Federal Accountability: Delegation of Responsibility by HUD Under NEPA

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INTRODUCTION

The National Environmental Policy Act of 19691 (NEPA) is the only statute designed to function as an environmental mandate to all federal agencies. NEPA does not explicitly establish pollution control programs. Rather, it states a broad policy that federal agencies must consider environmental factors as an integral part of their decision-making process.2 This general mandate has been the object of extensive controversy and commentary. NEPA was the subject of almost five hundred judicial decisions during its first five years.3 While judicial interpretation has clarified many issues presented by NEPA, others remain in controversy.

Section 102(2)(C) of NEPA4 requires preparation of an environmental impact statement (EIS) by the “responsible official” prior to “Federal actions significantly affecting the quality of the human environment.”5 One issue presented by this provision is the definition of “responsible official.” Since Section 102(2)(C) is directed at “all agencies of the Federal Government,”6 federal administrators are clearly responsible, at least in some degree, for compliance with this section. However, federal administrators need not necessarily accept total responsibility for compliance.

† Staff Member, ENVIRONMENTAL AFFAIRS.
3 S. Deutsch, The National Environmental Policy Act’s First Five Years, 4 ENV. AFF. 3 (1975).
5 Id.
6 Id.
Delegation of EIS preparation has been dealt with in several forums. First, extensive litigation culminated in a fundamental disagreement between United States courts of appeals. Second, the delegation issue prompted Congress to amend NEPA. Third, delegation of NEPA responsibility forms the core of a controversy over recent environmental regulations promulgated by the United States Department of Housing and Urban Development (HUD).

This article examines the extent to which a federal administrator may delegate responsibility for compliance with Section 102(2)(C) to state and local officials, focusing primarily upon the HUD regulations. However, background for discussion of the regulations requires some consideration of the split between the court of appeals and the amendment to NEPA.  

I. JUDICIAL DISAGREEMENT OVER THE EXTENT OF DELEGATION PERMISSIBLE UNDER NEPA

A. Greene County

The standards of permissible EIS delegation were first articulated in Greene County Planning Commission v. Federal Power Commission. The Federal Power Commission (FPC) had promulgated regulations providing that a license applicant submit a draft EIS which would serve as the sole basis for the FPC's environmental review. FPC officials, however, conducted field investigations to assess the applicant's environmental conclusion. Nevertheless, the Second Circuit rejected FPC reliance upon the draft EIS prepared by the applicant, finding that the federal agency had a "primary and non-delegable responsibility" to prepare the EIS. The primary reason for this finding was the court's belief that the applicant's statement was likely to be based upon "self-serving assumptions." The court found that such assumptions would be difficult to detect by reviewing an EIS totally prepared by the applicant. Allowing such assumptions into the EIS would defeat the NEPA objective of informing the public how the agency had weighed environmental concerns. Once an EIS based on self-serving assumptions was cir-

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\[^{7}\] The issues are not treated in strict chronological order, for the amendment to NEPA actually took place on August 9, 1975. See text at note 44, infra. The HUD regulations were promulgated on January 7, 1975. See text at notes 109-112, infra.

\[^{8}\] 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).

\[^{9}\] 18 C.F.R. § 2.81 (1971).

\[^{10}\] 455 F.2d at 420.

\[^{11}\] Id.

\[^{12}\] Id. at 419.
culated for comment to other agencies and discussed at formal hearings, the court thought that little revision of the statement was likely. This tendency was referred to as the "status quo syndrome." The Second Circuit rejected the contention that court action by citizens would be sufficient safeguard against self-serving assumptions, insisting that the federal agency had responsibility for ensuring objective environmental review. The court held that the FPC procedure constituted a total abdication of that responsibility.

Dispute developed as to the precise degree of delegation permissible under Greene County. Some commentators interpreted the case as prohibiting the applicant from gathering facts upon which the EIS would be based. However, Greene County did not necessarily go this far. This uncertainty notwithstanding, commentators at the time perceived that the Greene County approach was the logical, desirable solution to the delegation problem. Other courts of appeals did not agree.

B. The Greene County Holding

In Life of the Land v. Brinegar, the Ninth Circuit led other circuit courts in limiting Greene County so severely as to almost reject that decision. The court in Life of the Land upheld an EIS prepared by a state agency and a private consulting firm. The court found that the federal agency "actively participated in all phases of the preparation process" and that the EIS was "more or less a joint effort" between the consulting firm and federal and state officials. The court recognized that the consulting firm had a financial stake in the approval of the project, but noted that there was no evidence of self-serving assumptions by the consulting firm or the state agency. Both parties to the litigation conceded that NEPA

13 Id. at 421.
14 Id. at 420.
16 The court did not rule out all participation by an FPC license applicant in the EIS preparation. The court suggested that the Atomic Energy Commission procedures (36 Fed. Reg. 18071, Sept. 9, 1971) would suffice. Those procedures allowed the federal agency to use a statement prepared by the applicant as a basis for its own draft EIS. 455 F.2d at 422.
17 State Highway Commissions, supra note 15, at 1275.
18 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).
19 Id. at 467.
20 Id.
required the federal agency to retain legal responsibility for the ultimate work product. Regular meetings between federal officials, state officials, and the consulting firm, accompanied by active review of the EIS by the federal agency, was sufficient in the court's opinion.

*Life of the Land* distinguished *Greene County*, finding that the federal agency had not totally abdicated its responsibility in this instance. "Good faith objectivity" in the preparation of the EIS was all that was required. The issues discussed in both cases, however, were identical. The degree of federal agency participation in *Life of the Land* was not significantly greater than that in *Greene County*, despite the assertions of the court. The disparate results cannot be explained in terms of meaningful factual differences. Rather, the Ninth Circuit applied a standard of review fundamentally at odds with that used in *Greene County*. *Greene County* did not strike down the FPC procedure because of evidence of self-serving assumptions in that case. The court emphasized the mere likelihood of such assumptions, and the need for procedural safeguards against them. Potentialities, not proven facts, were the basis of the *Greene County* holding. In *Life of the Land*, the Ninth Circuit held that a degree of federal involvement no greater than that of *Greene County* supplied sufficient procedural safeguards, emphasizing that no proof of actual self-serving assumptions had been offered. The Ninth Circuit thus upheld an EIS effectively prepared by a party with a direct financial interest in minimizing interference with the project. The standards established in *Greene County* would surely preclude approval of an EIS prepared under such circumstances.

