

HUD'S NEPA RESPONSIBILITIES UNDER THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974: DELEGATION OR DEROGATION?

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The enactment of the Housing and Community Development Act of 1974 (CD Act)¹, and adoption of new environmental review procedures by the Department of Housing and Urban Development (HUD), mark an important turning point in the life of the National Environmental Policy Act (NEPA).² Congress and HUD have both expressed concern over the quality and protection of our environment. The CD Act and HUD's new environmental review regulations (Regulations)³ were intended to implement that concern.

One serious question which arises, however, is whether the delegation of federal environmental responsibilities to the local level under section 104 (h) of the CD Act⁴ can be reconciled with NEPA's commitment to federal accountability. This work will investigate the potential conflict by first examining whether the statutory goals of NEPA, the CD Act, and the Regulations are compatible. Following a description of the mechanics of section 104 (h) and the Regulations, this Note will then explore potential statutory interpretation problems. Finally, a number of important national policy considerations, tempered by technological and local fiscal realities, will be discussed.

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1. Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 5, 12, 15, 20, 31, 40, 42, 49 U.S.C. (Supp. IV, 1974)).

2. 42 U.S.C. §§ 4321-47 (1970), *as amended*, 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975).

3. 24 C.F.R. pt. 58 (1975). HUD released additions and corrections to these Regulations in July, 1975. 40 Fed. Reg. 29,992-98 (1975). Because no substantive changes were made, however, unless the specific section or subsection referred to was affected, citations will be to 24 C.F.R. (1975).

4. 42 U.S.C. § 5304(h) (Supp. IV, 1974). *See* note 33 and accompanying text *infra*.

I. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Since its enactment in 1969, NEPA has been bolstered with certain "action-forcing"⁵ procedures. These procedures were meant to inject an affirmative duty into the decisionmaking process of each federal and local agency⁶ to avert, or at least to minimize possible adverse environmental effects resulting from "major Federal actions significantly affecting the quality of the human environment."⁷

The crux of NEPA's "action forcing" provisions is section 102(2)(C).⁸ The detailed environmental impact statement (EIS) required

5. See S. REP. NO. 296, 91st Cong., 1st Sess. 19 (1969).

6. For a discussion of why a local agency might be held to environmental obligations under a federal statute see notes 96-125 and accompanying text *infra*.

7. National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970). The quoted language goes to the heart of NEPA, for a project must be an action which is major, federal and significant in its environmental effect for the Act to apply. In its guidelines for federal agencies the Council on Environmental Quality (CEQ) has stated that when agencies are considering what constitutes *major* action significantly affecting the environment, [they] should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively *major* resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future *major* course of action, or when several Government agencies individually make decisions about partial aspects of a *major* action.

40 C.F.R. § 1500.6(a) (1975) (emphasis added). In defining a "Federal" action the CEQ stated that there must be "sufficient *Federal* control and responsibility to constitute '*Federal* action' in contrast to cases where such *Federal* control and responsibility are not present." *Id.* § 1500.6(c) (emphasis added). The term "actions" has been defined as:

(1) Recommendations or favorable reports relating to legislation including requests for appropriations. . . .

(2) New and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance (except where such assistance is solely in the form of general revenue sharing funds . . . with no Federal agency control over the subsequent use of such funds);

(3) The making, modification, or establishment of regulations, rules, procedures, and policy.

Id. § 1500.5(a). In addition, to be "significant" an action must "[affect] the quality of the human environment either by directly affecting human beings or by indirectly affecting human beings through adverse effects on the environment." *Id.* § 1500.6(c).

8. 42 U.S.C. § 4332(2)(C) (1970). See generally M. WARNER & E. PRESTON, A REVIEW OF ENVIRONMENTAL IMPACT ASSESSMENT METHODOLOGIES (1974)

by that section serves three important purposes. Initially, the EIS permits concerned citizens and courts to determine whether the agency has considered the relevant environmental factors likely to be affected by major federal action.⁹ There is no "precise formula" to determine whether an agency has made an adequate evaluation of environmental factors.¹⁰ All that is required of the agency involved is a good faith effort¹¹ towards balancing the effect of the project on existing environmental amenities against economic, social and technical considerations.¹²

Secondly, the EIS serves to make NEPA an environmental full disclosure law.¹³ To meet the full disclosure standard, NEPA requires the responsible official to include a discussion of environmental effects sufficient to enable a reasoned choice of alternatives to any proposed major federal action.¹⁴ While the agency is not required to "foresee the unforeseeable," it cannot shun consideration of alternatives merely because some degree of forecasting is involved.¹⁵ As long as the agency

(prepared for Office of Research and Dev., U.S. Environmental Protection Agency); D'Amato & Baxter, *The Impact of Impact Statements Upon Agency Responsibility: A Prescriptive Analysis*, 59 IOWA L. REV. 195 (1973).

9. See, e.g., *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1973); *Silva v. Lynn*, 482 F.2d 1282, 1284 (1st Cir.), *rev'g sub nom. Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973).

10. E.g., *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974). Nor is there any requirement of unanimity among concerned parties on the desirability of the action. See, e.g., *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir.), *cert. denied*, 414 U.S. 1052 (1973); *Warm Springs Dam Task Force v. Gribble*, 378 F. Supp. 240, 244 (N.D. Cal.), *application for stay granted*, 417 U.S. 1301 (Douglas, Circuit Justice, 1974).

11. See, e.g., *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1973); *Life of the Land v. Brinegar*, 485 F.2d 460, 467 (9th Cir.), *cert. denied*, 414 U.S. 1052 (1973).

12. E.g., *Trinity Episcopal School Corp. v. Romney*, Nos. 75-7061, 7092 (2d Cir., July 24, 1975, as amended, Aug. 6, 1975); *Environmental Defense Fund, Inc. v. Corps of Engr's*, 470 F.2d 289, 298 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1113 (D.C. Cir. 1971). See note 165 and accompanying text *infra*.

13. See, e.g., *Sierra Club v. Lynn*, 502 F.2d 43, 57-58 (5th Cir. 1974); *Schicht v. Romney*, 372 F. Supp. 1270, 1272 (E.D. Mo. 1974).

14. See e.g., *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 852 (8th Cir. 1973); *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir.), *cert. denied*, 414 U.S. 1052 (1973).

15. *Scientists' Institute for Pub. Information, Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

takes a "hard look"¹⁶ at environmental considerations, both adverse and beneficial,¹⁷ it has fulfilled its statutory obligations.¹⁸

Lastly, the EIS preserves the integrity of the federal and local agency decisionmaking process by thwarting any tendency to circumvent persistent environmental problems or agency critics.¹⁹ Federal agencies are required to make a good faith effort to solicit, review and comment on responsible criticisms by other agencies or the public regarding the proposed agency action.²⁰ When these criticisms propose different actions or present conflicting data or opinions, there must be a good faith response.²¹ This interchange of environmental viewpoints is an extremely important element of NEPA, and reflects Congressional intent that environmental protection under NEPA should represent but one of a number of integrated policies to which the country is deeply committed.²²

II. THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

Another national policy is that of obtaining "a decent home and a suitable living environment for every American family."²³ The CD Act, specifically Title I-Community Development (Title I), was developed to solve certain problems entrenched in the existing "workable

16. See, e.g., *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972); *Sierra Club v. Froehlke*, 345 F. Supp. 440, 444 (W.D. Wis. 1972), *aff'd*, 486 F.2d 946 (7th Cir. 1973).

17. See *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 427 (5th Cir. 1973).

18. See *D'Amato & Baxter, supra* note 8, at 199-200; Kross, *Preparation of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81 (1972). See also Greis, *The Environmental Impact Statement: A Small Step Instead of a Giant Leap*, 5 URBAN LAW. 264 (1973).

19. See *Silva v. Lynn*, 482 F.2d 1282, 1284 (1st Cir.), *rev'g sub nom. Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973).

20. See 40 C.F.R. § 1500.9 (1975).

21. *Silva v. Lynn*, 482 F.2d 1282, 1284 (1st Cir.), *rev'g sub nom. Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973).

22. See, e.g., *Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975), *aff'g* 376 F. Supp. 987 (W.D. Wash. 1974) (highways and the environment); *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1034 (D.C. Cir. 1974), *rev'd sub nom. on other grounds, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (Trans-Alaska Pipeline and the environment).

23. Housing and Community Development Act of 1974 § 101(d)(3), 42 U.S.C. § 5301(d)(3) (Supp. IV, 1974).

program" requirements,²⁴ and to eliminate bureaucratic second-guessing by Washington.²⁵ Congress intended Title I to streamline existing grant procedures and to expand the role and responsibility of local governments in implementing new community development projects.²⁶ The role of local government, however, was not intended to be unlimited. Congress firmly rejected a general revenue sharing principle of "no strings" attached for Title I grants.²⁷ Instead, Congress adopted the block grant approach²⁸ with specific application²⁹ and eligibility³⁰ requirements to insure that federal funds would achieve national, as well as local objectives.³¹ The next sections of this Note initially will examine the requirements of section 104 (h) of the Act and the Regulations, and will follow with discussions of possible ramifications of such requirements.

24. See 120 CONG. REC. H 5364 (daily ed. June 20, 1974) (remarks of Representative Frenzel). Under the workable program requirements localities receiving federal funding were to conform local urban policies with priorities set by federal officials. Since the federal officials held the purse strings, and since federal and local officials' classifications of priorities were not always harmonious, friction was an unfortunate consequence. As a result many of HUD's programs were more frustrated than successful. See generally Catz, *Historical and Political Background of Federal Public Housing Programs*, 50 N.D.L. REV. 25 (1973); Hirshen & LeGates, *Neglected Dimensions in Low-Income Housing and Development Programs*, 9 URBAN L. ANN. 3 (1975); LeGates, *Can the Federal Welfare Bureaucracies Control Their Programs: The Case of HUD and Urban Renewal*, 5 URBAN LAW. 228 (1973); Mandelker, *Urban Conflict in Urban Renewal: The Milwaukee CRP Experience*, L. & SOC. ORDER 635 (1971).

25. S. REP. NO. 693, 93d Cong., 2d Sess. 55-56 (1974).

26. *Id.*

27. *Id.* at 55; cf. *Ely v. Velde (Ely II)*, 497 F.2d 252, 256 (4th Cir. 1974), *rev'd* 363 F. Supp. 277 (E.D. Va. 1973).

28. The Title I block grants replace ten prior development programs: the Public Facilities Loan Program; the Open Space Program; the Planning Advance Program; the Water-Sewer, Neighborhood Facilities and Advanced Land Acquisition Programs; the Urban Renewal, Code Enforcement and Neighborhood Development Programs; and the Model Cities Program. S. REP. NO. 693, 93d Cong., 2d Sess. 48-49 (1974). See generally Garrison, *Community Development Block Grants: A Whole New Ball Game for City Hall*, NATION'S CITIES, Nov. 1974, at 49.

29. Housing and Community Development Act of 1974 § 104, 42 U.S.C. § 5304 (Supp. IV, 1974).

30. *Id.* § 105, 42 U.S.C. § 5305.

31. S. REP. NO. 693, 93d Cong., 2d Sess. 55 (1974).

A. Section 104(h) and the Regulations

While various provisions of the CD Act demonstrate a general concern for the environment,³² section 104(h) specifically details HUD's environmental responsibilities.³³ This section was intended to develop local government competence in making environmental reviews by assigning HUD's environmental review responsibilities to the applicant.³⁴ The decentralization of environmental review was aimed at augmenting, not diminishing, the national commitment to environmental protection.³⁵

In implementing section 104(h), HUD may provide for the release of Title I funds for particular projects³⁶ to local applicants³⁷ who assume all of the NEPA responsibilities that would have fallen on HUD prior to the passage of the CD Act. Before qualifying for release of the requested Title I funds, the application must meet all the requirements and procedures set forth in section 104(a) and the Regulations.³⁸

Although the manner in which the applicant complies with the Regulations is for the most part discretionary, certain procedures are

32. *See, e.g.*, Housing and Community Development Act of 1974 §§ 101(a), 104(a)(2), 42 U.S.C. §§ 5301(a), 5304(a)(2) (Supp. IV, 1974).

33. In order to assure that the policies of the National Environmental Policy Act of 1969 are most effectively implemented in connection with the expenditure of funds under [Title I], and to assure to the public undiminished protection of the environment, the Secretary [of HUD], in lieu of the environmental protection procedures otherwise applicable, may under regulations provide for the release of funds for particular projects to applicants who assume all of the responsibilities for environmental review, decisionmaking, and action pursuant to [the CD Act] that would apply to the Secretary [of HUD] were he to undertake such projects as Federal projects.
42 U.S.C. § 5304(h) (Supp. IV, 1974).

34. 120 CONG. REC. H 8432 (daily ed. Aug. 15, 1974) (remarks of Representative Brown).

35. 42 U.S.C. § 5304(h)(1) (Supp. IV, 1974).

36. Final HUD Reg. § 58.3, 40 Fed. Reg. 29,993-94 (1975). There are a number of activities which would qualify as Title I projects, *i.e.* the acquisition of real property which is deemed by the applicant to be appropriate for rehabilitation; the acquisition, construction, reconstruction or installation of public works; code enforcement; clearance, demolition or removal of buildings; removal of material and architectural barriers which restrict the mobility of the elderly or handicapped. Housing and Community Development Act of 1974 § 105(a), 42 U.S.C. § 5305(a) (Supp. IV, 1974).

37. Final HUD Reg. § 570.3(b), 40 Fed. Reg. 24,694 (1975).

38. 42 U.S.C. § 5304(a) (Supp. IV, 1974); 24 C.F.R. § 58.1 (1975).

required by HUD.³⁹ Existing environmental conditions and current trends likely to develop without the proposed project, as well as the nature and magnitude of all environmental impacts of the project, must be identified.⁴⁰ The applicant must then consider whether modifications or alternatives would minimize or avert any adverse environmental impact.⁴¹ Finally, the applicant, independently of HUD, must make an important "level of clearance" finding. Essentially, this finding results in an applicant concluding that the project will or will not significantly affect the quality of the human environment.⁴² If the applicant decides that there will be no significant environmental impact, it is not required to file an EIS with the Council on Environmental Quality (CEQ). Rather, the applicant must file a "Notice of Finding of No Significant Effect on the Environment" with HUD.⁴³ Upon the filing of this notice and its release to the public, the applicant has completed its environmental review. If the applicant's independent level of clearance finding establishes that the project would significantly affect the environment, an EIS is required.⁴⁴

39. 24 C.F.R. § 58.15 (1975).

40. *Id.* §§ 58.3, 58.15(a), (b).

41. *Id.* § 58.15(c).

42. The Regulations state that "the applicant must make one of the two level of clearance findings . . . : (1) *Finding that request for release of funds for project is not an action which may significantly affect the quality of human environment.* . . . (2) *Finding that request for release of funds for project is an action which may significantly affect the quality of the human environment.* . . ." *Id.* §§ 58.15(d)(1), (2).

43. *Id.* § 58.16. Now that HUD has consulted with CEQ and promulgated its final Regulations, unless an EIS is filed by a Title I applicant, it will be HUD and not CEQ who will be the ultimate environmental 'watchdog.' Formerly, CEQ would have played a much more active role. *See, e.g.,* 24 C.F.R. § 600.65 (1974) (HUD sponsored actions to be in full accord with NEPA); 40 C.F.R. § 1500.6(e) (1974) (certain CEQ requirements still exist even though a "negative determination" was filed). *Cf.* 23 C.F.R. § 771.7(b) (1975) (negative declaration in Federal Highway Administration environmental assessment procedures). For a discussion of sharp criticism recently aimed at HUD's own environmental record see note 141 *infra*.

44. 24 C.F.R. § 58.17 (1975); *cf.* 40 C.F.R. §§ 1500.7, .8 (1975). HUD has established two threshold requirements for projects definitely requiring an EIS: any project which would remove, demolish, convert or emplace a total of five hundred or more dwelling units, or any water and sewer facility project which would serve under-developed areas of one hundred acres or more. 24 C.F.R. § 58.25 (1975). The danger implicit in setting such thresholds is that the applicant, regardless of the qualitative effects on the environment, may be encouraged to find no EIS is required for projects falling short of the quantitative line HUD has drawn. *Cf.* notes 137-41, 165 and accompanying text *infra*.

Upon completion of the environmental review and level of clearance finding, and prior to the actual release of Title I funds, the applicant must insure sufficient notification to the public. Such notification must be made at least five days prior to actual application, and must include publication of the applicant's intent to apply for funds as well as a description of the project.⁴⁵ The applicant is also required to state that it has prepared a detailed environmental review record⁴⁶ of the project which may be examined by the public. In addition, the applicant must consent to accept federal jurisdiction in any action alleging flaws in its environmental review.⁴⁷ Finally, the publication must contain a form certifying that HUD will accept objections to its approval of the request for release of funds and the applicant's certification⁴⁸ of compliance with NEPA only on very limited grounds, and only if such objection is received by HUD within fifteen days after funds are requested.⁴⁹

45. 24 C.F.R. § 58.30(a) (1975).

46. *Id.* § 58.11. See note 134 and accompanying text *infra*.

47. Housing and Community Development Act of 1974 § 104(h)(3)(D)(ii), 42 U.S.C. § 5304(h)(3)(D)(ii) (Supp. IV, 1974); 24 C.F.R. § 58.30(a)(6) (1975); Final HUD Reg. § 570.303(e)(4), 40 Fed. Reg. 24,701 (1975). The submission of the Title I applicant to federal jurisdiction may raise basic jurisdictional problems. The first question that may arise is whether § 104(h)(3)(D)(ii) of the CD Act, 42 U.S.C. § 5304(h)(3)(D)(ii) (Supp. IV, 1974), was a sufficient designation of federal jurisdiction. Was that section intended by the Senate and House conferees to confer *original jurisdiction* on the federal courts for NEPA questions relating to a Title I applicant's local activities? How otherwise would "[p]ersons and agencies seeking redress in relation to environmental assessments," as described in the Regulations, 24 C.F.R. § 58.32(b) (1975), get into federal court? Is this jurisdiction independent of the general jurisdictional provisions of the United States Code (Title 28)? If § 104(h)(3)(D)(ii) does not independently confer jurisdiction, could a party "seeking redress" obtain federal jurisdiction on the theory that the claim "arises under" federal law within the meaning of 28 U.S.C. §§ 1331, 1337 (1970)? Could it be argued that interpretations of the HUD contract with the Title I applicant are governed by federal law and therefore, assuming the requisite \$10,000 amount in controversy, the case "arises under" federal law within 28 U.S.C. § 1331 (1970)? In addition, would persons and agencies "seeking redress," as third-party beneficiaries of the contract, be entitled, absent diversity, to enforce its provisions? If HUD was deemed to have contracted away its NEPA responsibilities, would it be possible for a party "seeking redress" to bring suit against HUD under established principles of agency law? Such questions although beyond the scope of this Note *must* be considered in determining whether NEPA compliance questions within the Title I framework will be subject to scrutiny by the federal courts. *Cf.* Social Services Amendments of 1974, 42 U.S.C.A. § 660 (Pamphlet No. 1, 1975).

48. See text at notes 50-51 *infra*.

49. 24 C.F.R. § 58.30(a)(6) (1975).

After its intent to request Title I funds is published, the applicant must submit the actual request for funds,⁵⁰ consisting of an identification of the particular projects for which the Title I funds are requested and a documentation of the amount of funds to be allocated to each project. In addition, the applicant must submit a certification verifying that it has fully carried out its NEPA responsibilities.⁵¹ The applicant must describe the levels of all environmental clearances carried out,⁵² and specify the dates on which the opportunities for review, comment or other action regarding the environmental clearances began and ended. The certification is to be attested to by the applicant's chief executive officer, who consents to submit to federal jurisdiction for judicial resolution of any alleged breach of environmental duties.⁵³

Upon its approval of the certification, HUD has satisfied its NEPA responsibilities insofar as these responsibilities relate to the application and release of Title I funds.⁵⁴ Since HUD considers that *all* its NEPA responsibilities pertaining to Title I projects cease at this point, it will refuse to respond to inquiries or complaints relating to a project for which certification has been approved. Instead, HUD will merely forward them to the applicant and its certifying officer.⁵⁵ Thus, after certification approval, the only recourse available to those dissatisfied with local administrative environmental decisions is a suit for review in the federal courts.

B. Section 104(h) and the Regulations in Practice

The goals of maintaining effective environmental management and viable urban communities are not easily attained. Both goals are complex and, as a result, are susceptible to a number of problem-solving techniques. Thus, it is not unusual to find two governing bodies taking different approaches in their attempt to deal with problems arising from these goals.

As a recent example of such an attempt, the United Nations has begun advocating an "integrated global approach" to international en-

50. *Id.* § 58.30(b).

51. *Id.* § 58.30(c).

52. *See* text at notes 42-44 *supra*.

53. 24 C.F.R. § 58.30(c)(6) (1975). *But see* note 47 *supra*.

54. 42 U.S.C. § 5304(h)(2) (Supp. IV, 1974).

55. 24 C.F.R. § 58.32 (1975).

vironmental problems.⁵⁶ At the same time, Congress has moved to narrow direct federal involvement in local problems such as blight and community development by allowing greater local autonomy in decisionmaking.⁵⁷ These moves need not conflict in a philosophical sense as long as they are kept separate. The question arises, however, whether it is feasible to infuse a single statutory provision with broad environmental concern,⁵⁸ while at the same time emphasizing that the governmental body responsible for its implementation shall be relatively unimpeded in its pursuit of local priorities.⁵⁹

1. The Pre-CD Act Delegation Issue and the Courts

A crucial question regarding the operation of section 104(h) is whether its delegation of HUD's environmental responsibilities to the local level has repealed or superseded NEPA.

Prior to the passage of the CD Act there were two well-defined views on the delegation issue. The view that NEPA responsibilities are incapable of delegation was initially stated in *Greene County Planning Board v. Federal Power Commission*.⁶⁰ In *Greene County*, a local power authority sought a construction license for three new power lines. The Federal Power Commission (FPC) attempted to delegate its responsibility for conducting an environmental review to the local power authority.⁶¹ The Second Circuit invalidated this attempted delegation on the ground that the local power authority, while required by the FPC to draw up and file an EIS, was the very party applying for the license.⁶² The court, noting a dangerous inclination

56. The great potential for environmental degradation in one area resulting in adverse environmental impacts on an international scale spurred the Governing Council of the United Nations Environment Program (UNEP) to develop an Action Plan for the international environment. For a description of UNEP and its six priority areas see COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 427-53 (1974) [hereinafter cited as CEQ FIFTH ANNUAL REPORT].

57. See text at notes 25-26 *supra*.

58. See Housing and Community Development Act of 1974 §§ 101(a), (d)(3), 104(h)(1), 42 U.S.C. §§ 5301(a), (d)(3), 5304(h)(1) (Supp. IV, 1974); 24 C.F.R. § 58.1 (1975).

59. See 24 C.F.R. § 58.15 (1975).

60. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

61. *Id.* at 416.

62. *Id.* at 416-17.

for the local power authority to base its EIS on "self-serving assumptions"⁶³ given the FPC's lack of substantive participation in the formulation of the EIS, held the attempted delegation to be a violation of NEPA's mandate to consider environmental values at every important stage of the administrative process.⁶⁴

In *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*,⁶⁵ the Federal Highway Administration (FHWA), in defending its delegation of NEPA responsibilities, attempted to distinguish *Greene County*. The EIS for the section of highway being considered in *Conservation Society* was written and prepared by the Vermont Department of Highways (VHD) without supervision by a federal agency. Although the FHWA's cooperation with the local agency during the preparation of the EIS was more substantial than that of the FPC in *Greene County*, the FHWA was not protected from the charge of abdicating significant NEPA responsibilities.

The FHWA argued that, unlike the local power authority in *Greene County*, the VHD was in no sense an "applicant or contestant."⁶⁶ Further, without such a potential conflict of interest, the FHWA argued, any fear that the VHD would rely upon "self-serving assumptions" to prepare an EIS was unwarranted.⁶⁷ The court did not agree. Uncontroverted testimony by the Vermont Speaker of the House and the VHD Commissioner established that the VHD was duty-bound to follow the state legislative mandate regarding the building of highways.⁶⁸ The inherent conflict between the state mandate to build highways and the duty under NEPA to make an objective analysis of environmental considerations put *Conservation Society* squarely in point

63. *Id.* at 420. Cf. Kross, *supra* note 18, at 137.

64. 455 F.2d at 420-21. The Second Circuit was not alone in its stand on the nondelegability of a federal agency's NEPA responsibilities. In *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975), *rev'g* 378 F. Supp. 753 (S.D. Ill. 1974), the Seventh Circuit held that "the delegation [by the responsible federal agency] of responsibility for researching and drafting the impact statement" to the Illinois Department of Transportation was in "direct conflict" with NEPA. *Id.* at 776. See also *Committee to Stop Route 7 v. Volpe*, 346 F. