a blanket injunction, *see ANDERSON, supra* note 21, at 244-45.

34. 42 U.S.C. § 4332(C) (1970).

35. 40 C.F.R. § 1500.5(a)(2) (1976). The CEQ requires each federal agency to prepare its own guidelines. *See, e.g.*, *Atomic Energy Commission*, 10 C.F.R. § 11 *et seq.* (1975); *Environmental Protection Agency*, 40 C.F.R. § 6.100 *et seq.* (1976).

36. When federal agencies such as the Post Office, the Corps of Engineers, the Forest Service or the armed services provide services or undertake construction programs, the "courts do not normally discuss whether the federal presence is sufficient; it is assumed to exist." *ANDERSON, supra* note 21, at 58.

routinely applied when the federal agency regulates a non-federal party's power to affect the environment, such as the AEC's licensing power over a utilities project.<sup>37</sup> Even more indirectly, an agency decision to sponsor research has been held subject to NEPA because the results might ultimately affect congressional legislation or appropriations.<sup>38</sup>

The critical determination in joint projects involving federal funding or permission has been the presence of an identifiable action or commitment by the federal agency.<sup>39</sup> If such circumstances were present, it would have been safe to predict that "where the Federal Government is involved in a project in any way, no matter how slight its involvement, that project will more than likely be considered a 'federal action' within the meaning of NEPA."<sup>40</sup>

### C. *The Finding of Non-Federal Status of a Project*

Despite the existence of some federal presence, courts have carved out exceptions to the legislative dictate that an EIS is required for all major federal actions. Although no excuse for footdragging<sup>41</sup> is allowed once NEPA is deemed applicable, there is a range of excuses for not applying it in the first instance.

#### 1. NEPA Requirements in Conflict with Existing Law

Aside from a few express statutory exclusions,<sup>42</sup> there are judicial exceptions where NEPA's requirements are in direct conflict with

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37. See *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). See also *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971). An interesting question is posed by the trust position the United States Government holds with regard to Indian leases. See *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

38. See *Scientists' Inst. for Pub. Information v. AEC*, 481 F.2d 1079, 1089 (D.C. Cir. 1973), which involved funding for research on the fast breeder nuclear reactor.

39. See *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973). In a recent Ninth Circuit case, the court focused on the contract entered into between the Bonneville Power Administration, a federal agency, and a proposed magnesium plant to supply power and construct the transmission line to the plant. This contract federalized the entire project and required an environmental impact statement under NEPA. *Sierra Club v. Hodel*, 544 F.2d 1036 (9th Cir. 1976).

40. Yarrington, *supra* note 3, at 22.

41. See *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) ("this language [of NEPA] does not provide an escape hatch for footdragging agencies").

42. General Revenue Sharing Fund projects are excluded by 40 C.F.R. § 1500.5(a) (2) (1976). Other statutory exclusions in subsequent acts of Congress include actions under the Water Pollution Prevention and Control Act, 33 U.S.C. § 1371(c) (Supp. II



existing law.<sup>43</sup> In *United States v. SCRAP*,<sup>44</sup> the Supreme Court stated that "NEPA was not intended to repeal by implication any other statute."<sup>45</sup> That proposition was at the center of the Court's most recent holding in *Flint Ridge Development Co. v. Scenic Rivers Association*.<sup>46</sup> In that case, the Scenic Rivers Association sought to force the Department of Housing and Urban Development (HUD) to prepare an EIS before allowing a private real estate developer's disclosure statement (pursuant to the Interstate Land Sales Full Disclosure Act)<sup>47</sup> to become effective. The Association claimed that HUD's review of the disclosure statement was a major federal action.<sup>48</sup> The Court held that because HUD could not simultaneously comply with NEPA and the Disclosure Act, the NEPA requirement was not applicable. The Court stressed that "NEPA's instruction that all federal agencies comply with [EIS requirements] 'to the fullest extent possible' is neither accidental nor hyperbolic."<sup>49</sup>

## 2. Insufficient Nexus Between Federal and Non-Federal Parties

A second means by which courts have refused to find a project federal is by finding an insufficient nexus between the federal and non-federal parties. The requirements of NEPA will apply to a non-federal actor only where federal authority is present and directly related to the non-federal defendant. For example, where a plaintiff sought to halt zoning changes in a seashore municipality on the basis that the

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1973), and under the Clean Air Act, 42 U.S.C. § 1857 (1970). Clean Air Act projects are exempted by the Energy Supply and Environmental Coordination Act, 15 U.S.C. § 793(c)(1) (Supp. IV 1975).

