3-1-1972

Parklands and Federally Funded Highway Projects: The Impact of *Conservation Society v. Texas*

John W. Giorgio

Follow this and additional works at: [http://lawdigitalcommons.bc.edu/ealr](http://lawdigitalcommons.bc.edu/ealr)

Part of the Environmental Law Commons, and the Land Use Law Commons

Recommended Citation

[http://lawdigitalcommons.bc.edu/ealr/vol1/iss4/12](http://lawdigitalcommons.bc.edu/ealr/vol1/iss4/12)

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
Conservation Society v. Texas, decided by the United States Circuit Court of Appeals for the Fifth Circuit, evidences the entrance of courts into "a new battleground [where they will be] guided by the solemn expression of Congressional will to preserve parklands and the environment from harm or destruction at the hands of federal-aid projects." The court in this case analyzed the Department of Transportation's environmental policies and related procedures. The Department's duties in this regard have been mandated by the National Environmental Policy Act of 1969, the Department of Transportation Act of 1968, and the Federal-Aid to Highway Act of 1968.

In 1955, in a proposal to the Texas Highway Department, officials of the City of San Antonio called for the construction of a city multi-lane highway, to be known as the North Expressway. Five years later, the state, having accepted the city's proposal, chose a route for the highway that was to require the taking of portions of the Brackenridge-Olmos Parklands, located in a densely populated area of the city. In 1961 the proposed acquisition of the selected right-of-way was approved in a statewide bond issue election. In order to qualify for federal aid, which would cover one-half of the highway's cost, the state then conducted a public hearing in accordance with federal law. Thereupon, the Federal Bureau of Public Roads indicated that the project had met preliminary requirements for federal funding, such indication being the first federal action with respect to the project.

Between 1961 and 1967, the only activity that the state took with regard to the highway was the negotiation with affected land-owners for the right-of-way. In December 1967, however,
the San Antonio Conservation Society, fearing ultimate destruction of the park, entered federal district court and sought to have the state of Texas enjoined from starting any construction on the highway. The suit was not, however, pressed to a quick conclusion. In December 1969, while the suit was still pending, the federal Secretary of Transportation issued a press release in which he stated that he could not approve any construction through parklands. He indicated, however, that construction to the north and south of the parklands would be approved, but only after an agreement was reached to study routes alternative to the middle (parkland) segment. In August 1970 the Texas Highway Department so agreed, whereupon federal funds were authorized to begin construction of the two end segments of the highway.

The Conservation Society then proceeded with its earlier suit for a preliminary injunction. It specifically requested that the Texas Highway Department be prohibited from letting contracts on construction of the two end segments. The district court denied the Conservation Society’s motion for a preliminary injunction and granted defendant’s motion for summary judgment. The Conservation Society proceeded to the circuit court and requested a stay pending an appeal to that court; the motion, however, was denied. Certain members of the Conservation Society then successfully petitioned the United States Supreme Court for a stay; at the same time, they also petitioned for a writ of certiorari on the district court’s denial of the preliminary injunction. The Supreme Court, however, in December 1970, vacated the stay and, with two justices dissenting, denied certiorari.

The case then finally returned to the circuit court of appeals, where it was held that the Secretary of Transportation should not have divided the project into three segments to be considered separately, nor should he have approved release of funds for the end segments without having first conducted a detailed environmental study of the project as a whole. In reaching its decision, the court made reference to three federal statutes: the National Environmental Policy Act of 1969, the Department of Transportation Act of 1968, and the Federal-Aid to Highway Act of 1968. The court also relied heavily on the reasoning of Citizens to Preserve Overton Park v. Volpe, which was decided by the Supreme Court shortly after certiorari had been denied to the petitioners in Conservation Society.
It is submitted that the circuit court in *Conservation Society* made no error in holding that the above three statutes impose strict requirements on the Secretary with respect to highway construction through parklands. These statutes and the court's interpretation thereof as well as its interpretation of the pertinent case law are examined below. Reference is also made to relevant cases that have been decided subsequent to *Conservation Society*.

