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AMENDING NEPA: STATE PREPARATION OF IMPACT STATEMENTS

Andrew Quartner*

INTRODUCTION

On December 11, 1974, the Second Circuit Court of Appeals handed down Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation,¹ a decision which prompted the first direct amendment of the National Environmental Policy Act (NEPA)² since its enactment in 1969. In Conservation Society the Second Circuit invalidated Federal Highway Administration (FHWA) procedures which allowed the state applicant for federal-aid highway funds to prepare the NEPA-required environmental impact statement (EIS).³ In ruling that preparation of an impact statement was an exclusively federal duty, the court reached a result contradictory to those reached by several other circuits. This disparity among the federal courts of appeal, combined with a crisis in the highway construction industry in the states of the Second Circuit, created pressure for legislative action which culminated in passage, nine months later, of Public Law 94-83 amending NEPA.⁴

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* B.A., Yale University; J.D. (expected 1977), Columbia University Law School.
1 508 F.2d 927 (2d Cir. 1974), vacated and remanded, 423 U.S. 809 (1975) for reconsideration in light of Pub. L. No. 94-83 (1975) and Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 269 (1975) [hereinafter cited as Conservation Society]. The subsequent decision on remand was issued at 531 F.2d 637 (2d Cir. 1976).
3 508 F.2d 927 (2d Cir. 1974).
In contrast to the firm stance taken in the Second Circuit, this amendment allows state preparation of impact statements under certain circumstances. In February 1976, the Second Circuit, obligated to reconsider its decision in *Conservation Society* in light of the new law, reversed itself in a terse, per curiam decision.\(^5\)

The Second Circuit, in its original application of NEPA, looked first to see if the federal agency had prepared the impact statement. By allowing state authorship, this amendment eliminates a simple threshold test for measuring the sufficiency of an impact statement, and thus represents legislative sanction of an erosion of NEPA. The most meaningful requirement in the investigative process demanded by NEPA is the preparation of a detailed impact statement containing the results of an analysis of the project and its alternatives with respect to critical subject areas outlined by the Act.\(^6\) Theoretically, this impact statement forms the basis for later decisions of how, and even whether, to proceed with a planned project. Through framing the issues, generating and displaying data, and choosing materials to be included in the impact statement, the official preparing the statement has an opportunity to slant the EIS either in favor of or against the proposed action.\(^7\) Responsibility for authoring the document is thus of major importance to state and regional development projects, and ultimately to the effective functioning of NEPA.

This article will deal with six topics: 1) NEPA itself and its implementing guidelines, with particular attention to the issue of delegation of the responsibility to prepare impact statements; 2) the case history on the subject of delegation; 3) the legislative history of the NEPA amendment; 4) the amendment as enacted and suggestions for its interpretation; 5) the problems created by delegation; and 6) the outlook for the future.

\(^5\) 531 F.2d 637, 640 (2d Cir. 1976).
\(^7\) *Conservation Soc'y v. Secretary of Transp.*, 508 F.2d 927, 931 (2d Cir. 1974).
I. NEPA AND THE ISSUE OF DELEGATION

A facial examination of NEPA indicates that Congress intended that federal officials prepare the mandated impact statements. The Act requires "... all agencies of the Federal Government. ..." to include in proposals for major federal actions "... a detailed statement by the responsible official. ..." (emphasis added) assessing the environmental impact of the proposed action and its alternatives. The Federal Highway Administration and other federal agencies have seized on the omission of the modifier "federal" before "responsible official" to justify delegation of NEPA duties to local officials. The absence of the modifier "federal," however, was probably not intended to be significant. First, if Congress intended thereby to permit state preparation of impact statements, this fact would have been highlighted in the legislative history of NEPA; it is not even mentioned.9 Second, even if the missing modifier "federal" was noticed when NEPA was enacted, the word may simply have been considered redundant in the context of the sentence and therefore unnecessary. Finally, viewing the issue from a broader perspective, it is arguable that only by preparing the EIS itself can the federal government faithfully discharge the responsibilities assigned to it throughout the Act, and thereby guarantee the integrity of the process of study the Act established.

The Council on Environmental Quality (CEQ), the agency charged with implementing NEPA, consistently had avoided the issue of delegation in the earliest sets of its guidelines issued to assist federal agencies in executing their responsibilities under NEPA.10 Finally, in the latest revision of these guidelines, the issue was indirectly addressed.11 In its fifth annual report, CEQ claimed that it traditionally had no objection to delegation if some safeguards were employed, but the exact position of CEQ remains unclear.12

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11 40 C.F.R. § 1500.7(c) (1975). In 1974 CEQ issued a Legal Report on the issue of delegation. This document, which suggested that delegation procedures were acceptable if certain safeguards were taken, was merely a legal memorandum assessing judicial enforcement of NEPA and was not explicitly a CEQ policy statement. CEQ, LEGAL REPORT 8 (Sept. 5, 1974).
12 Delegation is proper "... where the Federal agency has maintained responsibility for the objectivity and adequacy of the statement. ..." though it remains the continuing responsibility of the federal agency to "... ensure that environmental considerations are meaning-
II. Case History

The Conservation Society case involved the construction of a twenty-mile segment of highway by the Vermont Highway Department (VHD) financed by a federal grant under the Federal-Aid Highway Act.\(^\text{13}\) The FHWA allowed the VHD to prepare the required impact statement.\(^\text{14}\) In consideration of the project’s EIS preparation the district court noted: “There is no indication whatsoever that FHWA or any of its employees conceived, wrote, or even edited any section of or passage in the EIS.” The FHWA role consisted only of “informal chats touching on the subject, together with . . . [a] field trip. . . .”\(^\text{15}\)

In reviewing the lower court’s decision, the Second Circuit found that the state agency was “established to pursue defined state goals, . . .” and that “. . . ‘self-serving assumptions’ may ineluctably color a state agency’s presentation of the environmental data.”\(^\text{16}\) Indeed, the VHD was under a 1968 state legislative mandate to build the road.\(^\text{17}\) Delegation would thus be unlikely to produce as “. . . dispassionate an appraisal of environmental considerations as the federal agency itself could produce. . . .”\(^\text{18}\) The Court relied upon its prior landmark decision in Greene County Planning Board v. Federal Power Commission,\(^\text{19}\) stating that: “Nothing short of ‘genuine’ federal preparation of the EIS accords with Greene County.”\(^\text{20}\)


\(\text{\^\text{16}}\) Conservation Soc’y v. Secretary of Transp., 508 F.2d 927, 931 (2d Cir. 1974).


