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The National Environmental Policy Act of 1969 and Its Applications to Federally-Funded Highways

should also be looked at when weighing the impact such suit will have on the state-federal balance.

The method employed by the Fourth Circuit in resolving the conflict of the doctrine of immunity with § 1983 properly disposed of the clash in terms of policy, and in so doing avoided the state-federal conflict by reference to state law. Though it used labels commonly employed by courts in questions of official immunity under § 1983, the court established a guideline for other courts to follow without losing sight of the real interests at stake. The Fourth Circuit has attempted to resolve the conflict without frustrating the purpose of § 1983 or the public policies behind the doctrine of immunity. While the decision is a refreshing change from those in which the true purposes of § 1983 are ignored, the Supreme Court in *Pierson v. Ray* may have nullified much of the thrust of § 1983 in holding that it is to be read against the background of common law torts.[68] It will require further ruling by the Court before the true scope of the doctrine of immunity is known.

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THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AND ITS APPLICATIONS TO FEDERALLY-FUNDED HIGHWAYS

Under the National Environmental Policy Act of 1969 (NEPA), major federally-funded projects are to be scrutinized to insure that all possible effects to the environment will be thoroughly evaluated before approval of any major federal action.[1] Despite this legislative prescrip-

[68] *See* note 17 *supra*.

[1] 42 U.S.C. § 4321 *et seq.* (1970). The pertinent text is set out in 42 U.S.C. § 4332(2)(C) [hereinafter referred to as section 102(2)(C), as originally numbered in the act passed by Congress] which provides:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
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> . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly

tion, enforcement of the statute has been complicated by questions of retroactive application.[2] Because of the continuing nature of road development, the problem of retroactive application has been particularly difficult to solve with regard to interstate highways which have reached various stages of completion as of the effective date of the statute. Several tests have been utilized to determine if the statute was applicable to a contested highway or highway segment, the most effective of which has been the "balancing of factors" test formulated by the Fourth Circuit in *Arlington Coalition v. Volpe.*[3]

In *Arlington Coalition,* plaintiffs claimed that highway authorities, in planning a highway through northern Virginia, had violated the provisions of NEPA as well as other federal statutes.[4] As a remedy, plaintiffs

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> 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.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . .

[2]The question whether NEPA was to be applied to projects receiving federal approval before January 1, 1970, the effective date of the act, has been termed a "volatile dispute in the law." Environmental Law Fund v. Volpe, 340 F. Supp. 1328, 1331 (N.D. Cal. 1972). For a discussion of the anticipated and actual retroactive effect of NEPA *see generally* Note, *Retroactive Application of the National Environmental Policy Act of 1969,* 22 HAST. L.J. 805 (1971); Note, *Retroactive Application of the National Environmental Policy Act of 1969,* 69 MICH. L. REV. 732 (1971); Note, *Retroactive Application of the National Environmental Policy Act,* 39 TENN. L. REV. 735 (1972).

[3]458 F.2d 1323 (4th Cir. 1972), *cert. denied,* 41 U.S.L.W. 3254 (U.S. Nov. 7, 1972). The Fourth Circuit did not specifically designate its standard the "balancing of factors" test, but its frequent use of the word "weighing" implied a balancing activity. The first use of the term "balancing" is found in Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109, 1113 (D.C. Cir. 1971), where the court held that "NEPA mandates a rather finely tuned and 'systematic' balancing analysis . . . ."

[4]Plaintiffs also alleged that highway officials had violated sections 128(a) and 138 of

sought an injunction restraining the defendants from proceeding with any further planning or construction of the challenged section of the highway until such time as compliance with the requirements of NEPA had been attained.[5] Defendants argued against the injunction on the ground that it would be an improper retroactive application of NEPA because the highway was in progress prior to the effective date of the act.[6] The Fourth Circuit's decision to grant the injunction was based on a weighing of costs and benefits, the elements that comprise the balancing test. Formulated in April, 1972, the test has been consistently followed in subsequent cases, with succeeding courts enumerating other factors that might be considered in applying the balancing test. The importance of the problem of retroactivity, demonstrated by the considerable amount of litigation concerning NEPA and highways, warrants a discussion of the development of the "balancing of factors" test and the manner in which it has been utilized.