The Courts of Appeals for the Fourth, Fifth, Eighth, and Tenth Circuits faced the delegation issue in the context of delegation by the Federal Highway Administration (FHWA). Each of the four circuits reached conclusions substantially equivalent to those of *Life of the Land*. The FHWA procedure provided that a state applying for funds would prepare the EIS, which would be subjected to environmental review. The FHWA and the United States Department

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21 Id.
22 Id.
23 Id.
24 The FPC in *Greene County* had conducted field investigation and reviewed the final work product. 455 F.2d at 416, 420. In *Life of the Land*, the United States Dept. of Transportation held meetings with the state and private agencies preparing the EIS, and the EIS was ultimately reviewed in Washington. 485 F.2d at 467.
of Transportation would then review the EIS. The Eighth Circuit upheld the FHWA procedure, emphasizing that the FHWA had recommended changes in the draft EIS in question and had added information. Terming this "significant and active" federal participation, the court purported to distinguish Greene County on its facts. The Tenth Circuit upheld a statement prepared under FHWA procedure "in consultation with" federal officials. This court also distinguished Greene County on factual grounds, finding that the federal agency had not merely "rubber stamped" the applicant's statement. The Fourth and Fifth Circuits summarily upheld the FHWA procedure.

C. The Second Circuit Affirms Greene County in Conservation Society

In December, 1974, the Second Circuit dispelled all doubt as to the continuing vitality of the Greene County holding. In Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, the court reaffirmed Greene County and highlighted the fundamental incompatibility of the Second Circuit's approach with that of the majority circuits. Conservation Society echoed many of the points expressed in Greene County but clarified some points and introduced additional considerations. Conservation Society clarified the standards required for proper EIS preparation, stating that "transposing the federal duty to prepare the EIS to a state agency is thus unlikely to result in as dispassionate an appraisal of environmental considerations as the federal agency itself could produce" [emphasis added]. The EIS procedure was thus compared with the maximum objectivity possible: complete federal agency preparation of the EIS. This approach contrasted sharply with that taken by the "majority circuits," which evaluated the EIS procedure with reference to a minimum: that

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27 Id.
29 Id.
30 Movement Against Destruction v. Volpe, 500 F.2d 29 (4th Cir. 1974); Finish Alatoona's Interstate Right, Inc. v. Brinegar, 484 F.2d 638 (5th Cir. 1973).
32 Id. at 931.
degree of federal agency participation in the preparation process sufficient to overcome the charge of a "rubber stamp" or a "total abdication."

Conservation Society introduced the consideration of judicial economy into the delegation debate. The court pointed out that the Greene County approach offered a clear standard which would allow agencies to order their activities to avoid litigation. While reducing litigation, the Greene County standard was also seen as ensuring more effective enforcement of NEPA. The federal agency would avoid the self-serving assumptions which might go unnoticed in an EIS prepared by an applicant. The court thus observed that the Greene County approach would result in better NEPA enforcement with less judicial involvement. The court dismissed the practical problems, such as insufficient personnel, of requiring total federal EIS preparation.

D. Synopsis and Assessment

Most circuits purported to apply the standard of review of Greene County while reaching the opposite result. They attempted to distinguish Greene County on the basis of factual differences. Some commentators agreed, asserting that no fundamental difference existed between the standard of review applied by the Second Circuit and that of the majority circuits. Conservation Society clearly established, however, that the Second Circuit would find "total abdication" in a number of cases upheld by the majority circuits. The majority circuits purported to require good faith objectivity and

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33 Id. at 932.
34 Id.
35 Id. The court in Conservation Society also relied upon the obligation of the state agency to implement programs established by the state legislature. The state agency was legally obligated to act as an advocate of the proposed project and might be acting improperly in performing an objective environmental assessment. Id. at 931. The importance of this ground was diminished by the Second Circuit's finding of illegal delegation in 1-291 Why? Ass'n v. Burns, 517 F.2d 1077 (2d Cir. 1975), where the state agency was under no obligation to act as an advocate.
36 The CEQ, for example, took the position that no fundamental difference existed between the tests applied in the Second Circuit and that applied in the majority circuits. S. REP. No. 94-152, 94th Cong., 2d Sess. 2 (1975). But see Hearings on H.R. 3130 Before the House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess., 13 (1975)(Statement of N. Tiemann) [hereinafter cited as Hearings on H.R. 3130].
37 The EIS struck down in Conservation Society was the subject of frequent meetings between FHWA and state officials. The FHWA Division Engineer made a field inspection specifically to discuss environmental review with state officials. The draft EIS prepared by the state was reviewed and sent back to the state for further consideration before being approved by FHWA. Hearings on H.R. 3130, supra note 36, at 17-18.
active federal participation in the EIS preparation. These standards emphasized a flexible approach and a case by case analysis of the facts. The majority approach did not assume a likelihood of state bias which would render inadequate all state prepared environmental assessments. Rather, the majority circuits sought to encourage cooperation between state and federal officials. This approach might have the advantage of encouraging environmental assessment in the early stages of a project.\(^\text{38}\) The states could not merely leave the responsibility for environmental assessment to federal officials who often become involved well after the start of a project. Instead, the State would begin environmental assessment in the early stages of a project, ensuring that fewer alternatives were foreclosed prior to consideration of environmental factors.