\(\text{\^\text{18}}\) 508 F.2d 927, 931 (2d Cir. 1974).

\(\text{\^\text{19}}\) 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972) [hereinafter cited as Greene County].

\(\text{\^\text{20}}\) Conservation Soc’y v. Secretary of Transp. 508 F.2d 927, 932 (2d Cir. 1974). This hard-line approach is repeated in other Second Circuit opinions as well. E.g., Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975) and 1-291 Why? Ass’n v. Burns, 517 F.2d 1077 (2d Cir. 1975). In the latter, the court reiterated its dissatisfaction with FHWA procedures, although the brief, per curiam decision did indicate some tolerance for state participation. 517 F.2d at 1078.
In *Greene County* the Second Circuit found that the Federal Power Commission (FPC) had "... abdicated a significant part of its responsibility ..." under NEPA by maintaining procedures that allowed the applicant for a license to operate a power station to prepare the draft EIS in uncontested cases. 21 According to the court, NEPA made consideration of environmental values the "primary and nondelegable responsibility" of the federal agency, and one danger of the FPC procedures here was "... the potential, if not likelihood, that the applicant's statement will be based on self-serving assumptions." 22

A. Other Circuits

Subsequent decisions, even those allowing delegation, have acknowledged the authority of the holding in *Greene County*. Several courts, however, have strained to distinguish *Greene County* while upholding particular impact statements. 23 Although paying lip service to *Greene County*, other courts seem simply to disagree with its reading of NEPA:

Inasmuch as section 102(2)(C) does not explicitly require that a federal official prepare the EIS, this court cannot find as a matter of law that preparation of the EIS by the HA [state highway authority] is a violation of the spirit or mandate of NEPA. 24

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22 Id. at 422. Another danger was that such procedures might place the burden of providing effective analysis of environmental factors on intervenors whose resources were generally limited, rather than upon the Commission, as Congress had intended. Similarly, in Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974), the Interstate Commerce Commission's failure to provide in its regulations for the circulation of a draft EIS prepared by its own staff, before administrative hearings, violated NEPA requirements as explicated in *Greene County*.
Implicit in this conclusion, and in the reasoning of most courts when not applying the Greene County rule to the federal-aid highway program, are three distinctions. First is the presumption that a state applicant for federal funds will not be as likely to be motivated by selfish purposes as a typical applicant for a federal license, and hence can be relied on to produce an even-handed assessment of the environmental consequences of the proposed project. Second, courts acknowledge that the modus operandi of the FHWA is different from that of other federal agencies because it must rely primarily on state highway departments to plan and construct highways. Finally, and most importantly, these courts generally find that the FHWA, unlike the Federal Power Commission in Greene County, does not give mere "rubber stamp" approval to an EIS but rather substantially participates in its preparation, and then reviews, approves, and adopts the statement as its own. Courts conclude that this procedure prevents the dangers that concerned the Greene County court.

These cases, however, never really detail what constitutes the substantial participation or the review and adoption by the FHWA. This suggests that these courts either were satisfied with very limited federal participation or merely accepted on faith the proposition that FHWA regulations are followed. Thus the findings of these courts, that sufficient safeguards are present to prevent the writing of self-serving statements, or that the agency procedures are adequate to ensure extensive federal involvement in the EIS preparation, are not convincing. For example, in Citizens Environmental Council v. Volpe the Tenth Circuit relied upon the district court's characterization of FHWA involvement as substantial in order to distinguish Greene County. The district court, however, did not specify the exact nature of the federal participation. It merely noted that the "record discloses" that the EIS has been prepared by the state highway authority in cooperation with the FHWA.

Similarly in Iowa Citizens for Environmental Quality, Inc. v. 27

26 Id. at 125. See also Citizens Environmental Council v. Volpe, 364 F.Supp. 286, 293 (D. Kan. 1973). This is contrasted, e.g., with the Army Corps of Engineers which plans and develops its projects independently.

27 See discussion of cases, notes 28-39 and accompanying text, infra. This requirement of participation was enacted into the new amendment. See notes 73-75 and accompanying text, infra.

28 484 F.2d 870 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

Volpe the Eighth Circuit concluded that "review, modification, and adoption by the FHWA as its own . . ." of the challenged impact statement provided adequate federal participation without indicating what warranted this conclusion.36 Remarking that the district court relied on "substantial evidence" of participation by the responsible federal agency, the court of appeals was satisfied that Greene County had been distinguished.31 Again, however, a reading of the district court opinion reveals a similar absence of supporting facts or explanation. The holding is a sparse statement that this was not an instance of rubber stamp approval but a case of true federal participation.32

In National Forest Preservation Group v. Volpe a federal district court in Montana was satisfied with merely reading Department of Transportation regulations without inquiring whether these had resulted in any significant federal involvement in that case.33 In Movement Against Destruction v. Volpe another district court recounted in depth three years of joint federal and local activity regarding the project and concluded that FHWA "officials were in a position to evaluate objectively the materials gathered in the EIS."34 There is little detail, however, about actual FHWA participation in the writing of the document. The circuit court summarily affirmed in a per curiam opinion.35

On the other hand, some courts have attempted to document the level of federal participation. In Finish Allatoona's Interstate Right Inc. v. Brinegar the Fifth Circuit pointed to a concentrated analysis by an FHWA study team.36 In Life of the Land v. Brinegar the Ninth Circuit noted that federal officials attended regular meetings regarding the EIS.37 In Sierra Club v. Lynn an interdisciplinary team

35 500 F.2d 29 (4th Cir. 1974).
36 484 F.2d 638, 639 (5th Cir. 1973).
37 485 F.2d 460 (9th Cir.), cert. denied, 414 U.S. 1052 (1973). This case is noteworthy for another aspect of its holding. Despite the fact that a private consulting firm participated in the drafting of the EIS, and ignoring the warning in Greene County about self-serving statements, the court found no bar in NEPA to the delegation which occurred in this instance. Although even CEQ found the case aberrational in its LEGAL REPORT, supra note 11, at 8, delegation to a private concern occurred once again in Sierra Club v. Lynn, 502 F.2d 43, 59
of Housing and Urban Development staff members compiled and prepared each of three environmental statements. In addition, HUD retained a geologist and his staff associates to obtain further verification and analysis of environmental studies and to review every aspect of the project. The Fifth Circuit found that this was sufficient federal participation. Likewise the Fourth Circuit, in *Fayetteville Area Chamber of Commerce v. Volpe*, sustained delegation procedures, calling attention to field inspections, erosion control recommendations, and instructions regarding the incorporation of CEQ comments, all made by the FHWA, as well as joint meetings to determine design concept and to review the draft statement.