Development of the Balancing of Factors Test

The declared policy of NEPA as expressed in section 102(2)(C) of the act is to protect and preserve the national environment to the "fullest extent possible."[7] To effectuate this policy, Congress also directed in section 102(2)(C) that all federal agencies prepare detailed statements regarding the environmental impact of every major federal action recommended for legislation or reviewed by the respective agencies.[8] The im-

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the Federal-Aid Highway Act of 1968 (23 U.S.C. §§ 128(a), 138 (1970)) and section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C. § 1653(f) (1970)).

[5]458 F.2d at 1327.

[6]*Id.* at 1332.

[7]Note 1 *supra.*

[8]The Council on Environmental Quality (CEQ), an independent federal agency created by NEPA to report directly to the President on the act's effectiveness, was assigned the task of fostering agency procedures to attain the stated objectives. Exec. Order No. 11514, 3 C.F.R. 526 (1972), 42 U.S.C. § 4321 (1970), directed the CEQ to circulate guidelines to federal agencies for the preparation of impact statements in accordance with 42 U.S.C. § 4332(2)(C) (1970). The final guidelines, issued on April 23, 1971, provided:

> To the maximum extent practicable, the § 102(2)(C) procedures should be applied to further federal actions having a significant effect on the environment, even though they arose from projects or programs initiated prior to enactment of the act on January 1, 1970.

36 Fed. Reg. 7723 (1971).

The Federal Highway Administration (FHWA), an operating division of the Department of Transportation, is the federal agency with the primary responsibility for developing highways. Following the issuance of the interim CEQ guidelines (35 Fed. Reg. 7390 (1970)), FHWA circulated proposed agency procedures which directed that "state highway departments should be requested to immediately begin implementation of the draft guidelines." FHWA notice dated November 30, 1970, *cited in* Peterson & Kennan, *The Federal-Aid*

pact statements are to insure that no action will be taken by the federal government without full knowledge of the environmental consequences.

Notwithstanding the creditable purpose of the act, the imposition of new statutory requirements upon partially constructed highways, or even those that have been approved, poses a difficult problem. Although highway programs are conceived in the abstract as a traffic route between two points, the actual work is done in segments[9] which can vary in stages of completion. The incremental segments then, are both independent actions and integral portions of a transportation scheme; modification of the location, design, or status of any individual project could cause revision of the connecting segments and possibly even halt all highway work until alteration of the one segment is made.[10] Therefore, a suit brought to enjoin the planning or construction of a highway project for failure to file an environmental impact statement could affect the whole program even if the evidence discovered in the study required an alteration or abandonment of only a proposed segment.

While NEPA sets out in detail the procedures to be followed,[11] neither the language of the act nor the legislative history[12] speaks to the question

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Highway Program: Administrative Procedures and Judicial Interpretation, 2 ENVIRONMENTAL L. REP. 50001, 50016 (1972).

For a discussion of the attempt by FHWA to postpone the effective date of NEPA thirteen months *see* note 29 *infra.*

[9]Under the complex system of interstate highway development, in order to obtain federal funding, state highway departments submit proposed highway programs to the FHWA. If approved, the route is divided into segments for which further approval is necessary as to specific location and design. The state undertakes all the work and expense at each stage, and as each approval is obtained, federal money is thereby released to reimburse the state for its proportional expenses incurred on behalf of the federal government. This system fosters controlled highway development in accordance with federal standards. For a thorough discussion of the procedure of the federal-aid highway program *see* Peterson & Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation,* 2 ENVIRONMENTAL L. REP. 50001 (1972). *See also* City of Boston v. Volpe, 464 F.2d 254, 258-59 (1st Cir. 1972); La Raza Unida v. Volpe, 337 F. Supp. 221, 224 (N.D. Cal. 1971).

[10]*See* Named Individual Members of the San Antonio Conservation Soc'y v. Texas Hwy. Dep't, 446 F.2d 1013 (5th Cir. 1971) (construction on end segments of highway enjoined while propriety of highway passing through federal parklands was decided).