**The Statutes**

The first of the three statutes to be noted is the National Environmental Policy Act of 1969 \(^27\) (hereinafter, NEPA). This act announces, in extremely broad terms, a national commitment to preserve the environment. Section 101(A) of NEPA, stressing the importance of conserving environmental quality, declares that it is the policy of the federal government to ensure that environmental factors be given detailed consideration in the planning of federal action. \(^28\) In spite of this broad commitment, however, section 101(A) has not yet been read as creating substantive rights in citizens to challenge federal action or inaction in the area of environmental protection. \(^29\)

After setting forth the general federal policy in the area of environmental protection, NEPA establishes specific procedures to be followed by administrative agencies when considering major federal projects. Section 102(C) provides that before commencement of any federal project that may significantly affect the environment, the responsible federal official is to submit to the Council on Environmental Quality \(^30\) a detailed statement setting forth the environmental impact of the proposed project as well as measures that will be undertaken to minimize any potentially adverse environmental effects. The report must also specify any alternatives to the proposed project whereby environmental damage would be avoided. \(^31\) Since NEPA becomes relevant whenever a federal project may significantly affect environmental quality, most projects considered by the Department of Transportation will require compliance with NEPA procedures.

The second and third statutes that the court treated were the Department of Transportation Act of 1968 \(^32\) (hereinafter, DOT Act) and the Federal-Aid to Highway Act of 1968 \(^33\) (hereinafter, Highway Act). These two statutes will be discussed together since the critical provision in each, the declaration of a federal policy,
is virtually identical. Section 4(f) of the DOT Act and section 138 of the Highway Act (hereinafter, sections 4(f) and 138) announce:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of [the Federal-Aid to Highway Act of 1968] [the Department of Transportation Act of 1968], the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife or waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such official unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and waterfowl refuge, or historic site resulting from such use.

Unlike NEPA there is no requirement that formal findings be submitted to the Council on Environmental Quality. However the above quoted sections reveal that there is a similarity in objectives between these two statutes and the NEPA. For example, section 102 (C)(iii) of NEPA states that in any environmental impact report the federal official must include the alternatives to the proposed project. Sections 4(f) and 138 also call for specifications as to project alternatives. Additionally, however, the latter two sections require that the Secretary not approve any parkland project unless he can show that the project’s alternatives are not feasible and prudent.84

One of the major problems in interpreting sections 4(f) and 138 involves the meaning of the term “feasible and prudent alternative.” This problem will be discussed in further detail below. It is appropriate here, however, to recognize that nowhere in the statute, the legislative history, or the DOT regulations is it clearly indicated what factors should be taken into account when considering possible alternatives. Uncertainty may develop, for example, when there are but two possible routes for a highway,
one of which would require the taking of valuable parklands, the other of which would require the relocation of substantial numbers of families and businesses. In such a situation, a question arises as to whether environmental considerations should be controlling. In this regard, one should note carefully the language of sections 4(f) and 138: the Secretary shall not approve a transportation project through a parkland unless there is no feasible and prudent alternative. The word "unless" has the effect of transmuting what at first appears to be a mandate (the Secretary "shall not" approve) into an authorization for the exercise of discretion. As considered below, however, Conservation Society held that the application of this discretion is subject to restrictive standards.

The second part of sections 4(f) and 138 provides that when there is no feasible and prudent alternative to a project that may result in some environmental damage, the Secretary must see that every effort is made to ensure that there will be only a minimum amount of harm done. This provision goes even further than section 102(C) (ii) of NEPA, merely requires that a reference be made to possible adverse effects on the environment. The DOT and Highway Acts thus present environmentalists with an important weapon by which they can effectively control the extent of damage attendant to federal highway activity.

It must be recognized, however, that not all parks are automatically protected under sections 4(f) and 138. These sections limit protection only to those parks which are of "national, state or local significance." Unless a park is of some significance as a park or recreation site there may be no bar to the taking of such parklands. This part of the two sections provides also that such a determination of "significance" should be made by the federal, state or local official who has jurisdiction over the parkland. The question arises at which level—local, state, or federal—can final determination be made to the park's local "significance." Possible answers to this question are examined below.