B. Post-Conservation Society Courts

In addition to the *Fayetteville* court, three other courts have addressed the issue of delegation since the *Conservation Society* decision. In *Swain v. Brinegar* the Seventh Circuit went beyond the Second Circuit in announcing that delegation of either the drafting or the researching of the initial EIS violates NEPA. A district court in New Hampshire held that while courts may differ on exactly what level of participation the federal agency must undertake, "... there is no question that the federal agency must play an active role. ..." That court found that the federal agency improperly substituted the applicant's efforts and analysis for its own. Finally, the Massachusetts district court in *Essex County Preservation Assn. v. Campbell* unqualifiedly praised the content, comprehensiveness, clarity, and documentation of the EIS under scrutiny. In addition, the court found "considerable federal review, discussion,

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*(5th Cir. 1974) where the court stated that absent bad faith, a federal agency "... cannot be expected to ignore useful and relevant information merely because it emanates from an applicant." Again no effort was made to square this holding with *Greene County*. A contrary holding is found in *Essex County Preservation Ass'n v. Campbell*, 399 F. Supp. 208, 212 (D. Mass. 1975) where the court invalidated the EIS, citing the danger that essential information will be either neglected or disguised when a private firm with a financial interest in the project is given the responsibility to gather and collect basic data for the EIS. Despite these contradictory case precedents, Congress neglected to address this issue in H.R. 3130 (See note 77, infra).

36 502 F.2d 43, 59 (5th Cir. 1974).
37 515 F.2d 1021, 1025 (4th Cir. 1975) [hereinafter cited as *Fayetteville*].
38 The amendment to NEPA was not in effect for any of these cases.
39 517 F.2d 766, 778 (7th Cir. 1975).
41 Id.
42 399 F. Supp. 208, 214 (D. Mass. 1975). Here, even the Sierra Club was pleased with the EIS.
and revision” of the EIS as it was being developed. Nevertheless, the court invalidated the impact statement because in its view the delegation of certain responsibilities to a private design engineer violated NEPA procedures.

At the same time, however, that courts in several circuits, following the lead of the Second Circuit, were becoming less inclined to accept FHWA delegation procedures, the FHWA was mobilizing forces on another front. The result was legislation which supercedes a good deal of this case history. The case history remains important, however, since key provisions of the legislation are derived from these opinions.

III. LEGISLATIVE HISTORY

At the time Conservation Society was handed down, standard FHWA practices did not satisfy the level of active participation in EIS preparation which the Second Circuit demanded. FHWA was initially reluctant to continue projects in the Second Circuit which required impact statements because after Conservation Society any of these projects could be enjoined for insufficient federal participation. Thus, shortly after the decision, the FHWA ordered a halt to virtually all work on projects within the Second Circuit. Though this order was later modified, the original shutdown involved so many projects and so many jobs that the construction industry felt the impact almost immediately. The resultant unemployment cri-

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[46] Id.
[47] Id.
[48] In a letter dated Jan. 2, 1975, Robert Kirby, Regional Federal Highway Administrator, instructed Division Engineers in Connecticut, New York, and Vermont to take no project approvals and to sign no draft EIS’s or negative declarations until further guidelines were issued.
[49] In letters of Jan. 29 and Feb. 28, 1975, Kirby directed that “projects not specifically involved” in Conservation Society could be approved if: (1) CEQ guidelines had been followed (see supra note 10), (2) FHWA had given substantive direction to the development of the EIS, and (3) the EIS, physically written by FHWA would have been substantially the same as that written by the state.
[50] Conservation Society had come at a time when the construction industry was already suffering the high unemployment rate of 19.3%. Testimony of Robert G. Georgine, President, Building and Construction Trades Department, AFL-CIO, Senate Hearings, supra note 4, at 122. The estimates regarding exactly what was involved varied as follows: N.Y. Times, April 22, 1975, at 1, col. 1 (city ed.): 130 projects, $2.3 billion, and 150,000 workers involved; Statement by Raymond T. Schuler, Commissioner, New York State Department of Transportation, Senate Hearings, supra note 4, at 86: 300,000 jobs and $3.3 billion; letter from Governor Carey, New York, introduced into record at House Hearings by Raymond T. Schuler: 71,000 jobs and $2 billion. Furthermore, the situation was exacerbated by the release of $2 billion in impounded funds from the Highway Trust Fund, announced Feb. 11, 1975.
sis in the construction industry, as well as FHWA's reluctance to assume the responsibilities assigned to it by the Second Circuit, provided the impetus for Congressional action. Despite assurances from the FHWA in subsequent memoranda that fewer projects, in fact, were affected, the Second Circuit states remained reluctant to commit funds to projects which might still be halted. An employment versus the environment standoff had emerged.

For several reasons, environmentalists insisted that legislation was an inappropriate solution to the problem. First, environmentalists thought that Supreme Court review would provide the proper forum in which to resolve the dispute. Indeed, as party to Conservation Society, the Secretary of Transportation had applied for certiorari to the United States Supreme Court.

Second, environmentalists argued that FHWA should not be permitted to mandate a change in a law to relieve a crisis created solely by its own noncompliance with that very law. Environmentalists believed that FHWA had flagrantly violated the law for the previous five years. Through its own environmental footdragging, FHWA was unable to comply when the Second Circuit finally enforced the letter of the law. Thus FHWA itself caused the project shutdowns and the spectre of prolonged unemployment. Rather than changing the law to accommodate FHWA, environmentalists argued that FHWA should change its procedures to conform with the law.