[11]Note 1 *supra.*

[12]For the history of S. 1075, National Environmental Policy Act of 1969, *see* S. REP. No. 296, 91st Cong., 1st Sess. (1969). The legislative history of the corresponding House bill, H.R. 12549, is found at H.R. REP. No. 378, 91st Cong., 1st Sess. (1969). The Senate bill was eventually passed although much of the text of the House bill was substituted for the original language. During the congressional debate prior to passage of the statute, it was frequently suggested by opponents of the bill that the act had no enforcement powers and would be no more than an expression of congressional policy. *See Hearings on S. 1075, S. 237 and S. 1752 Before Senate Interior and Insular Affairs Committee,* 91st Cong., 1st

of how to deal with federal projects in planning or construction stages as of January 1, 1970, the effective date of the act. No specific statement in the act evinces an intention by Congress to apply it retroactively to highways that have received final design approval[13] prior to January, 1970. Yet a broad reading of the statute indicates that the fullest environmental consideration was to be immediately undertaken in all federal projects.[14]

Prior to the formulation of the balancing test, no uniform technique for resolving highway injunction suits existed.[15] In cases arising soon after the passage of NEPA, some courts, unsure of the scope of the act and with little case law to rely on, interpreted the statute conservatively, holding that NEPA was not broad enough to make significant changes in approved highway programs. For example, in *Pennsylvania Environmental Council, Inc. v. Bartlett*,[16] the district court held that although the words of section 102(2)(C), requiring implementation of the provisions of that section "to the fullest extent possible," exhibited an urgent tone, they were also "flexible and pragmatic";[17] it thus declined to recognize any compulsory preparation of an impact statement. Another district court felt that the act was nothing more than a "declaration of congressional policy" and created no judicially enforceable rights or duties.[18]

Yet, "to the fullest extent possible" had been interpreted as an ada-

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Sess. (1969), *cited in* Reilly, *The National Environmental Policy Act and the Federal Highway Program: Merging Administrative Traffic*, 20 CATHOLIC U.L. REV. 21, 26-27 (1970).

[13]"Final design approval" is a significant step in the systematic development of federally funded highways. Technically termed "PS&E approval" (plans, specifications, and estimates), it is deemed to be a contractual obligation of the federal government for its proportional contribution for the remainder of the work until completion, the only federal participation remaining being final inspection. Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq.* (1970) at § 106(a). *See also* Peterson & Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ENVIRONMENTAL L. REP. 50001, 50010 (1972).

[14]*See* note 2 *supra*.

[15]In suits brought against state and federal highway officials for actions in violation of section 102(2)(C), the standard remedy requested has been an injunction halting any further activity in the planning or construction of a highway until such time as an environmental impact statement is prepared and the proposed highway is reconsidered in the light of any evidence contained in the statement. *See, e.g.*, Brooks v. Volpe, 319 F. Supp. 90 (W.D. Wash. 1970), *rehearing denied*, 329 F. Supp. 118 (W.D. Wash. 1971), *rev'd*, 460 F.2d 1193 (9th Cir. 1972).

[16]315 F. Supp. 238 (M.D. Pa. 1970).

[17]*Id.* at 248.

[18]Bucklein v. Volpe, 2 E.R.C. 1082, 1083 (N.D. Cal. Oct. 29, 1970) [E.R.C. refers to the Bureau of National Affairs, Inc. publication, ENVIRONMENT LAW-CASES]. *Contra*, Pizitz v. Volpe, ___ F. Supp. ___, ___ (M.D. Ala. 1972), *aff'd*, 467 F.2d 208 (5th Cir. 1972), noting that courts have entertained actions limited to ensuring compliance with the procedural requirements of the act.

mant directive by several courts hearing suits for non-compliance with section 102(2)(C) in federal actions other than highways.[19] The importance of environmental concern and compliance with the provisions of NEPA was stressed in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*,[20] where the words "to the fullest extent possible" were described by the District of Columbia Circuit Court of Appeals as intolerant of discretionary application.[21] The court differentiated between the flexible substantive policy provisions of NEPA found in section 101[22] and the highly inflexible procedural provisions of section 102 which establish a "strict standard of compliance."[23] By this differentiation, the court made it clear that impact statements must be prepared whenever possible; thereafter, any decision made on the basis of an environmental study is discretionary with the appropriate federal agency, with due consideration given to the policy expressed in section 101 of NEPA.[24]