43. Judicial exceptions include: (1) certain actions of the Environmental Protection Agency, *see* *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); (2) federal actions involving national security and military installations, *see* *Committee for Nuclear Responsibility v. Schlesinger*, 404 U.S. 917 (1971); (3) actions by temporary agencies and emergency action, *see* *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142 (5th Cir. 1973); *Cohen v. Price Comm'n*, 337 F. Supp. 1236 (S.D.N.Y. 1972).

In *Kings County Economic Community Dev. Ass'n. v. Hardin*, 478 F.2d 478 (9th Cir. 1973), conflict was found between the purposes of NEPA and those of section 1307 of the Agriculture Act of 1970, 7 U.S.C. § 1281 *et seq.* (1970), when the plaintiffs unsuccessfully sought to force the federal agency to deny farm subsidies, mandatory under the Act, to users of pesticides and fertilizers.

44. 412 U.S. 669 (1973).

45. *Id.* at 694.

46. 96 S. Ct. 2430 (1976).

47. 15 U.S.C. § 1701 *et seq.* (1970).

48. 96 S. Ct. at 2435.

49. *Id.* at 2437 (citation omitted) (emphasis added).

National Seashore Act<sup>50</sup> was created to preserve the seashore property, an injunction was denied.<sup>51</sup> Under that Act, the Secretary of Interior's authority was limited to the condemnation of a certain property along the seashore.<sup>52</sup> No connection was found between the role of the Secretary and the actions of the local zoning officials.<sup>53</sup>

A closer connection, though still insufficient, was presented in another case.<sup>54</sup> Property was condemned by the City of New York for use by a private paper machinery business. To finance its expansion, the business received a federal loan,<sup>55</sup> which concededly could have been a major federal action. However, because the city was not the beneficiary of the loan, its actions were not subject to an injunction.<sup>56</sup>

In both examples, federal authority was present but not directly related to the non-federal action. Therefore, federal presence in a connected but separate action is insufficient to constitute federal action.

### 3. Federal and Non-Federal Parts of Severable Project

A third method courts have used in dealing with a partially federal project is severing the non-federal part from an otherwise concededly federal project.<sup>57</sup> Cases suggest that the federal status of a project is not an all-or-nothing proposition. Federal involvement can be partial<sup>58</sup>

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50. Fire Island National Seashore Act of 1952, 16 U.S.C. § 459e *et seq.* (1970).

51. *Biderman v. Morton*, 497 F.2d 1141 (2d Cir. 1974).

52. *Id.* at 1148.

53. *Id.* at 1147.

54. *Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973).

55. The private party received money under the United States Economic Development Administration with the Department of Commerce. *Id.* at 1147.

56. The court stated that because "the expansion project could proceed independently of the EDA loan, . . . the City's condemnation and possession of [the] site [did] not legally rely on the EDA loan commitment." *Id.* at 1148.

57. This argument has failed in the highway context. See *San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); text accompanying notes 63-78 *infra*.

58. See *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975), which involved a challenge to the expansion and development of the San Francisco Airport. It was urged that federal action be recognized on the basis of layout approval from the Federal Aviation Administration and promise of future funding. The court granted an injunction against the federally-funded parts of the expansion program, but it denied an injunction against the state-funded terminal and parking garage projects. These "state funded projects are not so closely interwoven with those receiving federal funds to make the entire airport development program the relevant 'action' for NEPA purposes." *Id.* at 327.

Similar reasoning, but a less clear factual application, is found in *City of Romulus v. County of Wayne*, 392 F. Supp. 578 (E.D. Mich. 1975), involving runway expansion

and, in one instance, it was held to be revocable.<sup>59</sup> Also, federal funding solely for planning may not involve the government to a sufficient degree to federalize a project.<sup>60</sup>

#### 4. Federal Agency Involvement Terminated

Finally, NEPA has been held inapplicable in HUD cases where long-term redevelopment projects began before the effective date of the Act, and the federal agency could no longer affect changes in the plans.<sup>61</sup> In these cases the focus is on "when significant federal action last took place."<sup>62</sup>

#### D. Finding Federal Status—The Highway Cases

At the other end of the spectrum are the pre-partnership situations in which the focus is on when significant federal action first takes place.<sup>63</sup> These are most heavily litigated in the highway cases. In order to understand how and when a highway project becomes federalized, it is essential to know the administrative procedures of the federal aid

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of the Detroit Airport, where the court concluded:

There was no evidence presented, aside from the grant provisions and the preparation of the EIS itself, as to the role of the federal government in the project. The Court cannot, therefore, conclude that the project is sufficiently 'federal' *in toto* to warrant a blanket injunction. NEPA does not encompass local or state projects affecting the environment. If the role of the federal government is severed by injunction until an adequate EIS is prepared, the full directive of Congress will have been met.

*Id.* at 596 (citation omitted).

59. *See Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974). In the first round of litigation, NEPA had been held to be applicable to the federal agency, *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); however, the court held that a subsequent reimbursement of funds to the federal government defederalized the project. 497 F.2d at 257. For a criticism of the court's finding of defederalization, see Comment, *Injunctions, the National Environmental Policy Act of 1969 and the Fourth Circuit's Chimera of Revocability*, 60 IOWA L. REV. 362 (1974).

60. *See River v. Richmond Metropolitan Auth.*, 359 F. Supp. 611 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973). *But see Pacific Legal Foundation v. Burns*, Civil No. 76-1153 (C.D. Cal., filed Sept. 10, 1976), — F. Supp. — (C.D. Cal. 1976), where the court rejected the argument that the federal investigative aspects of the controversial Los Angeles diamond lane experiment could be severed from the non-federal operational aspects. *Id.* at 28, 31-33, — F. Supp. at —, —.

61. *See, e.g., Chick v. Hills*, 528 F.2d 445 (1st Cir. 1976); *Molokai Homesteaders Coop. Ass'n v. Morton*, 506 F.2d 572 (9th Cir. 1974); *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973); *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973).

62. *Jones v. Lynn*, 354 F. Supp. 433, 444 (D. Mass.), *vacated*, 477 F.2d 885 (1st Cir. 1973).

63. For cases which discuss the joint state-federal highway planning process, *see Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Thompson v. Fugate*, 452 F.2d 57 (4th Cir. 1971). Courts in a few cases have said that tentative allocation in the early planning stages of a highway project was insufficient to federalize a project, but they

highway system. The Federal-Interstate Highway Program statutory scheme and agency directives<sup>64</sup> result in a uniquely fragmented system of approvals.<sup>65</sup>

First, state highway officials must obtain program approval from the Federal Highway Administration (FHWA). Without such approval, a state may not undertake work "even with its own funds, on any project for which it ultimately may receive federal reimbursement."<sup>66</sup> Each program approval relates exclusively to individual projects and is submitted on a separate form.<sup>67</sup> This application includes, among other things, location of the project on an approved federal-aid system.<sup>68</sup> Next, the state officials must submit plans, specifications, and estimates for each project in the approved program.<sup>69</sup> Once these are approved, the federal and state agencies enter into an agreement authorizing the work.<sup>70</sup> After advertising for bids and awarding contracts, construction finally proceeds under the supervision of the state highway department. Thereafter, reimbursement occurs.

Early cases made it clear that a highway project constituted federal action at the point where the state sought approval<sup>71</sup> so long as federal funds eventually might be provided.<sup>72</sup> The problem has been one of timing. The project should be federalized early enough so that state action can be enjoined before "deleterious effects upon the environment have actually occurred . . . ."<sup>73</sup> However, a court may not be willing to stop a project if "it has reached the stage of progress where costs of

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are contra to the vast majority of highway cases. See *Bradford Township v. Illinois State Toll Highway Auth.*, 463 F.2d 537 (7th Cir. 1972), *cert. denied*, 409 U.S. 1047 (1973); *Civic Improvement Comm. v. Volpe*, 459 F.2d 957 (4th Cir. 1972); *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167 (S.D. Iowa 1972); *Northeast Area Welfare Rights Organization v. Volpe*, 2 E.R.C. 1705 (E.D. Wash. 1970).

64. 23 U.S.C. § 101 *et seq.* (1970); 23 C.F.R. § 1.1 *et seq.* (1976).

65. See ANDERSON, *supra* note 21, at 158-76.

66. Peterson & Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ENVIR. L. REP. 50,001, 50,008 (1972) [hereinafter cited as Peterson & Kennan].

67. Policy and Procedure Memorandum 21-1(5) (Feb. 2, 1962), ¶ 8a, Statutes & Regulations, ENVIR. L. REP. 46,513 (1976), *amending*, Policy and Procedure Memorandum 21-1 (Apr. 15, 1958).

68. 23 U.S.C. § 105(a) (1970).

69. *Id.* § 106(a). The section further provides that "[The Secretary's] approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." *Id.*

70. See Peterson & Kennan, *supra* note 66, at 50,008.

71. See *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971).

72. See *La Raza Unida v. Volpe*, 337 F. Supp. 221, 227 (N.D. Cal. 1971).

73. *Sierra Club v. Volpe*, 351 F. Supp. 1002, 1007 (N.D. Cal. 1972).

altering or abandoning the proposed route would *certainly* outweigh whatever benefits might accrue [from applying NEPA] . . . .<sup>74</sup>

It is rarely too early to apply NEPA in a highway context<sup>75</sup> because the statutory scheme which guides the behavior of state and federal agencies in partnership makes location approval requisite to, and virtually tantamount to, later funding.<sup>76</sup> It is rarely too late to apply NEPA if there is any critical or substantial action yet to be taken.<sup>77</sup> Severability arguments fail because of the interconnected nature of all parts of a highway system. Moreover, once a highway project is funded, the courts have not allowed a state agency to defederalize it by removing federal funds from a project.<sup>78</sup>

### III. PROBLEMS WITH TENTATIVE ALLOCATION

In contrast to the highway projects in which federal action is found in the earliest stages, *Boston v. Volpe*<sup>79</sup> and *Homeowners Emergency Life Protection Committee v. Lynn*<sup>80</sup> represent difficult cases of tentative allocation. In these cases the local sponsor denied binding entanglements or permanent commitments with the federal agency. A binding

74. *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1335 (4th Cir. 1972). The consideration of balancing the benefits of applying NEPA against the losses to be incurred touches upon the related issue of the retroactive application of the Act. For cases in which it was clearly too late to apply NEPA, see, e.g., *Pizitz, Inc. v. Volpe*, 467 F.2d 208 (5th Cir. 1972); *Ragland v. Mueller*, 460 F.2d 1196 (5th Cir. 1972).

75. When the states have tried to evade NEPA by not requesting federal aid for some separate segments of a highway project, the courts have rejected the device, using various grounds: the segment marked "non-federal" is an integral part of an otherwise federal project, *Thompson v. Fugate*, 347 F. Supp. 120, 124 (E.D. Va. 1972); the option to seek federal aid still remains open and the states cannot have the benefits of both possible funding and freedom from federal law, *La Raza Unida v. Volpe*, 337 F. Supp. 221, 231 n.5 (N.D. Cal. 1971); allowing the state to proceed "would make a sham of the reconsideration required by federal law," *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1328 (4th Cir. 1972); the federal defendants had acquiesced in trying to create the appearance of ineligibility for further federal aid, *Sierra Club v. Volpe*, 351 F. Supp. 1002, 1007 (N.D. Cal. 1972); the state may not subvert NEPA "by a mere change in bookkeeping or by shifting funds from one project to another, *San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1027 (5th Cir. 1971).

76. Cf. *Homeowners Emergency Life Protection Comm. v. Lynn*, 541 F.2d 814 (9th Cir. 1976); *Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972). See text accompanying notes 79-94 *infra*.

77. See ANDERSON, *supra* note 21, at 167-74 and cases cited therein.

78. *San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971). *Contra*, *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974).

79. 464 F.2d 254 (1st Cir. 1972).

80. 541 F.2d 814 (9th Cir. 1976).

and permanent relationship was solemnized only upon the transfer of money.

In *Boston*, plaintiffs tried to enjoin the Massachusetts Port Authority from continuing work on the Waterfront Outer Taxiway at Logan Airport.<sup>81</sup> Construction had already begun when the case was heard. Reviewing entanglements of the federal and non-federal actors in the project, the court rejected four pre-funding activities as insufficient to federalize the project. The activities were: (1) adoption of federal specifications in order to qualify for aid; (2) previous federal aid to another part of the project; (3) an intention on the part of the Port Authority to seek funds at a future time for another stretch of taxiway; and (4) most importantly, tentative allocation of funds.<sup>82</sup> Unlike highway location approval, which is normally final, tentative allocation of funds for airport projects is preliminary in nature and will be scrutinized closely again before funds are awarded.<sup>83</sup> This, the court reasoned, does not federalize a project.<sup>84</sup>

In *Homeowners*, plaintiffs' primary argument in the trial court was that joint planning and conformity to federal requirements in the hope of eventually securing federal funding formed the basis of an "ongoing relationship" between city and federal defendants.<sup>85</sup> The court distinguished the highway cases and held that reimbursement for the dam reconstruction, like the airport aid in *Boston*, was a single decision, and only when it was final would there be "major federal action."<sup>86</sup> Further, an analogy could not be made to highway location approval because the federal agency had not approved the location of the dam.<sup>87</sup>

Plaintiffs also argued a partnership in the dam reconstruction similar to the one found in *Silva v. Romney*,<sup>88</sup> where HUD had not granted money but had a 180 day commitment with a private developer for a housing project. The developer was enjoined from cutting trees prior to HUD's preparation of an EIS.<sup>89</sup> In *Homeowners*, the district court rejected the partnership argument on the basis that there had not been

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81. 464 F.2d at 256-57.

82. *Id.* at 258.

83. *Id.* at 259.

84. *Id.*

85. 388 F. Supp. at 973-74.

86. *Id.* at 975.

87. *Id.*

88. 473 F.2d 287 (1st Cir. 1973).

89. *Id.* at 289-90. The private developer received a 180 day commitment for a mortgage guarantee and an interest grant from HUD. However, the court focused on the overall relationship between the parties rather than solely on the contract. *Id.* at 290-91.

even tentative approval for funding of the dam, let alone a contract between the parties.<sup>90</sup>

When the Ninth Circuit heard argument in *Homeowners*, both the "ongoing relationship" analogy to the highway cases and the "partnership" analogy to HUD's agreement with a private party in *Silva* were ripe for discussion. The court could have upheld the district court's finding, based on *Boston*, that an actual allocation of funds was necessary for federalization. Alternatively the court could have carved out standards for finding that a proposed, but inevitable, federal project is federal prior to any actual allocation. It was an unattractive alternative. If an injunction were issued, it would halt a thirty-three million dollar project more than half-way to completion. If an injunction were denied because the project was not yet federal, the court would have to confront the reality that "federal involvement may not develop until after environmentally prejudicial steps have already occurred during a preliminary non-federal planning phase."<sup>91</sup> The Ninth Circuit avoided the dilemma by waiting until funds were granted and transferred to the city's account, at which point it was not necessary to step into the thicket of pre-partnerships, ongoing relationships, or tacit or implied agreements as bases for federalizing a project.

The Second Circuit in *Silva* had stepped into that thicket and emerged confessing "to a sense of growing uneasiness in seeing decisions determining the obligations of federal and non-federal parties under NEPA turn on any one interim step in the development of the partnership between the parties."<sup>92</sup> The *Silva* court had resisted a mechanical application of the rule that only an actual allocation or a contract can federalize a project. It had perceived the 180 day agreement between HUD and the developer as "but one manifestation of and quite irrelevant to an ongoing planning process by all parties to the project which must provide for the reasonable expectations of the parties."<sup>93</sup> The *Silva* opinion contained a strong plea for administrative guidelines to provide a pre-partnership regulatory scheme so that "courts can play a more structured role in environmental cases."<sup>94</sup>

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90. 388 F. Supp. at 975. The focus on the contractual relationship between the federal and non-federal parties is rooted in the reasoning of the Supreme Court in *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958). See also *Sierra Club v. Hodel*, 544 F.2d 1036 (9th Cir. 1976).

91. Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 238, 346 (E. Dolgin & T. Guilbert eds. 1974).

92. 473 F.2d at 290.

93. *Id.* at 290-91.

94. *Id.* at 292.

#### IV. STRUCTURING THE COURT'S ROLE IN DETERMINING FEDERAL STATUS

Even if the Council on Environmental Quality (CEQ)<sup>95</sup> had tried to develop guidelines for the courts, it could only list the factors to be considered in determining the federal status of a proposed project. No catalogue of projects and relationships could account for all eventualities. In assessing the federal-state relationship, a court would still have to look to all "the facts and the reasonable inferences to be drawn therefrom."<sup>96</sup> Administrative rules cannot be expected to provide an easy litmus test for the wide range of facts that come before the court. There will be a reiteration of the mandate to comply "to the fullest extent possible."<sup>97</sup>

The courts have evolved some standards on their own with varying clarity. The most satisfactory factors have been those that are objectively measurable. They include the degree of federal power to implement or alter a project, the nexus between federal and non-federal parts of a project, and the enforceability of a federal promise to a non-federal actor.