Finally, there was significant dispute between state transportation officials and environmentalists over the total number of jobs which were at stake. Some commentators claimed that the list of projects allegedly stopped by the Conservation Society decision included projects that either were enjoined for other reasons or were not presently scheduled for construction. Legislative relief, therefore, would not restore the vast number of jobs that advocates claimed.

Designed to generate employment and expedite highway construction, the funds were available on a first-come, first-served basis.

* Statement of Natural Resources Defense Council, Inc., Senate Hearings, supra note 4, at 46.
* Statement of Sara Chasis, Staff Attorney, Natural Resources Defense Council, Inc., Senate Hearings, supra note 4, at 43.
* Id. See discussion of NEPA itself, supra notes 8, 9 and accompanying text.
* For example, in New York and Connecticut, environmentalists claimed that the list of projects allegedly affected by the shutdown included some for which the route had not yet even been determined, some which may never be built, and some which were halted in litigation over other matters. Senate Report, supra note 4, at 6.
Legislative action, however, was the course which was taken. The first response from Washington, H.R. 3787, emerged in March, 1975 from the House Public Works and Transportation Committee. The bill was unsatisfactory for several reasons: (1) it applied only to New York, Vermont, and Connecticut, and hence its narrow scope ignored the possibility that the problem could arise outside the Second Circuit (as in fact it did); (2) it was an indirect amendment to NEPA, to be added to 23 U.S.C. § 109 (1970); and (3) it went far beyond any circuit’s application of NEPA by sanctioning complete delegation of NEPA responsibilities to state officials. Though H.R. 3787 passed the House, the bill ultimately died in Senate Committee.\(^{55}\)

Anxious to prevent erosion of NEPA through indirect amendments, the House Subcommittee on Fisheries and Wildlife Conservation of the Merchant Marine and Fisheries Committee undertook hearings to consider direct amendment of NEPA in April, 1975. The Committee considered six new bills and reported favorably on H.R. 3130.\(^{56}\)

Unlike H.R. 3787, H.R. 3130 was a direct and explicit amendment to NEPA (to be added as new section 102(b)):

A statement prepared after January 1, 1970 shall not be deemed to legally insufficient solely by reason of having been prepared by a state agency or official if the responsible Federal official furnishes guidance and participates in such preparation and independently evaluates such statement prior to its approval and adoption. This procedure shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the statement, nor of any other responsibilities under this Act.\(^{57}\)

Following passage in the House,\(^{58}\) H.R. 3130 was referred to a joint committee of the Interior and Public Works in the Senate, which held hearings in May.\(^{59}\) In the interim the Swain and Appalachian Mountain Club decisions were handed down.\(^{60}\) The Senate Report comments that “... the rapidity with which these decisions fol-

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\(^{55}\) H.R. 3787 passed the House by a vote of 275-99. 121 Cong. Rec. 2994 (daily ed. April 21, 1975). The bill was subsequently reported unfavorably in the Senate. Senate Report, supra note 4, at 7.


\(^{57}\) The phrasing of this amendment derives partially from the case history discussed supra, notes 13-46 and accompanying text, and CEQ regulations, supra note 10 and accompanying text.


\(^{59}\) Supra, note 4.

\(^{60}\) Supra, notes 41, 42 and accompanying text.
ollowed Conservation Society seemed only to increase the concerns of those who feared massive interruptions in highway construction, with their attendant adverse economic consequences. 61

In considering amendment of NEPA, the Senate reported favorably on H.R. 3130 but with certain changes and limitations. 62 First, the amendment was made applicable only to "major Federal actions funded under a program of grants to states," 63 since even those circuits permitting delegation had only done so with respect to EIS's written pursuant to this type of federal project. 64 Second, the Senate specifically mentioned that the only agencies to which delegation would not be considered invalid were those with "statewide jurisdiction" and "principal planning and decisionmaking responsibility" for the action. 65 By means of the limitation the Senate strove to express what had been implied in the House bill, citing in support a passage from the House Report. 66 Finally, the Senate, while sanctioning delegation under the guidelines established in the modified House bill, stipulated in a proviso that there must be independent federal preparation of the analysis of any impacts and alternatives which were of "major interstate significance." 67

FHWA was particularly displeased with the Senate bill. 68 One apprehension was that the phrase "major interstate significance," in its broadest sense, could be construed to include almost any impact, thereby creating the undesired consequence that the proviso would undo the entire effect of the amendment. The first part of the amendment would allow delegation if certain guidelines were followed, while the appended proviso would prohibit delegation in almost every instance. 69

Since the House and Senate had passed substantially different versions of the amendment, two conferences were held to resolve the

61 Senate Report, supra note 4, at 6.
63 Id.
64 Supra, notes 23-39 and accompanying text.
68 Letter dated May 21, 1975 from Norbert T. Tiemann, Federal Highway Administrator to Senators Jackson and Randolph: "... the proposed Senate report accompanying H.R. 3130 would destroy the Federal-State relationship in the Federal-aid highway program. ... The bill as reported is worse than no bill at all." Tiemann noted that implementation would require 2000 additional FHWA positions and would impose long delays on all highway projects.
69 Fear of this interpretation resulted in the somewhat awkward wording of subsecton (iv) in the final version. See notes 92-100 and accompanying text, infra.
discrepancies. House conferees felt that, even narrowly interpreted, the Senate proviso added a burden to federal agencies that did not exist elsewhere. Thus the Senate bill would be creating new limitations instead of merely clarifying the requirements of NEPA as originally enacted, as was intended by the House. Also, despite the language in the House Report indicating that delegation was only sanctioned to statewide agencies, the House conferees urged that this limitation not be expressed in the final version. Their fear was that by making the limitation explicit, it would be interpreted as exclusive by the courts and delegation to anything other than a statewide agency would be deemed improper. The congressional intent, however, was simply not to address that type of delegation at all, but only to state clearly that FHWA procedures (which provide for delegation to statewide agencies) were acceptable. Omitting the phrase, and adopting the House language instead, would have gone too far the other way, and permitted delegation to any state agency, even very localized ones. This would have noticeably increased the number of programs affected by the legislation.

After considering these positions, the conferees agreed to the following text, which ultimately became Public Law 94-83 (Redesignating other subparagraphs in section 102(2) and adding the following subparagraph):

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
(ii) the responsible Federal official furnishes guidance and participates in such preparation,
(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto.

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70 At the conferences held July 17 and July 22, 1975, the Senate Conferees were: Henry M. Jackson, Floyd Haskell, Dale Bumpers, Paul J. Fannin, Mark O. Hatfield; and the House Conferees were: Leonor K. Sullivan, Robert L. Leggett, John Dingell, John M. Murphy, Philip E. Ruppe, Edwin B. Forsythe.

71 House Report, supra note 4, at 4. This, of course, depends largely on one's perspective. If NEPA is read as requiring preparation by the federal official in all instances, then the Senate version is less of a change since it allows delegation in fewer cases.

72 Conference Report, supra note 4, at 4.
which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement. The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.73

The text of the final amendment contained several significant revisions. First, the phrase “principal planning and decision making responsibility,” initially included to describe those state agencies qualified to prepare EIS’s, was deleted from the Senate version. The conferees generally agreed that this phrase added little to the previous version,74 and was much too vague to be included in clarifying legislation. Furthermore, complications could arise in states where one agency had planning responsibility and another had decision-making power.

Second, in order to prevent any misunderstanding, the final version includes a disclaimer stipulating that the issue of delegation to agencies of less than statewide jurisdiction is simply not addressed in the amendment. The amendment leaves resolution of controversies about such delegation to the courts.

Lastly, the final version adopts the concept of the Senate proviso, though not as broadly and with different, more explicit wording. An analysis of the Senate Report shows that the Senate intended federal preparation for only those impacts which were “out of state” and not those impacts which were contained wholly within one state but which might have interstate significance.75

IV. ANALYSIS OF THE NEW LEGISLATION

The negative format of the amendment is unusual and striking: “An impact statement shall not be deemed insufficient if . . . .” The legislative history suggests a possible reason for phrasing the amendment in this fashion. The confusion regarding NEPA and the construction crisis which followed the Conservation Society decision prompted congressional concern about the very high standard set by

74 Conference Report, supra note 4, at 3.
75 Senate Report, supra note 4, at 11-12.
the Second Circuit for delegation of EIS preparation. The practices and procedures required of the FHWA by other circuits did not equal the level of active participation in EIS preparation which the Second Circuit demanded. The simplest way for Congress to relieve the pressure for legislation and to register its disapproval with the Second Circuit approach was merely to state that that standard was too high, without commenting on whether it considered the standards in the other circuits high enough.

In trying to deal with the problem in this piecemeal fashion, however, Congress usurped the judicial function. A court should review the particular fact situation presented and determine whether there was compliance with the law. The legislature, on the other hand, should take the time to provide courts with the general guidance needed to adjudicate future disputes. This involves some anticipation of what is necessary for minimum compliance with the law rather than merely functioning as a super-judiciary after the fact. Here, Congress chose the latter role. The consequence is legislation which leaves many questions unanswered.

To illustrate the confusion created by the law, consider the negative format of the amendment, which indicates that it really applies in one and only one fact situation. When a court is tempted to invalidate an impact statement because of delegation, it must first check this amendment. If all the conditions it sets forth are met, the court is instructed to validate the statement. The converse, however, is not true. When the court finds that the conditions specified in the amendment are not met, it is not instructed to invalidate the impact statement. To the contrary, the court may validate the impact statement anyway, upholding the delegation, because minimum levels of compliance have not been established.

Despite the negative format, however, the Conference Committee was concerned that the courts might nevertheless look to the amendment as an implication of minimum requirements. Accordingly, it decided, with respect to one of the four subsections, that it was better to make its intentions explicit. In order to prevent courts from reading section D(i) of the new amendment as establishing that delegation to state agencies of less than statewide jurisdiction was invalid, the conferees chose to add the one-line disclaimer at the end of the legislation stating that the validity of such delegation was not addressed by Congress.

77 The combined negative format and appended disclaimer in this legislation make its
Without the disclaimer, it is unlikely that the courts would have read any subsection as creating a minimum standard. Ironically, by specifically stating that subsection (i) was not meant to create a minimum standard, Congress left the status of subsections (ii), (iii), and (iv) uncertain. The omission of similar disclaimers for these subsections may lead courts to infer that they do create minimum standards.

In any case, the amendment will not be easy to apply. The conditions included in the amendment are framed in broad terms and the exact parameters of required federal participation remain to be defined. In the following overview each subsection of the amendment is considered in detail and guidelines are suggested for its application.

(i) Delegation to Statewide Agencies

The House Report comments, even under its less explicit original version of the amendment, that in "... no case would H.R. 3130 permit delegation to any state agency lacking sufficient resources, personnel, and interdisciplinary expertise to prepare an EIS that meets the requirements of NEPA." Even if an agency has statewide jurisdiction, it should not be permitted to assume the responsibility for EIS preparation unless it has these additional characteristics. Lacking these, an agency might produce a substantively deficient EIS. Rather than relying on case-by-case substantive analysis to ensure adequate impact statements, procedures should be established which are designed to minimize the risk that deficient EIS's will be written. Further, an agency lacking the necessary abilities might choose, in turn, to delegate the EIS preparation to private concerns (often those with a financial interest in completion of the project) and inadequacy will be replaced with vested interest. A major thrust of NEPA is to encourage those officials in planning and decision-making capacities to become informed and concerned about the environment, both to ensure the most objective evaluation of the project at hand, and to foster the growth of a sense of

application unclear in instances of delegation to private concerns. Despite the warnings in Greene County about relying on statements prepared by applicants, there is growing case law involving participation in EIS preparation by private concerns. See supra note 37. When these parties have financial interests in obtaining approval of the project, the issue of private delegation is an important one and any objections that environmentalists had to delegation to states are magnified when such private parties are concerned. Yet a court faced with a situation in which there was delegation to private concerns finds no guidance from this legislation.

78 House Report, supra note 4, at 4.
environmental responsibility in persons in positions of authority. These officials can encourage the selection, in the first instance, of environmentally-sound projects. Since the preparation of an EIS is the procedure mandated to effect and ensure the policy and purpose of the Act, the responsibility for such preparation should rest with the sponsoring federal agency.

Finally, though the proviso clearly permits courts to validate EIS's even though responsibility for their preparation was delegated to an agency with less than statewide jurisdiction, nothing in the amendment mandates or recommends such validation. First, considerations under NEPA are best made by a statewide agency since its perspective and jurisdiction will ensure consideration of all the ramifications of the project and will allow coordination with other plans in the widest region possible. Additionally, a non-statewide agency will be more likely to lack the characteristics discussed above and will be forced to seek private help in the assessment.

(ii) Furnish Guidance and Participate

Courts sustaining delegation procedures often noted that the FHWA had furnished guidance and participated in the preparation of the EIS's involved. But these courts were never under specific legal duty to make such findings, and hence these cases are not particularly helpful in defining this requirement. The reports accompanying the new legislation are equally unhelpful. Congress has enacted these terms into law without offering any insight into their meaning.

A careful reading of the requirement suggests initial interpretation for the subsection: there must be actual federal participation and guidance in the preparation of the impact statement. Clearly the amount of communication necessary merely for administrative purposes whenever the federal government totally or partially funds a project will be impressive. Some courts may have mistaken this type of administrative involvement for actual participation in preparation of the EIS. Similarly, assistance in selection of location or

80 Some courts required participation. See supra, notes 27-39 and accompanying text. The derivation of "furnish guidance" is uncertain.
81 Senate Report, supra note 4, at 11; Conference Report, supra note 4, at 4-5.
82 A court's evaluation of the sufficiency of federal involvement in the preparation of the EIS should be totally divorced from any consideration of the substantive merits of the EIS. Essex County Preservation Ass'n v. Campbell, 399 F. Supp. 208 (D. Mass. 1975).
design, although demonstrating early federal involvement in the project, does not in itself evince any participation in EIS writing.

To begin with, the federal agency must maintain a "highly trained and capable interdisciplinary staff" at those levels charged with the responsibility to participate and guide. Further, those levels must have jurisdiction wide enough to provide a perspective in which alternatives can meaningfully be considered. The Senate Report suggests that "... the involvement of the Federal official should come early and at every critical stage in the preparation of the EIS, and should be substantial and continuous." This participation and guidance should consist of several elements. The federal agency should make a preliminary study of the proposed project, its intended location, and possible affected areas, and make field trips to the actual sites to obtain valuable firsthand familiarity with the environmental impacts to be considered. On the basis of this study, the federal agency should issue guidelines to the state agency regarding preparation of the impact statement for that specific project. There should be continuous contact between the federal and state agencies regarding compliance with these guidelines, as well as written suggestions by the federal agency for improvement where needed. It may be helpful for the federal agency to appoint one person from the appropriate office to work full time with the staff of the state agency actually preparing the EIS. Such a liaison would promote objectivity and full consideration of the impacts through continuous involvement in the project.

When considering the state-prepared impact data, the federal agency should spot check findings using its own verifying techniques. The need for this, of course, would vary with the amount of continuous federal involvement of the type suggested above.

The federal agency should participate in the drafting of the EIS. Writing, editing, and general preparation can all be effective tools of persuasion, and thus actual federal involvement must continue through this stage. The federal agency should be certain that the EIS evaluates two topics the state agency may unavoidably neglect: (1) a consideration of the alternatives beyond the scope of the state agency; and (2) the coordination of the project with other plans,
needs, and projects on a wider regional level.

To prevent unnecessary litigation over the extent of participation, the Senate Report suggests that federal agencies "carefully document their guidance and participation." If maintained, such documentation would not only provide a record for review but would force federal agencies to be more aware of their role in the preparation process.

(iii) Independent Federal Evaluation of the EIS

Subsection (iii) requires that, in addition to his participation in the preparation stage, the responsible federal official independently evaluate the statement prior to its approval and adoption. The courts which relied on federal agency review of the EIS to distinguish Greene County offer no help in explaining this requirement. This subsection underscores the fact that in the final analysis the federal official remains responsible for the EIS. In addition to legal responsibility for the document, however, the federal official must be prepared to vouch for the contents and scope of the EIS, including for example, the empirical accuracy of the data collected and the manner in which it is presented. With these responsibilities in mind, the meaning of the subsection becomes clear: no state-prepared EIS should be accepted unless the federal official has carefully and completely reviewed the document in order legitimately to corroborate its contents.

Clearly, the extent of this undertaking must vary with the amount of participation and guidance provided by the federal official in the earlier preparation stages of the document. This step is merely a final check.

(iv) Independent Federal Preparation

This subsection deals with important regional considerations. When one state is the beneficiary of a project which might have adverse effects beyond its borders, the host state should not be entrusted to make the official analysis of the impact on the other

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88 Senate Report, supra note 4, at 11.

Supra notes 28-39 and accompanying text.


Rep. John Dingell, a conferee commenting on the amendment, noted that some form of written evaluation is appropriate for this subsection. 121 Cong.Rec. 4399 (daily ed. Aug. 1, 1975). In addition, this review must come before the final printing of the document. In I-291 Why? Ass'n v. Burns, 372 F. Supp. 223, 245 (D. Conn. 1974) the regional office of the FHWA did not see the final draft until it was already in printed form, leaving officials only two options: rejection in toto or "rubber stamp" approval. Clearly this was unsatisfactory. See also CEQ guidelines, 40 C.F.R. § 1500.7(a) (1975).
jurisdiction. First, with everything to lose and nothing to gain, the host state has no incentive to prepare an unfavorable assessment of the environmental impacts on that other jurisdiction. Second, the host state may be incapable of adequately evaluating the project's regional impact due to limited financial resources, and a general inability to truly understand and study another locality, all crucial to an appreciation of the environmental impact of the project.