Instead of applying the conservative interpretation approach of *Bartlett*, some courts have dealt with the problem of applicability of NEPA to highways by use of a "critical date" test.[25] In all such cases,

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[19]*See, e.g.*, Environmental Defense Fund v. Corps of Eng'rs of United States Army, 325 F. Supp. 749 (E.D. Ark. 1971), *vacated*, 342 F. Supp. 1211 (E.D. Ark. 1972). Indeed, as stated by one court, "[i]t is hard to imagine a clearer or stronger mandate to the Courts." Texas Comm. on Natural Resources v. United States, 1 E.R.C. 1303, 1304 (W.D. Tex. Feb. 5, 1970), *vacated as moot*, 430 F.2d 1315 (5th Cir. 1970).

[20]449 F.2d 1109 (D.C. Cir. 1971).

[21]*Id.* at 1114.

[22]Section 101 of the original act is now codified as 42 U.S.C. § 4331 (1970), the pertinent section of which provides:

> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote to general welfare, 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.

[23]449 F.2d at 1112.

[24]*Id.* at 1113-14. Specifically criticizing the defendant's reliance on Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970), and Bucklein v. Volpe, 2 E.R.C. 1082 (N.D. Cal. 1970), where it was held that there was neither compulsory nor compelling need for impact statements, the court noted that those courts were discussing the substantive and not the procedural duties imposed by NEPA. *Id.* at 1115 n.13. Because a narrow reading of the statute curtailed the vigorous implementation of its provisions as envisioned by its proponents, one commentator has suggested that by concluding that the "fullest extent possible" language was indicative of a moderate, flexible, and pragmatic approach, those courts have "clearly misconstrued the qualifying language of Section 102(2)(C)." Note, *The National Environmental Policy Act of 1969 Saved from "Crabbed Interpretation"*, 52 BOSTON U.L. REV. 425, 442 n.101 (1972).

[25]Concerned Citizens of Marlboro v. Volpe, 459 F.2d 332 (3d Cir. 1972); Harrisburg

the courts have reasoned that the provisions of section 102(2)(C) were required only if final design approval[26] for the challenged project came after January 1, 1970. The primary fault with this approach was that it focused solely on the critical dates involved to the exclusion of what had actually been accomplished on the highway. Decisions were often made without reference to the stage of completion of the project, indicating that the courts had paid little heed to the intent of Congress.[27] The mandate of NEPA was that all major federal actions, regardless of status, be reviewed anew with a critical eye toward protection of the environment.[28] The simplistic critical date test inhibited the attainment of that goal.[29]

A third analysis frequently used by the courts has resulted in the refusal to apply NEPA if a highway is thought to be so developed that reassessment of its design or location is impractical.[30] This reasoning was

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Coalition Against Ruining the Environment v. Volpe, 330 F. Supp. 918 (M.D. Pa. 1971); Elliot v. Volpe, 328 F. Supp. 831 (D. Mass. 1971). *Accord,* Wildlife Preserves, Inc. v. Volpe, 443 F.2d 1273 (3d Cir. 1971), where the court held companion environmental statutes, Federal-Aid Highway Act (23 U.S.C. § 101 *et seq.* (1970)) and Department of Transportation Act (49 U.S.C. § 1653(f) (1970)), not applicable because the challenged projects had received final design approval prior to the effective date of either act. *But see* Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972), where the court said:

> There is much to be said for establishing a definite event after which an E.I.S. [impact statement] is not required for projects already initiated. . . .
>
> However, Congress did not do so and I do not believe such arbitrary action is within congressional intent.

Id. at 1171.

[26]The significance of final federal design approval is explained in note 13 and accompanying text *supra.*

[27]*See* note 2 *supra.*

[28]Note 1 *supra.*

[29]Another version of the critical date test was derived from the FHWA guidelines of November 24, 1970 that exempted projects receiving design approval before February 1, 1971, thereby postponing the effective date of NEPA thirteen months. Universally, courts have rejected this attempt to delay NEPA, sensing this delay in implementation to be unnecessary. *See* Conservation Soc'y of S. Vt., Inc., 343 F. Supp. 761 (D. Vt. 1972), where Judge Oakes rejected out of hand the claim of highway officials that no impact statement was required if design approval came before February 1, 1971. *Cf.* Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). There, Judge Wright was confronted with an AEC administrative rule that prohibited environmental issues from being raised in hearings scheduled before March 4, 1971. Finding that this postponed the effectiveness of NEPA for fourteen months, the judge found the time lag "shocking" in light of the importance of environmental considerations during the agency review process. *Id.* at 119.

[30]*See* Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972), where it was held unreasonable to believe that Congress intended for an environmental study to be made and the highway possibly rerouted when sixteen miles of the twenty mile highway was completed. Although decided one month after *Arlington Coalition,* no reference was made to the balancing of factors test.

employed by the district court in *Civic Improvement Committee v. Volpe*,[31] in holding that although other major federal actions had been enjoined pending preparation of an impact statement,[32] such action was unnecessary since it was unlikely that the route would be changed even with the benefit of an impact statement because previous work had largely established the route of the highway.[33] The implication derived from the frequent use of this standard was that to order preparation of an environmental study with concomitant reevaluation of a highway, subjecting it to possible alteration or abandonment, could be an act in disregard of the previous money and effort invested in the road. This might constitute a retroactive application of NEPA not intended by Congress.[34]

The results flowing from the standards employed in *Civic Improvement Committee* and *Bartlett*, like the results derived from the use of the critical date test, frustrated the liberal application of NEPA envisioned by the proponents of the act.[35] Consequently, one year after the passage of NEPA, effective enforcement of the statute as regards federal highways had not yet been achieved. No single test theretofore employed was broad enough to encompass all of the factors involved in a suit for noncompliance with the provisions of section 102(2)(C). It appeared that proper implementation of the impact statement requirements could only be realized through a comprehensive, uniform standard. Such a standard is the "balancing of factors" test as set out in *Arlington Coalition v. Volpe*.[36]

The Fourth Circuit, in *Arlington Coalition*, felt that in spite of the reasons expressed in cases refusing to impose the requirements of section 102(2)(C), the determining factor seemed to be the stage of construction of the project. 458 F.2d at 1331.

[31]4 E.R.C. 1160 (W.D.N.C. March 24, 1972), *aff'd*, 459 F.2d 957 (4th Cir. 1972).

[32]The court cited Environmental Defense Fund v. TVA, 339 F. Supp. 806 (E.D. Tenn. 1972) (action to enjoin construction of a dam and reservoir projects), and Named Individual Members of the San Antonio Conservation Soc'y v. Texas Hwy. Dep't, 446 F.2d 1013 (5th Cir. 1971) (action to halt highway through parkland).

[33]The court noted that location of the road had been administratively established, construction contracts had been let, earth moving had begun, and there was little chance that a more practical route would be found. 4 E.R.C. 1162.

[34]Note 30 *supra*. *Cf.* Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038, 1039 (D. Ore. 1970).

[35]The CONFERENCE REPORT ON S. 1075, NATIONAL ENVIRONMENTAL POLICY ACT, 115 CONG. REC. 39702 (1969), stated:

> Rather, the language in Section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

Id. at 39703.