One possible reading of the majority circuit cases was that they approached EIS procedure in negative terms. If federal participation was not a "rubber stamp" or a "total abdication," the EIS was upheld. In fact, no majority court struck down an EIS on the basis of the degree of federal participation. In addition to these negative requirements, the majority circuits suggested that there was an affirmative requirement of "active federal participation." Yet the majority courts found active federal participation wherever they found no "total abdication." Thus, whether this purported affirmative requirement has any substantive import is unclear.

The majority approach did insist on some procedural safeguards. For instance, the federal agency was required to accept legal responsibility for the ultimate EIS and the federal officials were required to participate, at least minimally, in the preparation of the statement. The majority courts recognized the possibility of self-serving assumptions even if the federal agency complied with these requirements, but insisted upon evidence of the assumptions.

On balance, the Second Circuit approach is clearly more consistent with NEPA. NEPA allows no discretion in procedural matters, for Section 102(2)(C) requires that the procedures of NEPA be implemented "to the fullest extent possible."\(^\text{39}\) The procedural requirements were thus phrased in terms of maximums. NEPA requires more than sufficient procedural safeguards and an openness to proof of violation. This emphasis must be seen in light of the great difficulty in producing evidence that self-serving assumptions have

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\(^{38}\) The importance of environmental input early in the project development is widely recognized. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1119 (D.C. Cir. 1971).

\(^{39}\) Id. at 1112.
caused misleading omissions from an EIS. Additionally, the Second Circuit was probably accurate in its assessment of the practical results of its approach. Clear standards put agencies on notice as to how they can avoid litigation. The insistence by the majority circuits on "good faith objectivity" or significant federal participation established standards which are perhaps dissimilar and certainly nebulous. The Second Circuit approach would also improve enforcement. A federal agency required to put together an EIS would be far more likely to notice improper assumptions or insufficient treatment of an issue than it would if required only to read through an EIS prepared by an applicant for funds. Without a thorough knowledge of a project it is often difficult to detect what was left out of an EIS.

In any event, the Second Circuit decision in *Conservation Society* led to an impasse in the delegation debate. An almost total cessation in federally funded highway construction within the jurisdiction resulted. The situation became increasingly critical as the Seventh Circuit and a district court in Massachusetts both decided in favor of the Second Circuit approach. Rather than wait for the Supreme Court to reconcile the differences, Congress amended NEPA.

**II. THE NEPA AMENDMENT**

On August 9, 1975, President Ford signed into law an amendment to NEPA which significantly changed the nature of the delegation debate. The amendment, which provided that under certain circumstances an EIS could be prepared by a state applying for federal funds, was passed in direct reaction to the *Conservation Society* holding. The amendment allowed delegation only if: 1) the state agency preparing the EIS exercised statewide jurisdiction; 2) the federal agency furnished guidance and participated in the preparation of the statement; 3) the federal agency independently evaluated the statement and then adopted the statement as its own; 4)
the federal official prepared a written assessment of any disagree­ment over the environmental impact of the project; and 5) the pro­gram was funded by federal grants to the states.46 These limitations on the extent of permitted delegation manifest the intent of Con­gress to embody the approach to NEPA delegation taken by the majority of the courts of appeals.47 These limitations indicate a sensitivity to potential abuses of unlimited NEPA delegation. This sensitivity is evidenced by notable caution in the wording and place­ment of the amendment to keep NEPA delegation within clearly described boundaries.48

Several considerations cast doubt on the wisdom of the amend­ment. First, the need for the amendment was not clearly estab­lished. It was drafted in order to assure that the approach of the majority circuits to NEPA delegation and not that of Conservation Society, was embodied in NEPA. Some commentators at the time, however, suggested that no significant difference existed between the two approaches to NEPA delegation.49 Additionally, the Supreme Court had agreed to review the Conservation Society holding,50 assuring a timely judicial resolution of the conflict in the ab­sence of legislative action. Congress felt that legislative action was necessary to avert the financial problems attendant to a halt in highway construction in the Second Circuit, and believed that the situation was too serious to allow the additional time necessary for the Supreme Court to settle the dispute. Yet it was unclear at the time whether serious interruption of highway construction occurred or whether legislative action was the proper solution to the problem.51 Furthermore the amendment, embodying the majority circuit approach, contained all of the disadvantages of that approach, in­cluding lack of clear standards and retreat from the mandate that NEPA procedures be implemented to the fullest extent possible.

The merits of the amendment and the effect it will be likely to have on environmental enforcement continue to be matters of cru­cial importance. This subject warrants a discussion more extensive than can be undertaken within the scope of this article. The history

48 Id. at 11.
49 See supra note 36.
50 Conservation Society was granted certiorari, but was vacated after the 1975 NEPA amendment, 44 U.S.L.W. 3181 (U.S. Oct. 10, 1975).
51 The Senate Conference Report on H.R. 3130 observed that 91% of the FHWA projects were too small to be affected by NEPA, and other projects were delayed by problems other than NEPA. S. Rep. No. 94-152, 94th Cong., 2d Sess. 6 (1975).
of the amendment demonstrates that, regardless of its merits, careful attention was focused on the proposal. A full discussion of the merits occurred both in committees and on the floor of Congress. The amendment attempted an informed solution to a problem which Congress found pressing enough to warrant legislative action.

Unfortunately the NEPA delegation issue has not always been treated with such sensitivity. Just one year prior to the passage of the NEPA amendment, Congress demonstrated its potential for uniform uninformed, insensitive treatment of NEPA delegation in the Housing and Community Development Act of 1974.52 (Community Development Act).

III. Delegation of EIS Preparation by HUD

On January 7, 1975, the Department of Housing and Urban Development promulgated environmental regulations pursuant to Section 104(h)(1) of the Community Development Act.53 The regulations present the greatest allowance of delegation of NEPA responsibilities to non-federal officials to date. The process by which increased delegation became law is significant, as is the substantive impact of such delegation on environmental enforcement.