The first question which this subsection raises concerns the type of impact which warrants notification to that other jurisdiction. The legislative history suggests that only physical impacts qualify. For example, when construction of a highway segment in Vermont will affect traffic flow in New Hampshire, or obligate the construction or location of connecting arteries, or increase air or water pollution in other jurisdictions, this subsection would seem to require notification. Economic effects on another jurisdiction, on the other hand, would appear to be beyond the contemplation of the section.

A second question raised by subsection (iv) concerns the seriousness of the impact required for early notification. Beyond the description "significant," neither the legislation nor the legislative history provides insight. When the impact is "significant," the subsection may well require notification beyond adjacent states. Representative Dingell made the following observation:

In any case, the spurious charge of further delay and paralysis are ill-founded if one understands that this section does not require the consideration of some new category of impacts, but rather simply clarifies the existing duty to fully consider significant impacts wherever they occur.

It is hoped that affected jurisdictions are not only given "early notification" (early in the planning stages) but are also kept continuously apprised of important developments and changes. The affected jurisdiction must also be given sufficient time to review the draft and final statements prepared by the host state in order to register any disagreement.

How notification is made is not important as long as it is effective. It should be relatively easy to review whether the proper

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92 Senate Report, supra note 4, at 11-12.
93 Id. at 12.
94 Id. at 11, 12. Conference Report, supra note 4, at 4-5.
96 See text of amendment, 42 U.S.C.A. § 4332(2)(D)(iv) (Supp. 1976), and text accompanying note 73, supra.
97 Though not referred to in the legislative history, one possibility is the A-95 review process established pursuant to NEPA. Office of Management & Budget Circular A-95, 38 Fed. Reg.
agency in the affected jurisdiction was given timely notice and opportunity to evaluate the documents.98

Finally, if the affected jurisdiction disagrees with the host’s analysis, the federal agency itself must prepare an assessment of that particular impact.99 How serious the disagreement must be to warrant this special federal involvement remains unclear, although the Conference Report suggests any difference in the “characterization, extent or likelihood” of such impacts gives rise to the responsibility.100 When applicable, the federal agency, through broader perspectives, with access to expertise and an opportunity for overall objectivity, may be able to prepare a report which fairly evaluates that impact.

V. PROBLEMS OF DELEGATION

This legislation in no sense mandates delegation. The amendment excuses delegation but it does not intend to recommend the procedure, which may lead to several problems. Despite the conclusions of several circuits,101 state applicants for federal grants-in-aid sufficiently resemble the private applicants of Greene County to warrant concern that they too might produce self-serving EIS’s. Moreover, delegation inevitably narrows the scope of impact analysis from regional to more local consideration of alternatives.

A manifestation of this narrowing of scope for highway projects is known as “segmentation.” The situation in Conservation Society illustrates this phenomenon. Although a twenty-mile segment (wholly within Vermont) was all that was officially considered, it was apparent that a 280 mile superhighway project spanning three states and involving a much broader commitment of funds and resources was really at stake.102 Although the FHWA could have treated this transportation corridor as a unit, and meaningfully con-


98 It is not clear from the legislation exactly what agency in the state is to be notified. Certainly the only reasonable way to interpret the responsibility of notifying the “state” would be to require that either the proper officials or agency is informed. See text of amendment, 42 U.S.C.A. § 4332(2)(D)(iv) (Supp. 1976), supra note 73 and accompanying text.

99 Id. Although this provision should ensure a fair analysis of the impacts when the benefits are confined to host states while the effects are felt by other, non-beneficiary states, it would be less effective when effects and benefits are shared by all states alike.

100 Conference Report, supra note 4, at 5.

101 See supra, notes 23-39 and accompanying text.

102 508 F.2d 927, 934 (2d Cir. 1974).
considered alternatives to highway construction, the Vermont Highway Department, under legislative mandate to build this single stretch of road did not. The court commented: "... development is apparently foreseen as the piecemeal construction of smaller segments, each considered on an ad hoc basis."\(^{103}\) Segmentation is antithetical to the purposes of NEPA, and to the responsibilities it imposes on the federal government\(^{104}\) as acknowledged in the FHWA regulations.\(^{105}\) Yet, delegation and segmentation go hand-in-hand.

Further, it is not clear whether the states are able to do an adequate job of impact evaluation. Less than half the states have adopted state Environmental Policy Acts.\(^{106}\) Although there has been no in-depth study of their effectiveness, the Council on Environmental Quality has made this observation: "[w]hile state regulation of environmental affairs is frequently difficult due to a lack of expertise and funding, several states ... appear to be on the road toward strengthening their EIS processes."\(^{107}\) Even if the states can provide staff equal to the job, there will be unnecessary duplication with fifty staffs doing the work that one large superstaff, relying in part on assistance from local officials, could do more efficiently and effectively. Members of Congress, other federal officials, and the public, all could more easily monitor the performance of NEPA responsibilities where there is federal preparation.\(^{108}\) In addition, the qualified staff that would have to be maintained to prepare EIS's could influence federal agencies to pursue more environmentally sound projects from the outset.\(^{109}\) Consistent federal

\(^{103}\) Id.


\(^{105}\) "A highway section should be as long as practicable to permit consideration of environmental matters on a broad scope and meaningful evaluation of alternatives. ... Piecemealing proposed highway improvements in separate EIS's is to be avoided. ..." 23 C.F.R. 771.5(a) (1975). See also Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 835 (D.C.Cir. 1972).

\(^{106}\) The following states have adopted comprehensive regulations for EIS's: California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Montana, North Carolina, South Dakota, Virginia, Washington, Wisconsin, and Puerto Rico; the following states have adopted comprehensive Executive Orders for Administrative Orders for EIS's: Michigan, New Jersey, Nevada, and Texas; the following states have limited or special EIS requirements: Arizona, Delaware, Georgia, and Nebraska. 6 CEQ ANN. REP., Appendix NEPA ch. (1975) (draft).

\(^{107}\) Id. at 49.


\(^{109}\) One response of the FHWA to this suggestion was made by Francis C. Turner, Federal Highway Administrator in 1970. He noted that the volume of highway projects was so large (at that time 7-10,000 per year) that it would be impossible to staff the agency adequately to handle all impact statements in Washington, and so it was necessary to take a "calculated
preparation would allow the type of coordinated, systematic consideration of plans and their alternatives that the authors of NEPA envisaged. It would allow the consideration of alternatives which often extend beyond the scope of the agency to which preparation is delegated.\textsuperscript{110}

Finally, delegation presents problems for judicial administration. Case-by-case determinations of the quantum of federal involvement in a state prepared document are more difficult than application of a \textit{per se} rule that state prepared EIS's are simply invalid.\textsuperscript{111} Litigation under the new standard will involve difficult issues of proof and line drawing. In each case where authorship is contested, there will be protracted litigation rather than the administration of a flat rule, which, if enforced, would eliminate any need for litigation.

VI. OUTLOOK FOR THE FUTURE

How shall the burden of preparing impact statements be distributed in the future? By passing the NEPA amendment, and thereby opening the door to state preparation, Congress may be interpreted as giving sub silentio approval to the circuit court trend of sanctioning state preparation as long as there is the slightest hint of federal involvement.\textsuperscript{112} If this occurs, courts could become increasingly liberal in their application of the Act. The subsequent history of the \textit{Conservation Society} litigation indicates the seriousness of this possibility.

\textsuperscript{110} For a more detailed discussion about the ability of state highway departments to fully consider alternatives, see Comment, \textit{The Preparation of Environmental Impact Statements by State Highway Commissions}, 58 IOWA L. REV. 1268 (1973).


\textsuperscript{112} \textit{Supra} notes 28-39 and accompanying text.
Upon remand, the Second Circuit disappointed environmentalists by yielding their position to a greater extent than was really necessary under the circumstances. The court correctly concluded that H.R. 3130 was a direct response to the first Conservation Society decision, and that Congress meant to reject the holding of that case.\textsuperscript{113} Congress’ displeasure, however, focused more on the strict standard enunciated by the Second Circuit than on the findings that in that particular case, there was insufficient federal participation. Indeed, the findings of the district court, as underscored by the dissent in Conservation Society \textit{II},\textsuperscript{114} indicated so little federal involvement that the court could have maintained the injunction against the Route 7 project by finding that, even under the relaxed standards established by the amendment, there had not been adequate federal participation. The court chose instead to validate the impact statement.\textsuperscript{115} Needless to say, Conservation Society \textit{II} was a most inauspicious start for the new law. For the circuit, which before had been so vehement in its insistence on federal preparation, to decline to invest this new law with any substance, was not encouraging to say the least.

Another threat to NEPA looms on an entirely different front. Although FHWA initially sponsored H.R. 3130, it was not entirely satisfied with the enacted version.\textsuperscript{116} Anxious to reduce NEPA responsibilities to the vanishing point, FHWA sponsored a provision in the Federal-Aid Highway Act of 1975 that would have allowed the FHWA to shift the responsibilities, originally assigned to it by Congress, onto the state.\textsuperscript{117} Under this procedure, the Governor of a state may be “certified” as the “responsible official” to fulfill the various requirements imposed on the federal agency, thus relieving the federal agency of legal responsibility for those duties. Certification is already in practice with respect to other FHWA responsibilities.\textsuperscript{118} The procedure differs quite markedly from that sustained by

\textsuperscript{113} 531 F.2d 637, 639 (2d Cir. 1976).
\textsuperscript{114} \textit{Id.} at 640.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} Public Works Comm. Chairman Rep. James J. Howard, the only conferee who did not affirm the Conference Report, issued a “Dear Colleague” letter on July 25, 1975, urging rejection of the Report and reflecting FHWA’s view of the bill. The Public Works Comm. has jurisdiction over the highway program, and managed to muster unusually high opposition (143 votes against) to the Conference Report. The final vote was 279-143. 121 \textit{CONG. REC.} 7741 (daily ed. July 29, 1975).
\textsuperscript{118} Morganthaler, \textit{On the Road Again: Certification Acceptance Forces NEPA to Adapt}, 4
H.R. 3130, which, even though allowing state preparation of impact statements, still requires federal participation and leaves the Federal official responsible for the “scope, objectivity, and content of the entire statement.” When Congress passed the Federal-Aid Highway Act in April, 1976, it included certain certification provisions but not those regarding NEPA responsibilities. FHWA thus failed to succeed in this effort to be relieved of its NEPA responsibilities, but the possibility of the enactment of a similar provision in the future remains a very real threat to the continued vitality of NEPA.

CONCLUSION

These events threatened an erosion of NEPA, and an abandonment of its purposes and procedures. But H.R. 3130 can have another effect. It can offer an opportunity to restate a national commitment to the analysis and evaluation of the environmental impact of governmental projects. It is possible to permit state participation in the preparation of NEPA statements without undermining the basis of NEPA. States must be encouraged to develop their expertise in environmental science and to assume the responsibilities that a meaningful Environmental Policy Act involves. In addition, the participation and cooperation of the host state and all affected states is crucial to a comprehensive analysis of a planned project. At the same time, the courts must not be reticent in applying H.R. 3130. Rather, they must ensure that the amendment requires substantial and continuous federal participation in EIS prep-

E.L.R. 50023, 50030 (1974). The author comments that certification has already limited the degree to which FHWA can effectively review environmental impact, since FHWA involvement comes at such an advanced stage that meaningful evaluation of alternatives is foreclosed. See also Federal Highway Administration Launches New Effort to Win Congressional Reduction of Its NEPA Obligations. 5 E.L.R. 10177 (1975).


119 See H.R. 8235, 94th Cong., 2d Sess. (1976), particularly sections to amend 23 U.S.C. § 117(1970); 122 Cong. Rec. 3060 (daily ed. April 7, 1976) (reported in House by Comm. on Conference). This bill as reported contained provisions authorizing certification procedures for some FHWA responsibilities under federal law, but not those for NEPA responsibilities as provided for in unenacted H.R. 8430. Though there is no danger of certification of NEPA responsibilities at present, the fact that FHWA requested it once, and the fact that the agency did achieve some certification privileges in this recent Act suggest that the issue may arise again in future bills.

aration. Then, faithful adherence to NEPA, even as amended, can guarantee comprehensive and valuable environmental assessment of federal projects.