The Issues

The Scope of the Secretary's Discretion

Any analysis of the Secretary's discretionary power regarding parkland highway construction must begin with the statutes. In Conservation Society the court dealt with the NEPA in a summary fashion and found that since the Secretary of Transportation did
not file an environmental impact report as required by that act, he was in violation of federal law.\textsuperscript{40}

As to the DOT and Highway Acts, the court found that the Secretary’s division of the project into three segments and his approval of funds for the construction of the north and south segments were an abuse of discretion under sections 4(f) and 138 of those two acts.\textsuperscript{41} The court, focussing on semantics, reasoned that since those sections provide that “the Secretary shall not approve any \ldots project which requires the use of any publicly owned land from a park \ldots”\textsuperscript{42}, the Secretary was not authorized to split the single highway project into three separate segments, each to be separately administered. The court was then able, under the Administrative Procedure Act,\textsuperscript{43} to set aside the Secretary’s actions as being beyond his statutory power.

In reaching this decision, the court contemplated what effect splitting the project into three segments would have on the Secretary’s duty to consider possible alternatives.\textsuperscript{44} It concluded that there would have been virtually no alternative to construction through the park if construction had been completed on either side of it. This fact had been recognized earlier by Mr. Justice Douglas in his dissent to the Supreme Court’s denial of certiorari. He posed the following questions:

How can end segments of a highway aimed at the heart of a park be allowed without appraising the dangers of drawing a dotted line between the two segments? \ldots What are the alternatives that would save the park completely? \ldots Could the freeway be rerouted so as to avoid the parklands completely and leave it as a sanctuary?\textsuperscript{45}

The problem of piecemeal division as it relates to the Secretary’s discretion also surfaced in \textit{Citizens Committee for the Hudson Valley v. Volpe}.\textsuperscript{46} In that case the Army Corps of Engineers was planning to construct a freeway along the Hudson River. In order to complete the freeway, the Corps of Engineers would have had to construct a dike and a causeway. Since jurisdiction over the construction and maintenance of dikes was vested in Congress under the Rivers and Harbors Act of 1899,\textsuperscript{47} and the jurisdiction over the construction of causeways was vested in the Department of Transportation by the Department of Transportation Act,\textsuperscript{48} the District Court for the Southern District of New York ruled that the Corps of Engineers would have had to obtain the approval of both the Congress and the
Secretary of Transportation before the construction of either the dike or the causeway could begin.\textsuperscript{49} If the dike had already been constructed, then the Secretary of Transportation would have been limited in the number of possible alternatives to the causeway he could consider under the DOT and Highway Acts. Specifically citing section 4(f) of the DOT Act, the court stated:

Such a piecemeal approach to the exercise of federal agency jurisdiction would also frustrate one of the main purposes of the Department of Transportation Act, i.e. the conservation of the country's natural resources. Before the Secretary of Transportation is to approve any project within his jurisdiction, he has to determine, inter alia, the effects of the project on the natural resources of the area.\textsuperscript{60}

The court in Conservation Society dealt with another question regarding the scope of the Secretary's discretion. As indicated above, section 4(f) of the DOT Act and section 138 of the Highway Act prohibited the Secretary from approving a highway project unless it has no "feasible and prudent alternative."\textsuperscript{61} Although this provision is, on its face, vague, it has been given greater precision by the courts. The court in Conservation Society noted the interpretation given to this provision by the Supreme Court in Citizens to Preserve Overton Park v. Volpe.\textsuperscript{52} In Overton the Secretary of Transportation had already approved a route through Memphis's Overton Park; moreover all of the families and businesses along that route had been relocated and most of the buildings destroyed. This situation is to be contrasted with Conservation Society, wherein the Secretary had given approval only to construction of the two end segments, which approval posed no immediate threat to the city park.\textsuperscript{63} In Overton, the Secretary argued that the "feasible and prudent alternative" provision required the Secretary to "engage in a wide-ranging balancing of competing interests."\textsuperscript{64} This was evident, he maintained, in the legislative histories of the DOT Act and the Highway Act.\textsuperscript{65} For example, the House-Senate Conference Report on the DOT Act stated:

The Amendment of both relevant sections of law is intended to make it unmistakably clear that neither section constitutes a mandatory prohibition against the use of enumerated parklands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to
preserve these lands, or clearly enumerated local preferences should be overruled on the basis of his authority.\textsuperscript{56}

The Supreme Court, however, noting that the legislative history of section 4(f) was ambiguous,\textsuperscript{67} was not convinced. It looked instead to the express language of the statute in order to determine its meaning. The court then established separate criteria for determining whether an alternative was "feasible" and whether it was "prudent." The court found that in order for the Secretary to find that an alternative route was not "feasible," he would have to conclude that "as a matter of sound engineering it would not be feasible to build the highway along any other route."\textsuperscript{58} This would leave very little room for agency discretion. In order for the Secretary to find that an alternative route was not "prudent," he would have to find that the presence of truly unusual factors required the use of the parklands for highway construction:

It is obvious that in most cases consideration of cost, directness of route, and community disruption will indicate that parklands should be used for highway construction whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another, there will always be a smaller outlay required from the public purse (114 Cong. Rec. 24037, statement by Senator Yarborough) when parklands are used since the public already owns the land and there will be no need to pay for the right-of-way. And since people do not live or work in parks, if a highway is built on parklands no one will have to leave his home or give up his business. Such factors are common substantially to all highway construction. Thus if Congress intended those factors to be on an equal footing with the preservation of parklands there would have been no need for the statutes.\textsuperscript{59}

The Supreme Court concluded that unless there existed such restrictive engineering decisions and such truly unusual factors, the "feasible and prudent alternative" provision prohibited the taking of parklands.\textsuperscript{60}

A recent circuit court case in the District of Columbia, decided after \textit{Conservation Society}, also examines the meaning of the "feasible and prudent" provision. In \textit{D.C. Federation of Civic Associations, et al. v. Volpe}\textsuperscript{61} the court rejected a finding by the Secretary that there was no feasible and prudent alternative to the construction of the Three Sisters Bridge across the Potomac
River. It then required him to reevaluate the existing alternatives. The court further asserted that even if no feasible and prudent alternative routes existed, this would not necessarily mean that construction could be permitted along the proposed route. The court indicated that it was conceivable that the most feasible and prudent alternative to a proposed route would be no route whatsoever. And the court concluded that if it were shown that the route could not be built in accordance with federal law, then it simply could not be built.

As the above cases suggest, the Secretary's discretionary power regarding decisions on "feasible and prudent alternatives" is limited in scope. An overextension of this limited discretion is not excused by the fact that it is made in good faith; the court in Conservation Society expressly stated that it is not necessary to find bad faith dealings by the Secretary in order to find him violative of his discretionary power. His decision-making process is limited in the sense that it be essentially one dimensional: he is not required to balance economic and environmental interests; rather, he is simply required to strive to protect parkland environments from the damages attendant to massive transportation projects. And certainly, the Secretary's exercise of discretion cannot be colored by political considerations.

Political pressure, however, was an issue in D.C. Federation et al. v. Volpe, mentioned above. The circuit court in that case invalidated the Secretary's approval of the Three Sisters Bridge in Washington because at the time he conducted the environmental study he was subject to undue political pressure. Congressman William Natcher, Chairman of the House District of Columbia Committee, had declared his intention to block any funds for the construction of the Washington subway system unless the Three Sisters Bridge project was approved by the Secretary. At the district court level, it was noted:

... on the basis of the Secretary's contemporaneous statements and his testimony before the court, there is no question that the pressure regarding the rapid transit system appropriations was given some consideration at the time of the approval of the project.

Nevertheless the district court ruled that even though the Secretary was susceptible to this political pressure, that fact was not in itself sufficient to invalidate his decision. The circuit court, however, reversed and remanded. The Secretary was required to
make a new determination on the feasibility and prudence of alternatives with regard only for those factors made relevant by Congress in the applicable statutes. The circuit court found:

The impact of this pressure is sufficient, standing alone, to invalidate the Secretary's action. Even if steps were taken to comply with the statutes, extraneous pressures intruded into the calculus of consideration on which the Secretary’s decision was based.

While political pressure was not involved in Conservation Society, there was pressure of another sort that evidently influenced the Secretary’s decision to fund construction of the two end segments. As noted above the circuit court in Conservation Society found that the Secretary had attempted to balance the demands of the Texas Highway Department to begin construction against the desire of the Conservation Society to preserve the park. The Secretary, in good faith, had tried to satisfy both groups. Yet it would seem that such an attempt was as much in contradiction of the statutes, and the Congressional intent there underlying, as was the submission to political pressure in D.C. Federation. Although the Secretary is required to "cooperate and consult with" the states, he is to do so only to the end of maintaining or enhancing the beauty of the lands traversed. Despite the possibility that this provision might be interpreted loosely with respect to roads through open areas, it seems appropriate, in light of declared policy, to interpret the provision strictly with respect to roads through urban parklands. It would seem impossible to "maintain or enhance" the beauty of urban lands that are to be touched by a new roadway if that roadway were permitted to traverse the very parks that give urban lands whatever beauty they possess.

Although the presence or absence of undue external pressure was not determinative in Conservation Society, it might yet become a critical issue when the Secretary announces his findings as to alternative routes for the middle (parkland) segment. In such an event, the reviewing court might consider extending the reasoning of D.C. Federation to influences of a less political character.

**Parks of "Local Significance"**

Section 4(f) of the DOT Act and section 138 of the Highway Act protect from federal highway projects any park that is found
to be of National, State or "local significance as determined by the Federal, State or local official having jurisdiction thereof."\(^{70}\) A problem may arise in the event a local official expressly determines that a particular park in his jurisdiction is, as a park, of no local significance. Given such a negative determination, it may be asked whether the Secretary may still make his own finding as to a park's local significance. It may be argued that the word "or" permits the Secretary to make an independent determination if the local (or State) officials have made a negative determination (or if they have made no determination at all). More generally, it may be argued that a negative finding at any one level need not bind officials at any other level. However, if a positive finding is made at any one level then that determination is binding upon officials at any other level.

In *Conservation Society* the court's treatment of this local significance issue, although ultimately properly resolved, was more circuitous than the treatment suggested above. Shortly after the enactment of section 4(f), the San Antonio City Council passed a resolution that the Brackenridge-Olmos Parklands were of primary local significance as part of the right-of-way for the North Expressway and only of secondary local significance as parklands.\(^{71}\) The city council evidently hoped that the Secretary of Transportation would honor this determination. The circuit court, however, refusing to find this resolution determinative on the question of local significance, simply asserted that the Secretary should have had final review over a determination of local significance by a local official.\(^{72}\) The express language of section 4(f), said the court, indicates that an appropriate local official has the right to pass on the local significance of a park in his jurisdiction; but the ultimate purpose of section 4(f) would be thwarted if an appropriate federal official were not afforded the opportunity for a full administrative review over any determination by a local official. The circuit court concluded:

The question, therefore, is whether Congress intended to leave the choice between parks of local significance and federal-aid highways to local authorities; or whether Congress, in passing section 4(f), has already made the choice between the two uses. Only one construction fairly can be given to section 4(f), and that is that Congress itself had made the choice between the two uses. Clearly, Congress did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city
councils across the nation. If there was any doubt about this question before Overton Park, there most assuredly is no longer any doubt.73

The court in Conservation Society made reference to the Supreme Court's discussion of "local significance" in the Overton case. The district court in Overton had found that when the Memphis City Council approved the use of Overton Park for the highway it thereby determined that the park was of no local significance.74 The district court and the circuit court of appeals accepted that determination at face value. The two courts concluded that because of this determination, the protective provisions of sections 4(f) and 138 could not apply. The Supreme Court, however, even though it did not expressly reject the authority or validity of this local determination, held that the sections did apply.76 One may thus infer that the local officials' negative determination regarding "local significance" was not a binding determination on that issue.76

In Harrisburg Coalition v. Volpe,77 a case decided three months before Conservation Society, the federal circuit court in Pennsylvania found that the Secretary of Transportation was empowered to review any local determination of local significance and to reverse any such determination that he found to be erroneous. The court stated that had it come to a contrary conclusion then "the operation of the Executive branch of the federal government would be dependent on the action or inaction of a state or one of its municipalities and the Secretary of Transportation would be powerless to do anything about it"78

Federal Involvement: Its Threshold and Effects

In dicta, the court addressed the question of the nature of federal involvement.79 The court stated that the North Expressway had become a federal project—and thus subject to federal "protective devices"—on the day the Secretary authorized the release of funds to begin construction of the two end segments.80 It was significant to the court that this authorization had triggered the letting of contracts and the active commencement of construction.81 The fact that no federal monies had actually been applied to the project was of no consequence to the court.

A case that is particularly relevant to this question was decided after Conservation Society by a federal district court in California.
In *La Raza Unida v. Volpe*, which involved the construction of the Foothills Freeway, California highway officials had failed to comply with the NEPA, DOT and Highway Acts. The court held that the highway project had become subject to federal law at the time the DOT approved the location design for the highway. Federal involvement was deemed to commence even prior to any DOT authorization for federal funding—the event that was considered critical in *Conservation Society*. The *La Raza* court stated:

> [C]ommon sense dictates that the federal protective devices apply before federal funds are sought. It does little good to shut the barn doors after all of the horses have run away. If the federal statutes and regulations are to supply any protection at all it must be prior to the time the residents have left and the deleterious effects to the environment have taken place. All the protections that Congress sought to establish would be futile gestures were a state able to ignore the spirit (and letter) of the various acts and regulations until it actually received federal funds.

The reasoning of *La Raza* is sound. Federal participation in such matters as location design may give rise to expectations of ultimate federal funding. These expectations in turn might cause activity, such as the purchase of land along a proposed right-of-way, that otherwise might not occur. It seems fitting then that any such activity be subject to federal controls. If these controls did not arise concurrently with federal involvement, the mere suggestion of federal assistance might be exploited by pro-highway state officials so as to induce state commitment to a highway project. Then, once such a commitment were made, these officials could forcefully argue for the fulfillment of that project lest already expended funds be wasted.

In *Conservation Society* the court volunteered that any attempt by the state to withdraw its application for federal aid would not thereby enable it to avoid federal controls. The above quotation and commentary regarding the threshold of federal involvement apply equally to the effect of such involvement. The only effective way to prevent abuse of federal assistance programs is to require that federal controls be indefeasible. Even if the withdrawing party were the federal government, rather than the state government, the federal controls should continue. Were it otherwise, state officials, on becoming convinced that their state was irrevocably committed to a project, might manipulate circumstances so as to compel the federal government to withdraw.
PARKLANDS AND HIGHWAYS

Conclusion

Conservation Society v. Texas gives full force to the environmental policies declared in the National Environmental Policy Act of 1969, the Department of Transportation Act of 1968, and the Federal-Aid to Highway Act of 1968. The court rejected the contention that the Secretary of Transportation might use the "feasible and prudent alternative" provision of the latter two acts in such a way as to constrict the scope of his environmental-protection duties. In construing the provision strictly, the court required that the Secretary, in his evaluation of proposed highways through parklands, give utmost consideration to environmental preservation. Moreover, the court made clear that the Secretary would not be bound by any local determination that a park was without local significance. Given such a determination, he would still be required to make an independent judgment on the local significance of the park in question. Finally, the court, in dicta, dealt with the meaning and effect of federal involvement in state highway programs. It stated that federal involvement might commence even prior to the utilization of federal monies and that, once federal involvement had commenced, a state could not thereafter avoid federal law by attempting to withdraw its request for federal aid. The nature of federal involvement awaits further analysis by the courts, and it is hoped that such analysis proceeds in the direction suggested by Conservation Society.

Footnotes

1 Named Individual Members of the San Antonio Conservation Society v. The Texas Highway Department and the United States Department of Transportation, 446 F. 2d 1013 (5th Cir. 1971), 2 ERC 1872. (hereinafter, Conservation Society.)
2 446 F. 2d at 1914.
6 446 F. 2d at 1014.
7 Id. at 1015.
8 Id. Certification to the Secretary of Transportation that public hearings have been held is required before a state can submit a location plan for a federal-aid highway project. 23 U.S.C.A. §128 (Supp. 1971).
9 There are various stages of federal approval for the federal-aid
highway system. Approval at each stage is required before the state can receive federal funds. 23 U.S.C.A. §103. First the state must hold public hearings on the proposed highway. Second the federal government must approve a general corridor for the highway, then a specific location selected by the state. The federal government then must approve designs, plans, specifications, and estimates. 23 U.S.C.A. §106(A). The last approval, at which time the state can receive federal funds, is the actual construction. The state of Texas had received such construction approval, but federal funds had not yet been applied to the project.

10 446 F. 2d at 1016.
11 Id.
12 Id.
13 Id. at 1017.
14 Id.
15 Id. at 1018.
16 Id. at 1019.

17 After the circuit court denied the motion for a stay, the Board of Directors of the Conservation Society voted to end all litigation concerning the North Expressway. However, certain members of the Conservation Society decided to continue the litigation in spite of the majority's decision.

20 400 U.S., 91 S. Ct. 368 (1970). (Mr. Justice Black and Mr. Justice Douglas dissenting.)
21 446 F. 2d at 1013.
24 23 U.S.C.A. §138 (Supp. 1971). A review of some of the cases that have been decided under these statutes shows that the Secretary of Transportation has complied with their requirements: In Bucklein v. Volpe, F. Supp. No. C-70 700 RFP (N.D. Cal. October 29, 1970), 2 ERC 1082, injunctive relief was denied because under NEPA ample consideration had been given to environmental impact before the disbursement of federal emergency funds for road repairs. In Daly v. Volpe, F. Supp. No. 9490 (W.D. Wash. June 1, 1971), 2 ERC 1506, a preliminary injunction was denied because it was shown that extensive correspondence, consultation, meetings and hearings were held on location of the highway. And in Citizens to Preserve Foster Park v. Volpe, F. Supp. No. Civ. 71 F. 71, (N.D. Ind. August 18, 1971), 3 ERC 1031, a preliminary injunction was denied because there was no showing that the Secre-
The decision to construct a highway through the park was arbitrary or capricious or that he could not reasonably have believed there were no feasible alternatives.

The Supreme Court granted a stay on construction of the Memphis highway on the same day that a stay was granted to halt construction on the San Antonio highway. Unlike the San Antonio case, however, the Supreme Court granted certiorari to the Memphis citizens' group and ruled in favor of their appeal. The court did not indicate why certiorari was granted in Overton and not in Conservation Society. The facts in each case were not identical. In Overton the Secretary of Transportation had already approved the route through the park, while in Conservation Society approval had only been given to construction of the two end segments.

The full text of section 101(A) is:

The Congress, recognizing the profound impact of man's activities on the interrelations of all components of the natural environment, particularly of the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance in a manner calculated to foster and promote the 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.

In Environmental Defense Fund v. Corps of Engineers 325 F.Supp. 728 (E.D. Ark. 1971), 2 ERC 1260, the plaintiffs argued first that section 101(A) created substantive rights in individuals to "safe, healthful, productive, and aesthetically and culturally pleasing surroundings." The court maintained that as a statement of general federal policy section 101(A) is merely an attempt to improve and coordinate federal environmental protection programs. The court also rejected the plaintiffs' second argument that section 101(A) is a recognition of a constitutionally protected right to live in an environment that preserves the "unqualified amenities of life." The plaintiffs contended that the source for this constitutional right was to be found in the 5th and 14th Amendments and as one of the unenumerated rights of the 9th
Amendment. The court felt that the creation or existence of any such right must be clearly set forth by statute and that section 101(A) did not do so.

Although this argument was rejected, the district court, nevertheless, invalidated the Secretary's approval of the project because he had failed to comply with section 102(C) of NEPA for the following reasons: among others, (1) defendants did not "utilize a systematic interdisciplinary approach" in evaluating the environmental impact of the project, (2) it did not appear that methods and procedures had been developed in consultation with the Council on Environmental Policy, (3) the statement did not adequately explain alternatives to the proposed action, and (4) the statement did not adequately bring to the reader's attention all "irreversible and irretrievable commitments of resources in the proposed action."

The Council on Environmental Quality was established under the National Environmental Policy Act. The purpose of the Council is to assist the President in studying the environmental impact of federal projects. NEPA requires the Council to submit an annual Environmental Quality Report to the Congress.

The text of Section 102(C) is:

The Federal Government shall:

(C) include in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the 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 proposed project 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-range productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.


The district court in Overton relied on a DOT regulation published in conjunction with the DOT Act and the Highway Act to facilitate in determining what factors should be taken into account when studying feasible and prudent alternatives. This regulation was in the form of a Policy and Procedure Memorandum (PPM 20-8), 23 C.F.R. Ch. 1
Appendix A. PPM 20-8, section 4(C) is designed to help facilitate consideration of alternative plans for highway construction. It defines social, economic, and environmental effects as “meaning the direct and indirect benefits or losses to the community and to highway users. It includes all such effects that are relevant and applicable to the particular location or design under consideration.” Such effects as (1) fast, safe and efficient transportation, (2) economic activity, (3) recreation and parks, (4) aesthetics, (5) residential and neighborhood character and location, (6) conservation and general ecology of the area, and (7) displacement of families and businesses are included.

38 Id.
39 Id.
40 446 F. 2d at 1022. The circuit court did discuss two minor issues which will be dealt with in this footnote.

Although the defendants attempted to raise the issue of standing, the circuit court was not impressed with their argument. Prior case law has established the general principle that conservation societies such as the one involved in this case have standing to challenge federal action in the area of environmental protection. Scenic Hudson Preservation Conference v. The Environmental Protection Council, 354 F.2d 608 (2nd Cir. 1965), 1 ERC 1084, cert. denied 384 U.S. 941 (1966), and Pennsylvania Environmental Council v. Bartlett, 315 F.Supp. 238 (M.D. Penn. 1970), 1 ERC 1713. One qualification to this rule is that a local conservation group which has a real interest in the outcome of the litigation must be a party. Sierra Club v. Hardin, 325 F.Supp. 99 (Alaska. 1971), 2 ERC 1385. The basic test for standing was enunciated in Data Processing Service v. Camp, 397 U.S. 150 (1970). (1) Does the plaintiff allege that the challenged action will cause him injury in fact, economic or otherwise? (2) Is the interest sought to be protected within the zone of interests to be protected by the statute?

The state of Texas also argued that the three federal statutes had been applied retroactively in this case. They claimed that the North Expressway became a federal project in 1963 when the Bureau of Public Roads notified the Texas Highway Department that the development of the highway project would be approved by the federal government. Although the statutes cannot be applied retroactively, Brooks v. Volpe, 318 F. Supp. 90 (W.D. Wash. 1970), 2 ERC 1713, the circuit court ruled that the law to be applied was that which was in effect at the time the Secretary actually authorized the disbursement of federal funds. The disbursement occurred on August 13, 1970 which was well after the effective dates of the statutes.

41 446 F. 2d at 1023.
42 49 U.S.C.A. §1653(f) (emphasis added).
To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonable delayed, and
(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

44 446 F. 2d at 1022.
45 91 S. Ct. at 372.
48 49 U.S.C.A. §1655 (Supp. 1971). Subsection (g) of section 1655 transferred jurisdiction over bridges and causeways on navigable waterways from the Secretary of the Army to the Secretary of Transportation.
49 302 F. Supp. at 1090.
50 Id.
53 446 F. 2d at 1020.
54 91 S. Ct. at 821.
57 The court cited certain sections of the Congressional Record which indicate that the Secretary was meant to have limited discretion.
58 91 S. Ct. at 821.
59 Id.
60 Id. at 91 S. Ct. 822.
The court used the criteria established in Overton. The court noted that: "It is not inconceivable, for example, that the Secretary of Transportation might determine that present and foreseeable traffic needs can be handled without the construction of an additional river crossing.")