A. The Community Development Act

A near crisis atmosphere pervaded Congress during its consideration of housing legislation in 1974. On January 8, 1973, the Secretary of HUD had issued orders to all regional offices to refuse all applications under major federal housing programs.54 Though challenged in court,55 the impoundment of housing funds by the Nixon Administration was successful in cutting off virtually all federal housing assistance. At the same time twenty-five per cent of the population was housed in substandard, overcrowded or overpriced accommodations, and that percentage was rising annually.56 The mood in Congress was typified by the comment of one representative that he

56 In 1960 there were 4.7 million Americans living in substandard housing. In 1970 the number had increased to 7 million. 120 CONG. REC. 5397-98 (daily ed. June 20, 1974)(remarks of Representative Burke).
would place the housing needs of this country subordinate only to
two other more pressing demands: the need to curb inflation and the
need to reduce interest rates. . . ."57

Many proposals were introduced in Congress to alleviate the
crisis. The bill which emerged from Senate Committee was S.3066,
an omnibus bill dealing with many different aspects of community
development needs.58 S.3066 was a complicated piece of legislation
which was the product of four years of legislative effort.59 The most
significant feature of the bill was a major change in the mode of
grant allocations.60 Formerly federal assistance had been dispensed
through categorical grants. Communities had applied for funds for
project categories such as urban beautification, historic preserva­
tion, and sanitary code enforcement.61 Under the new system of
allocation created by Title 1 of S.3066, funds would be dispensed in
block grants. The amount of federal assistance to a community
would be computed, and the community would then be given con­
siderable discretion as to how the funds were spent, since no federal
project-by-project approval was involved under the block grant sys­
tem. The thrust of S.3066 was to allow flexibility and broad discre­
tion to communities using funds.62 The bill was seen as a step toward
a "new federalism" in which the federal government placed in­
creased power in the hands of local officials.63 S.3066, as passed by
the Senate on March 11, made no mention of NEPA.

On June 20, the House passed its version of the Community De­
velopment Act. The House version grew out of H.R.15361,64 a pro­
posal which was similar to S.3066 in many ways. One significant
difference between H.R.15361 and S.3066 was that the House ver­
sion expressly authorized delegation of NEPA responsibility by
HUD for the community development programs. H.R.15361 stated
in relevant part:

57 120 CONG. REC. 5392 (daily ed. June 20, 1974)(remarks of Representative Pepper).
58 The chairman of the conference committee described this bill as the single most impor­tant housing legislation since the National Housing Act of 1934. He observed that the bill re­
wrote all of the landmark housing legislation passed in the previous 40 years. 120 CONG. REC.
61 See, e.g., The Public Facilities Loan Program authorized by Title II of the Housing
Amendments of 1955; The Model Cities Program, and Urban Renewal, Code Enforcement
and Neighborhood Development Programs. 120 CONG. REC. 14886 (daily ed. Aug. 13, 1974).
62 S. REP. No. 93-693, 93d Cong., 2d Sess. (1974); in UNITED STATES CODE CONG. AND ADMIN.
63 120 CONG. REC. 5367 (daily ed. June 20, 1974)(remarks of Representative Anderson).
64 The text of H.R. 15361 is printed at 120 CONG. REC. 5406 et seq. (daily ed. June 20, 1974).
In order to assure that the policies of the National Environmental Policy Act of 1969 are most effectively implemented in connection with the expenditure of funds under this title, and to assure to the public undiminished protection of the environment, the Secretary, in lieu of the environmental protection procedures otherwise applicable, may under regulations provide for the release of funds for particular projects to applicants who assume all of the responsibilities for environmental review, decision-making, and action pursuant to such Act that would apply to the Secretary were he to undertake such projects as Federal projects. The Secretary shall issue regulations to carry out this subsection only after consultation with the Council of Environmental Quality. 65

The wisdom of excepting community development projects from the usual NEPA requirement of federal agency accountability for the project's EIS is debatable. Clearly, however, this exception should have been debated openly before enactment into law. It was not.

B. Section 104(h)

Section 104(h)(1) of the Community Development Act was the subject of little debate in the House of Representatives and only ex post facto consideration in the Senate. The section of H.R.15361 which later became Section 104(h)(1) of the Community Development Act was discussed on less than one page of the accompanying House report. 66 On the floor of the House, one representative requested an explanation for the provision. He was given a hasty assurance that the section would not weaken NEPA enforcement. 67 After passage by the House, H.R.15361 was sent to Conference Committee to be reconciled with S.3066. The Conference Committee adopted the House provision relating to NEPA, and it became Section 104(h)(1) of S.3066 as reported after more than a month of work in conference.

On August 13, 1974, the Senate began debate on the Conference Committee version of the Community Development Act. That version contained Section 104(h)(1), which the Senate had never before considered or debated. The bill was perceived as one of the most important measures of the session. 68 It was the product of extensive labor and a delicate balance of interests. The bill dealt with many different aspects of the housing problem which demanded immedi-

65 120 Cong. Rec. 5407 (daily ed. June 20, 1974).
68 See supra note 58.
ate attention. The Senate was then faced with the choice of either voting for the omnibus bill with one questionable provision which had not been considered, or jeopardizing the whole package. The Senate hesitated even to engage in extensive debate on the measure. Only Senator Jackson objected to the procedure through which Section 104(h)(1) was presented to the Senate as a \textit{fait accompli}, saying:

I hope that this will be the last time we are confronted with an "11th hour" decision on a provision which would erode the effectiveness of NEPA without having the benefit of study and full debate in the Senate. Unfortunately, I doubt that this will be the case. There are forces which would diminish the effectiveness of NEPA at every opportunity.\textsuperscript{69}

Despite his objections, even Senator Jackson voted for the bill. In light of the crisis existing at the time of consideration, passage of the bill was inevitable.\textsuperscript{70}

Adding Section 104(h)(1) in Conference Committee was only one aspect of the questionable procedure involved. This one short subsection was added to a long, complex piece of legislation which on its face had nothing to do with NEPA.\textsuperscript{71} Such "indirect amendment" is particularly irresponsible where, as in this case, it exempts a program from NEPA procedures, since one of the greatest strengths of NEPA is that it is a general environmental mandate to all federal agencies.\textsuperscript{72}

\textbf{C. The Substantive Import of Section 104(h)(1)}

The significance of Section 104(h)(1) in the NEPA delegation debate is obvious from a comparison with the amendment to NEPA passed one year after the passage of the Community Development Act.\textsuperscript{73} The 1975 NEPA amendment permitted delegation only within boundaries carefully defined by Congress to avoid irresponsible delegation which would defeat the NEPA mandate of federal accountability. It authorized delegation only to agencies with statewide jurisdiction.\textsuperscript{74} Section 104(h)(1) allows delegation to any applicant, including local government officials. The NEPA amendment

\begin{footnotesize}
\textsuperscript{69} 120 CONG. REC. 14885 (daily ed. Aug. 13, 1974) (remarks of Senator Jackson).
\textsuperscript{70} The vote was 84 in favor, none opposed and 16 abstaining. 120 CONG. REC. 14899 (daily ed. Aug. 13, 1974).
\textsuperscript{71} Id. at 14884.
\textsuperscript{72} Id. at 14885. Congress recognized this factor and rejected an indirect amendment to NEPA the following year. S. Rep. No. 94-152, 94th Cong., 2d Sess. 7 (1975).
\textsuperscript{73} Pub. L. No. 94-83 § 102(2)(D), 89 Stat. 424 (1975).
\textsuperscript{74} Id. § 102(2)(D)(1).
\end{footnotesize}
explicitly required the federal agency to retain ultimate responsibility for the EIS. Section 104(h)(1) places no such limitation on the delegation, providing that applicants would "assume all of the responsibilities for environmental review, decision making and action . . ." under NEPA. Section 104(h)(1) does not require the federal agency to be involved at all in the EIS preparation, in contrast with the NEPA amendment which requires federal agency participation and guidance.

The role of HUD under Section 104(h)(1) is limited to assuring that the delegation of NEPA responsibility is accomplished efficiently. The Secretary of HUD has fulfilled all NEPA obligations if the applicant claims ("certifies") that it has complied with NEPA and will take legal responsibility for that compliance. The delegation of NEPA responsibility is thus almost complete. After certification, HUD is to approve the project and any challenge to compliance with NEPA must then be directed toward the applicant, not the agency.

A number of considerations support the exemption of community development programs from usual NEPA procedures. These programs often focus on crises, such as the housing shortage, which require immediate relief. Such desperate needs often force environmental concerns into the background. Although housing programs need not conflict with environmental concerns, even among observers who perceive such possible compatibility, many claim that NEPA is an awkward instrument for reconciling the two interests.

Critics initially point to the financial burden of NEPA compliance. This burden is particularly significant in regard to housing, for lack of funds has always plagued government housing programs. Federal housing programs rely primarily on private developers who may hesitate to undertake the added expense of NEPA compliance. Additionally, the cost of compliance does not

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75 Id. § 102(2)(D).
76 Community Development Act, 42 U.S.C. § 5304(h)(2) (Supp. IV, 1974).
78 B. Ackerman, "Impact Statements and Low Cost Housing," 46 S. Cal. L. Rev. 754, 800 (1973) [hereinafter cited as Ackerman].
79 The cost of impact statement preparation for a 400-unit housing project is estimated at $20,000-$30,000 per year during construction. Id. at 761.
necessarily correlate with the size of the project and may over burden small projects.81

Furthermore, NEPA procedures often result in considerable delay.82 The delays caused by extensive record keeping may be compounded by the possibility of extended litigation over environmental issues. Delay in the construction of a housing project may render unfeasible a tightly budgeted program.83 Delay also allows more time for community groups to mobilize opposition to the project. Time for community reaction can be a positive result of NEPA, and indeed NEPA was meant to allow increased public awareness of the environmental effects of government action.84 However, particularly in the case of housing, the result may not be desirable, for the opposition which mobilizes may have little or nothing to do with environmental issues.

NEPA has been abused by community groups attempting to block the entry of low income citizens (hence racial minorities) into their neighborhoods.85 Some controversy persists over the extent to which “environment” as referred to in NEPA includes the social environment.86 Clearly, however, NEPA was not meant to facilitate snob zoning and racial discrimination.87 Yet the vulnerability of housing programs to delay and increased financial burdens have caused some groups to institute litigation in hopes of crippling the project despite a probable lack of success in the courtroom. As one writer observes “the opposition which benefits from the application of §102(2)(C) requirements to subsidized housing projects is usually pursuing exclusionary objectives contrary to the spirit and values of the fourteenth amendment.”88 Since NEPA pertains only to government subsidized projects, a low income project on a given site might be defeated by the cost of compliance with NEPA while a private developer could then build a similar project (probably not low income) without impediment.89

81 Ackerman, supra note 78, at 761.
82 Id. at 762.
83 Id.
87 Daffron, supra note 85, at 82; Ackerman, supra note 78, at 758.
88 Ackerman, supra note 78, at 755.
89 Id. at 789.
In addition to the above procedural deficiencies of NEPA as applied to housing, HUD's institutional inertia is also a problem. HUD has a history of trying to avoid compliance with NEPA. The explanation for this attitude lies in part with the procedural problems discussed above, but evidence exists that HUD's insufficient compliance also stems from resentment over past problems with NEPA. This resentment may now be so deep-seated that even if the procedural deficiencies of NEPA were eliminated, HUD would resist compliance.

If problems with NEPA and federal review exist, so do serious drawbacks to local control over environmental review. The most striking disadvantage is that environmental impacts often extend beyond artificial borders. The Community Development Act provides only generalized mandates to consider regional environmental impacts, and the HUD regulations implementing the Act do not require meaningful regional environmental review. This consideration has inspired opposition to local control over environmental review. Another reason to doubt the wisdom of local environmental

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**A recent report of the General Accounting Office charges that HUD's NEPA compliance has been poor. Through June 30, 1974, HUD filed only 81 impact statements on nearly 30,000 project proposals, and the statements were of low quality. ENVIRONMENTAL ASSESSMENT EFFORTS FOR PROPOSED PROJECTS HAVE BEEN INEFFECTIVE—DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, GAO (RED-75-383), at 11, 20 (July 22, 1975) [hereinafter cited as GAO REPORT]. See also 120 CONG. REC. 14884 (daily ed. Aug. 13, 1974) (remarks of Senator Jackson).

HUD defends its efforts at environmental compliance with every conceivable argument, asserting 1) that its environmental compliance should not be judged solely on the number of impact statements filed, 2) that the number of impact statements filed by HUD is increasing dramatically, 3) that the other federal agencies engaged in similar activities are even worse at environmental enforcement, and 4) that inconsistent and unpredictable judicial interpretation of NEPA make compliance difficult. Telephone interview with James Shumar, Principal Program Officer, Environmental Planning Division of HUD, November 10, 1975 [hereinafter cited as Shumar Interview]. See also Memo from James F. Miller to HUD Regional Offices regarding NEPA Oversight Hearings by the House of Representatives (Sept. 26, 1975) (on file at ENVIRONMENTAL AFFAIRS office, Newton, MA) [hereinafter cited as Miller Memo].

When discussing NEPA, HUD officials often point to its past abuse for exclusionary purposes and the unpredictability of NEPA decisions. Memo from David O. Meeker, Coordinator of Community Planning and Development, to HUD Regional Offices regarding NEPA Oversight Hearings by the House of Representatives, at 10 (Sept. 7, 1975) (on file at ENVIRONMENTAL AFFAIRS office, Newton, MA) [hereinafter cited as Meeker Memo]. See also Miller Memo, supra note 90.

* The HUD regulations require only that the environmental appraisal be "on as comprehensive a scale as is feasible." 24 C.F.R. § 58.5(2)(g) (1975).
* Memo from Andrew Biemiller to Henry Schechter (July 19, 1974) in 120 CONG. REC. 14889 (daily ed. Aug. 13, 1974), wherein the AFL-CIO outlines its opposition to Section 104(h)(1) due to failure to consider regional environmental impacts [hereinafter cited as AFL-CIO Memo].
review is the lack of technical expertise available at the community level. The Chairman of the Council on Environmental Quality expressed his support for local control of environmental review because communities had recently developed the necessary machinery to undertake such review. Yet proponents of Section 104(h)(1) in the House justified the move to local control in order to encourage the development of the expertise. No extended discussion of the ability of local governments to handle environmental reviews occurred. Recent studies indicate that the necessary technical expertise does not presently exist on the community level and that a lack of effective environmental review is one of the most serious flaws in the community development program.

As pointed out in Conservation Society, preparation of EIS’s by applicants for federal funds has other disadvantages. Applicants are likely to make unconscious choices which might not be reflected in the EIS, but which could foreclose alternatives potentially less detrimental to the environment. Local applicants are unlikely to have the sophisticated legal advice to allow them to order their affairs to avoid the complex legal pitfalls of NEPA compliance. Given HUD’s own environmental review record, that agency is unlikely to be of much assistance. Local control of environmental review also involves less visibility than preparation by a state or federal agency. Such low visibility makes it more difficult for interested

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94 120 CONG. REC. 8432 (daily ed. Aug. 15, 1974).
95 Section 116 of the Housing and Community Development Act, 42 U.S.C. § 5316(c) (Supp. IV, 1974) does provide that the recipients of block grants can use up to 10% of their grant for planning activities. Therefore, some financial assistance for EIS preparation is provided. However, critics of the provision claim that this financial assistance is far from adequate. Comments of the United States Environmental Protection Agency to HUD’s Proposed Environmental Regulations of Oct. 10, 1974 (on file at HUD’s Washington, D.C. Office).
96 The United States Environmental Protection Agency (EPA) reports that the quality of EIS’s filed pursuant to the HUD regulations varies greatly. Some of the statements are far too detailed; others are superficial. This variation indicates that applicants have no accurate sense of NEPA’s requirements. There is also indication that community development funds are not being requested because of reluctance to undertake NEPA responsibilities. Both HUD and the EPA have begun investigations. 6 BNA ENV. REP.—CURR. DEV. 1074 (Oct. 24, 1975). A recent study published in the JOURNAL OF HOUSING identifies compliance with NEPA as the major problem with the community developments program. 9 J.O.H. 445 (Oct. 1975).
99 AFL-CIO Memo., supra note 94.
environmentalists to monitor the decision process.

The disadvantages of local preparation of an EIS might conceivably be offset by federal agency participation or review. Section 104(h)(1), however, may preclude such review. It provides that HUD shall approve any application unless: 1) it is plainly inconsistent with the housing needs of the area; 2) it is clearly an inappropriate plan for implementation of housing goals; or 3) the application does not comply with other provisions of Title I of the Community Development Act or other applicable law. The third ground constitutes the only possible basis upon which an application could be refused for insufficient environmental review. Although this third ground functions as a residual or "catch all" clause, it is uncertain whether the courts will give this clause any substantive effect.

An argument can be made that less effective environmental enforcement was a necessary tradeoff in order to affect local control over community development. The Community Development Act was drafted to implement increased local control over the spending of funds, and was thus an outgrowth of the "new federalism." Section 104(h)(1), by providing for local control of environmental review, is consistent with this goal. Local control is thought to increase citizen interest in a project, thus encouraging closer correlation between planning and implementation of projects. Increased citizen input may result in projects being more closely tailored to local needs, and give citizens a greater role in allocation of resources.