[36]Note 3 *supra*. In *Calvert Cliffs*, the court was establishing a guide for federal agencies

Arlington Coalition was a suit initiated by persons who owned property or resided in the path of a segment of proposed interstate highway I-66.[37] In the district court, the plaintiffs' suit to enjoin defendants' planning and construction activities was denied.[38] The Fourth Circuit, in reversing the district court, held that compliance with NEPA was mandatory for any highway

> until it had reached that stage of progress where 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.[39]

Inquiring into the stage of development that I-66 had reached, the court found that almost all necessary property in the proposed corridor route had been acquired[40] and that a large amount of relocation of residents and businesses had been accomplished.[41] However, final engineering plans, specifications, and estimates had not been approved and very little construction had begun. Having weighed all the relevant facts, the court concluded that I-66 had not yet reached the point where the costs of suspension or modification of the project would certainly outweigh the

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as to how to determine whether to alter or abandon a challenged highway after an impact statement had been prepared. It recommended that the "balancing analysis" include both the "environmental amenities" and the "economic and technical considerations." 449 F.2d at 1113. The Fourth Circuit, with no acknowledgement of the District of Columbia Circuit Court of Appeals, apparently adopted this test, with refinements, to indicate when the requirements of NEPA should be imposed on an ongoing highway project.

[37]The highway was to originate at a point approximately seventy-five miles west of Washington, D.C., and was to extend through Arlington County, Virginia, that portion being the contested section of the highway. There it was anticipated that I-66 would connect with another proposed highway, both crossing the Potomac River into the District of Columbia at a planned bridge site. For a discussion of the public debate and litigation concerning the proposed Three Sisters Bridge *see* D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971) and D.C. Fed'n of Civic Ass'ns v. Volpe, 434 F.2d 436 (D.C. Cir. 1970).

[38]332 F. Supp. 1218 (E.D. Va. 1971). Among the bases for Judge Lewis's decision were the following: (1) several cases had held that NEPA was particularly not applicable to highways initiated before January 1, 1970; (2) FHWA interim instructions dictated that compliance with NEPA was not required of projects initiated before February 1, 1971; (3) an impact statement was being prepared; and (4) a private consultant had been engaged to advise the state on how to lessen the noise pollution problem.

[39]458 F.2d at 1331.

[40]At the time of the trial, 93.9% of all dwellings and 98.5% of all business structures had been acquired. *Id.* at 1328.

[41]At the time of the trial, 75.6% of all families and 84.6% of all businesses had been relocated. *Id.*

benefit that might accrue to the general public through safeguarding the environment by means of impact statements.[42]

The uniqueness of the test is the manner in which it operates: within the phrasing of the standard, one can see how the court allocated weight to each element to be considered. Primarily, the test takes into account the congressional attitude toward strict enforcement of the statute,[43] for the use in the test of the words "clearly" or "definitely" indicate that it is weighted in favor of environmental interests. Phrased in this manner, the test creates a presumption in favor of applicability of NEPA, thus requiring highway officials to justify their failure to file an impact statement. To overcome this presumption, officials must present substantial proof that little or no environmental damage will be caused by a challenged highway. In the alternative, authorities must provide convincing evidence that it is too late to modify feasibly the proposed route.[44]

Additionally, the balancing of factors test was constructed to take into consideration the problem of retroactive application of the statute. In its opinion, the Fourth Circuit stated that there would be no retroactivity simply because an action was approved for funding before the effective date of the statute,[45] thereby disposing of the critical date approach. However, the court recognized that some federal actions, having reached a certain stage of progress, could not be amended even by the urgent imperatives of NEPA.[46] That recognition is implicit in the balancing test; through use of the cost-benefit analysis, retroactivity is taken into account and is determined as that which lies beyond the point where costs of halting the project outweigh benefits to the public.

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[42]*Id.* at 1329-30.

[43]The Fourth Circuit was certain of Congress's intention to apply NEPA strictly when it held that

> if there is a reasonable possibility that a mistake had been made in the planning of a project as expensive, disruptive, and permanent as a highway, and if that project can still be altered or abandoned, the project must be held in abeyance pending determination of whether a mistake in fact has been made.

458 F.2d at 1338.

[44]The Fourth Circuit believed that the evidence must be persuasive; any doubt that the critical stage has been reached when reconsideration of the projct is nearly impossible must be resolved in favor of applicability. 458 F.2d at 1331.

[45]The critical date approach had previously been weakened by the decision in Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971). There the Fifth Circuit agreed with the idea of setting an administrative approval date (such as final federal design approval) as the point of "major federal action" for purposes of application of NEPA. However, the court also held that compliance with section 102(2)(C) was required on all federal projects on which substantial actions were yet to be taken "regardless of the date of 'critical' federal approval of the project." *Id.* at 144.

[46]458 F.2d at 1331.

Thus, in *Arlington Coalition,* a standard was formulated based on the Fourth Circuit's view of both the congressionally established priorities and the reality that some projects are too fixed to be changed. Applied to a contested highway project, the test insures the complete consideration of all pertinent facts and provides a means of measuring the costs and benefits of compliance with the impact statement requirements of NEPA.

Subsequent Application of the Balancing of Factors Test

Conceptually, the balancing of factors test is a hollow formula because the Fourth Circuit gave few suggestions as to what should be considered "costs" and "benefits" for use in the test.[47] Specifically, the court noted that final federal design approval had not been given, construction contracts had not been awarded, and actual construction on the highway had not yet begun.[48] In stating that the court could not define for all cases the point of completion beyond which section 102(2)(C) was no longer applicable,[49] the Fourth Circuit was saying that it could not prescribe all of the factors that should be considered in determining whether to apply NEPA. Therefore, the Fourth Circuit indicated that decisions were to be made on a case-to-case basis, each judged by a weighing of all of the pertinent factors. The question then arises of what other factors are to be employed in the weighing analysis. Subsequent courts applying the balancing test have studied a wide range of factors. A discussion of these will indicate how definition has been given to the terms "costs" and "benefits" by way of later courts identifying facts that warrant review when applying the balancing test.

In suits challenging highways for non-compliance with section 102(2)(C), previous related highway development must be one of the factors to be considered. Because extension increments are simply continuances of previously constructed highways, their degree of dependence on the existing segments restricts the extent to which an addition can be altered. Although completed segments obviously cannot be changed, the general rule of applicability of NEPA to extension segments should be the one expressed in the Council on Environmental Quality Guidelines: "Where it is not practical to reassess the basic action, it is still important that future incremental major actions be shaped so as to minimize ad-

[47]The broadness and flexibility of the balancing test did not escape criticism. In Ward v. Ackroyd, 344 F. Supp. 1202, 1225 n.71 (D. Md. 1972), Judge Miller termed the test "vague, subjective and extremely difficult to apply. . . ."

[48]458 F.2d at 1332.

[49]*Id.*

verse environmental consequences."[50] To require more than this would raise even further a question of retroactive application of the statute; to do less would be contrary to the spirit of NEPA.

The modification of an extension segment is also restricted by the work completed on projects within that segment itself.[51] Therefore, any court hearing an injunction suit must take into consideration the "status of the work" on a segment in applying the balancing test. This factor is so broad that it is actually a category encompassing specific considerations that certain courts have noted in highway cases. In *Arlington Coalition,* the Fourth Circuit noted that federal agency officials might take into account previous investment in the proposed route in reconsidering a challenged highway project.[52] The court thereby implied that investment was to be a factor of consideration for a trial court as well when applying the balancing test.[53] Some of the expense-related items that courts have looked at that relate to the degree of completion of a segment are the number of bids advertised and contracts awarded,[54] the amount of right-of-way obtained and relocation accomplished,[55] the possible escalation of costs to the program through inflation during the delay period,[56] the public safety,[57] and the amount of unemployment due to delay in con-

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[50]35 Fed. Reg. 7391 (1970). This instruction appears to have been interpreted to sanction the abandonment of a highway project if an impact statement so indicates. In Comm. to Stop Route 7 v. Volpe, 346 F. Supp. 731, 734 (D. Conn. 1972), it was implied that an extension increment could be abandoned if what had been worked on before had independent utility.

[51]Under the often misleading nomenclature of interstate highway development, a "project" may be both an incremental length or section of a highway program, or it may be a unit of work within a section such as surveying or paving. To avoid confusion in this article, the term "segment" was used in note 9 and accompanying text to mean a project in the extension or length sense. "Project", as used in the text accompanying this footnote, and only here, is meant to be items of work within a section of highway.

[52]458 F.2d at 1333.