The least satisfactory of the factors to be considered is the intention or expectation<sup>98</sup> of the non-federal actor in seeking federal aid or permission. In finding that the project was not yet federal, both the First Circuit in *Boston*<sup>99</sup> and the district court in *Homeowners*<sup>100</sup> noted the ability and intention of the non-federal party to proceed, if necessary, without federal funds. The non-federal defendant was in the anomalous posi-

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95. See note 23 *supra*. The CEQ is comprised of three persons, selected by the President, with whom all impact statements are filed. They are qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

96. 42 U.S.C. § 4342 (1970). For a discussion of the need for regulations in this area, see Brown, *Applying NEPA to Joint Federal and Non-Federal Projects*, 4 ENV'TL AFF. 135 (1975).

97. *Thompson v. Fugate*, 347 F. Supp. 120, 124 (E.D. Va. 1972).

98. 42 U.S.C. § 4332 (1970).

99. See *Citizens for a Balanced Environment and Transp., Inc. v. Volpe*, 376 F. Supp. 806 (D. Conn. 1974), *cert. denied*, 423 U.S. 870 (1975), where the court said that "determination of whether the federal government is sufficiently involved in a highway to make it a 'Federal action' within the meaning of NEPA should not depend on the state of mind of a potential state applicant for funds." *Id.* at 812.

100. 464 F.2d at 259.

101. 388 F. Supp. at 974.



tion of disclaiming dependence on federal funds to defeat the injunction while trying to persuade the federal agency that federal aid was vital to the local project. The interests of the party as a defendant in federal court ran directly counter to the interests of the party as an applicant for federal funds.

#### V. CONCLUSION: ALTERNATIVES TO MOOTNESS

When the Ninth Circuit heard *Homeowners*, it had the opportunity to address the pre-partnership federal issue with the benefit of the judicial experience accumulated since *Boston*.<sup>101</sup> It could have resolved the issue in one of two ways.

The court might have stated unequivocally that an enforceable commitment by the federal agency (actual grant of funds or permit) is the single act that can federalize a project. It might have reasoned that the ongoing relationship rationale of the highway cases<sup>102</sup> does not apply to agencies or projects which lack the statutory scheme and entangled history of the state-federal highway system. This could be justified as offering a manageable formula for agency decision and court review. It is a rule that all parties can understand, and by its clarity, might lessen litigation.

Alternatively, the court could have insisted on looking through the form to the substance of the relationship. The court could have identified a class of inevitably federal projects. These would be

a narrow class of cases—essentially those where both the likelihood of eventual agency action and the danger posed by nonpreparation of an environmental impact statement were great—in which it would allow judicial intervention prior to the time at which an impact statement must be ready. [This approach keeps sight of] the inadequacy of other remedies and the narrowness of the category constructed.<sup>103</sup>

If the court had found that the mandate of NEPA would be better met by triggering federal environmental review before a non-federal party could act, then standards would have to be established to distinguish between merely possible partnerships and highly probable ones.

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101. See text accompanying notes 81-84 *supra*.

102. See text accompanying notes 63-78 *supra*.

103. *Kleppe v. Sierra Club*, 96 S. Ct. 2718, 2733 (Marshall & Brennan, J.J., concurring in part and dissenting in part). The Court of Appeals for the District of Columbia Circuit reversed the lower court's denial of injunction and granting of summary judgment to the defendants on the issue of whether a regionwide, comprehensive EIS was required before the Department of Interior could grant permission to develop coal reserves on federally-owned land in the Northern Great Plains. *Id.*

The plaintiff would have the burden<sup>104</sup> of persuading the court that if the marriage had not already been consummated, it most surely would be. The showing could be based on the agency track record with that particular kind of project, its statutory mandate and regulatory scheme; or, the showing could be rooted in the nature of the project itself, *i.e.*, its inherent dependence on federal action for completion. An extension of the term "federal action" to pre-federal action could have been justified as being consistent with NEPA's intention to force environmental review before environmentally prejudicial steps have been taken.

The Ninth Circuit could have promoted the goals of NEPA by expanding the concept of federal project or promoted the cause of predictability by narrowing the definition. It chose to do neither, thereby leaving prospective litigants still unsure as to whether the highway rationale is limited to highways or whether an "inevitably federal" argument will work in other contexts. To a party looking for guidance, *Homeowners* provides no help.

*Julie Pressman Downey*

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104. Most cases which have addressed the question of burden of proof have placed it where it traditionally rests, on the plaintiff. However, in *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971), the court placed the burden on the federal government. Another view was expressed in *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973):

[O]nce a prima facie showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement.

*id.* at 1335.