Additionally, the federal government maintains considerable control over selected aspects of the community development program. For instance, the block grants can be used only for specified types of projects, and the federal agency annually maintains compliance with the program. Also, the funds may not be used inconsistently with federal civil rights legislation. Congress thus made exceptions to the general thrust of the Community Development Act toward local control. Federal environmental review through the usual NEPA procedures could have been retained without seriously damaging local control objectives. Commentators analyzing analogous federal block grant programs have concluded that NEPA com-

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102 Housing and Community Development Act, 42 U.S.C. § 5304(c) (Supp. 1974).
pliance would not significantly interfere with substantive local control objectives. 107

In summary, telling arguments have been advanced in favor of exempting HUD from the usual NEPA procedures. NEPA can be an awkward instrument as applied to government housing. The delay and increased financial burden have made compliance costly. NEPA has been abused by community groups opposed to low income housing, and a problem of institutional inertia has arisen in HUD's apparent dislike for NEPA. With effort these disadvantages might be overcome. That effort might be better directed toward devising an environmental review system which would be more appropriate to housing programs.

Unfortunately, the Community Development Act took neither approach. It offered no new incentives to developers to comply with NEPA and proposed no alternative to NEPA. The Community Development Act merely passed the difficulties of NEPA compliance one step down the line, making compliance more difficult and less effective. The one possible advantage of this approach was that it may result in less interference by environmentalists. If this was the real aim of Section 104(h)(1), Congress should merely have exempted HUD from environmental review requirements.

Even granting that local control is desirable in some circumstances, federal environmental review need not interfere with substantive local decisions. NEPA does not require a particular result in a given case, but mandates only that environmental impacts be recognized and considered. If a community is aware of adverse environmental impacts of a project, but decides to proceed nevertheless, NEPA is unlikely to stand in the way.108

D. HUD Regulations Pursuant to Section 104(h)(1)

Doubts concerning the wisdom of Section 104(h)(1) were compounded by the regulations promulgated by HUD to implement that subsection.109 The regulations were proposed in October,

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107 The foremost discussion of the Revenue Sharing Program concludes that application of NEPA is consistent with the local control objectives of that program. Note, NEPA and Unrestricted Grants, 60 Va. L. Rev. 114, 136 (1974). See also Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), for a discussion of NEPA as applied to the Law Enforcement Assistance Administration block grant program.


1974,\textsuperscript{118} finalized in January, 1975,\textsuperscript{111} and modified in July, 1975.\textsuperscript{112} The regulations and the public reaction to them illustrate the conflicting forces brought to bear on the EIS delegation issue.

Those favoring strict environmental review have claimed that the regulations go beyond the intent of Congress. The regulations provide for delegation of NEPA responsibility for all Title I grants with only minor exceptions.\textsuperscript{113} The applicant has no choice as to whether it will accept NEPA responsibility. The regulations require delegation regardless of whether the applicant has the technical expertise to carry out an environmental review. The applicant is able to avoid responsibility for NEPA compliance only by claiming "legal incapacity."\textsuperscript{114} Legal incapacity exists when an applicant is forbidden by its charter or constitution from accepting the responsibility.\textsuperscript{115} This condition is difficult to prove, and the procedural prerequisites to a finding of legal incapacity are prohibitory.\textsuperscript{116}

Environmentalists have claimed that this required delegation extends beyond the mandate of Section 104(h)(1).\textsuperscript{117} Section 104(h)(1) provides that HUD may delegate NEPA responsibilities "for particular projects." That phrasing may imply that HUD retains the responsibility to analyze each project to gauge the desirability of delegation in each case. Such individualized project consideration would result in retention of some federal agency control over EIS preparation.

The delegation of NEPA responsibilities under the regulations is extensive. HUD does not normally even receive a copy of the EIS prepared by the applicant, for the applicant need only certify to HUD that the environmental review is complete.\textsuperscript{118} The regulations

\textsuperscript{112} 40 Fed. Reg. 29991 (July 16, 1975).
\textsuperscript{113} 24 C.F.R. § 58.5 (1975).
\textsuperscript{114} Id
\textsuperscript{115} Interview with David Prescott, Environmental Review Officer for HUD Region I, Nov. 10, 1975 [hereinafter cited as Interview with David Prescott].
\textsuperscript{116} For example, if an applicant is found legally incapable of one project, it is prohibited from accepting responsibility for all projects for the entire year. If an applicant does not request a finding of incapacity before filing the original application, it waives the right to claim legal incapacity. 24 C.F.R. § 58.5(b)(1) (1975). The effect of a finding of incapacity does not excuse an applicant from its obligation to prepare an EIS, but only from legal responsibility for it. No claims of legal incapacity have been made to date in HUD Region I. Interview with David Prescott, supra note 115.
\textsuperscript{117} Comments of Conn. Urban Renewal Ass'n, supra note 100, at 1.
\textsuperscript{118} 24 C.F.R. § 48.17(e). HUD is designated in Appendix II of the CEQ guidelines (40 C.F.R. § 1500) (1975) as one of the agencies with special expertise in housing. NEPA requires in Section 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970), that "the responsible Federal official shall
do establish a procedure whereby a citizen can challenge the release of funds for a project if the applicant has not complied with certain procedural requirements during the environmental review. In that case, HUD will review only the procedure followed by the applicant, not the substance of the applicant’s environmental analysis.\(^{119}\)

The Community Development Act provides that HUD should approve an application only after the applicant has shown that citizens have been given an opportunity to participate in the preparation of the application.\(^{120}\) Yet the HUD regulations provide that the decision as to whether to hold public hearings remains completely within the discretion of the applicant.\(^{121}\) HUD will review an applicant’s hearing procedure if hearings are held, but will not review an applicant’s decision to hold no hearings at all.\(^{122}\)

The procedures established by the regulations contain an additional flaw. If an applicant finds that the project requires EIS preparation, the regulations prescribe procedures which the applicant must follow and which HUD will review.\(^{123}\) If an applicant determines that no EIS is required, however, the regulations prescribe few procedural requirements. After publishing a statement of intent not to file an EIS and reasons therefor, the applicant must allow a period for public comments. The environmental review process will then be complete unless the applicant determines that further consideration is necessary.\(^{124}\)

Some of the questionable provisions in the regulations are arguably authorized by Section 104(h)(1). For example, NEPA does not specifically require public hearings. Thus, some rational ground exists to justify HUD’s decision not to require hearings.\(^{125}\) Other provi-

\(^{119}\) 24 C.F.R. § 58.31(a), (b) (1975).
\(^{121}\) NEPA does not require public hearings, and HUD asserts that in keeping with the theory of local control, it should not impose on applicants procedures which are more strict than those imposed by NEPA. Shumar Interview, supra note 90. This approach ignores the fact that the Community Development Act, 42 U.S.C. § 5304(a)(6)(B) (Supp. 1974), may require more extensive citizen participation than does NEPA.
\(^{122}\) 24 C.F.R. § 58.31(a), (b) (1975).
\(^{123}\) 24 C.F.R. § 58.17 (1975).
\(^{124}\) 24 C.F.R. § 58.16 (1975).
\(^{125}\) See note 121, supra. Another questionable provision of the HUD regulation establishes overly mechanical threshold tests to determine whether the project is a “major Federal action significantly affecting the quality of the human environment” and thus subject to NEPA. The regulations provide that projects of a given size require EIS preparation. 24 C.F.R. § 58.25 (1975). This provision implies that projects of a smaller size do not require EIS preparation. HUD has been criticized in the past for use of such mechanical tests which are not consistent
sions in the regulations are clearly beyond the authorization of Section 104(h)(1). For example, the regulations provide for delegation of HUD's responsibilities under the National Historic Preservation Act despite the complete absence of statutory authority for the delegation. Most provisions fall on the borderline, and must be viewed in light of the more general mandate of Section 104(h)(1).

On one hand, Section 104(h)(1) was meant to allow local control over environmental assessment, in accord with the overall thrust of the Community Development Act. Substantive review of applications by HUD is limited to very narrow grounds. Section 104(h)(1) provides that the applicant may "assume all of the responsibilities for environmental review." On the other hand, Section 104(h)(1) did explicitly provide that it had been enacted "in order to assure that the policies of the National Environmental Policy Act of 1969 are most effectively implemented . . . and to assure the public undiminished protection of the environment . . . ." The section, then, was not to be a carte blanche requirement of delegation. The whole of Section 104(h)(1) must be interpreted in light of this mandate to assure continued protection of the environment. The section authorized only that degree of delegation consistent with this general mandate.

CONCLUSION

Senator Henry Jackson, the author of NEPA, said of Section 104(h)(1) of the Community Development Act:

Proponents of this NEPA exemption would argue that the force and effect of NEPA is not changed, that the responsibility has simply been transferred from HUD to the State and local governments. This glib response ignores the fact that the most basic purpose of NEPA was to hold the Federal government responsible for maintaining the quality of our environment . . . . Let no one be mistaken that this exemption, by permitting the delegation of the impact statement responsibility, denies the most basic purpose of NEPA: the requirement of Federal accountability.

with the spirit of NEPA, which demands each project be evaluated on its merits in light of all the circumstances. NEPA and HUD, supra note 77, at 889.

127 120 CONG. REC. 5367 (daily ed. June 20, 1974).
130 120 CONG. REC. 14884 (daily ed. Aug. 13, 1974).
Congress and the courts have generally been sensitive to this NEPA requirement of federal accountability. The courts of appeals in *Conservation Society* and *Life of the Land* disagreed over the degree to which states could participate in the preparation of EIS's, but both courts insisted that the federal agency accept ultimate responsibility for NEPA compliance.\(^{131}\) Congress drafted the 1975 amendment to NEPA so as to limit the erosion of federal accountability.

HUD, however, has shown no such sensitivity to the requirement of NEPA. A report of the General Accounting Office (GAO Report)\(^ {132}\) substantiated HUD's reputation for poor environmental performance. HUD's reluctance stemmed in part from the burden of NEPA compliance and the abuse of NEPA by those opposed to low income housing.\(^ {133}\)

A solution to the apparent conflict might begin with a more efficient adaptation of NEPA to the needs of housing programs. Careful definition of the types of social impacts to be considered under NEPA would prevent its abuse by persons desiring to exclude low income housing from their neighborhoods. Delays encountered pursuant to NEPA compliance could be minimized if cases involving housing projects were given priority in the courts.\(^ {134}\) The financial burdens of environmental compliance must be recognized as a necessary cost in housing construction, and must be fully provided for in annual appropriations. The GAO Report suggested that reorganization within HUD and more specific environmental guidance to agency personnel would greatly improve NEPA compliance.\(^ {135}\)

On the other hand, perhaps NEPA may not be the most efficient means of reconciling housing and community development needs. An alternative procedure which recognizes the vulnerability of housing programs to financial burdens and delay might be created.

Clearly, the procedures established by the Community Development Act and the HUD regulations are unsatisfactory. HUD has not adequately faced the problem of conflicting housing programs and environmental goals. Instead, NEPA problems have merely been passed along to local authorities who are even less able to handle

\(^{131}\) *See text at note 21, supra.*

\(^{132}\) GAO REPORT, *supra* note 90.

\(^{133}\) *Id.* at 41 (HUD reaction to GAO REPORT).

\(^{134}\) One obvious difficulty with this scheme is that many so-called "priority" programs might also demand streamlined court procedures for NEPA litigation. To the extent that this is a problem, the immediacy of housing needs and the disgraceful human suffering resulting from failure to satisfy those needs place housing programs in a special status.

\(^{135}\) GAO REPORT, *supra* note 90, at 43.
them efficiently. The result has been less effective environmental enforcement, and continued interference with community development programs. The fault lies partly with Congress for enacting Section 104(h)(1) of the Community Development Act, and partly with HUD for the regulations implementing the program. The need for a national approach to environmental priorities was the original rationale behind NEPA. The effort should not so quickly be abandoned.