[53]Investment may be defined in terms of either money or time, but as a factor for consideration in the balancing test it contributes to the cut-off point for the imposition of the provisions of section 102(2)(C). *Accord,* Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971); Stop H-3 Ass'n v. Volpe, 4 E.R.C. 1684 (D. Hawaii Oct. 18, 1972).

[54]Civic Improvement Comm. v. Volpe, 4 E.R.C. 1160, 1162 (W.D.N.C. Mar. 24, 1972), *aff'd,* 459 F.2d 957 (4th Cir. 1972); *see also* Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 145 (N.D. Ga. 1971).

[55]Keith v. Volpe, 4 E.R.C. 1350 (C.D. Cal. July 7, 1972); Lathan v. Volpe, 4 E.R.C. 1487 (W.D. Wash. Aug. 4, 1972), 455 F.2d 1111 (9th Cir. 1972).

[56]Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 738 (D. Conn. 1972) (the court refused to consider defendants' claim of increased costs because that assumed that the highway was to be built and such a decision could not be made until after preparation of an impact statement).

[57]Keith v. Volpe, 4 E.R.C. 1350, 1368 (C.D. Cal. July 7, 1972), *motion to amend*

struction.[58] The frequency with which the degree of completion of projects comprising a segment has been a subject of consideration indicates that it, particularly when considered in conjunction with prior highway development, may be the most controlling factor in determining whether to apply NEPA.

Any balancing of factors should include the likelihood of harm to the environment if the project is constructed as planned. Such consideration is necessary whether the damage is ascertainable or unknown. In the former case, under certain circumstances, it may appear that the route cannot or will not be changed.[59] Accordingly, it might be argued that there is no compelling need for an impact statement. A decision based on this reasoning, however, is an unauthorized administrative judgment by a court which approves further development of a road. Unless the highway is so inalterably fixed, the wiser course of action would be to enjoin all development activities until the preparation of an impact statement to insure that no alternate route does exist[60] and that there will be no further significant environmental damage.[61] When the harm is unknown, the situation is exactly that for which an impact statement was intended to provide guidance. Ecological relationships are subtle and can often be detected only by close study, the detrimental effects of highway construction not always being evident.[62] For that reason, impact statements should be required in all cases unless it is obvious that no environmental damage will occur.[63]

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judgment denied, 4 E.R.C. 1562 (C.D. Cal. Sept. 11, 1972) (concern over exposed utility lines and vacant structures); Brooks v. Volpe, 4 E.R.C. 1532, 1534 (W.D. Wash. Aug. 30, 1972) (danger of detour during winter months taken into account in forming injunction).

[58]Brooks v. Volpe, 4 E.R.C. 1492 (W.D. Wash. Aug. 4, 1972), *rehearing*, 4 E.R.C. 1532, 1533-4 (W.D. Wash. Aug. 30, 1972).

[59]Brooks v. Volpe, 4 E.R.C. 1492 (W.D. Wash. Aug. 4, 1972), *rehearing*, 4 E.R.C. 1532, 1535 (W.D. Wash. Aug. 30, 1972) (most scarring of the landscape had occurred by the time of suit so little could be protected by injunction); Civic Improvement Comm. v. Volpe, 4 E.R.C. 1160, 1162 (W.D.N.C. Mar. 24, 1972), *aff'd*, 4 E.R.C. 1163 (4th Cir. May 15, 1972) (little chance that route or elevation of road would be changed by impact statement); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, 241 (M.D. Pa. 1970) (most feasible route was to encroach on a trout stream bed).

[60]Keith v. Volpe, 4 E.R.C. 1350 (C.D. Cal. July 7, 1972).

[61]Conservation Soc'y of S. Vt., Inc. v. Volpe, 343 F. Supp. 761 (D. Vt. 1972).

[62]*Id.* The highway was originally planned to extend through marshlands but was rerouted when highway officials were appraised of the unique biological value of the area. Due to the absence of an impact statement, such value may have been overlooked if not for the efforts of concerned citizens.

[63]Ward v. Ackroyd, 344 F. Supp. 1202, 1226 (D. Md. 1972), holding that although highway officials had taken into consideration all conceivable effects of road construction, further highway development must be enjoined pending public hearings that might provide additional information.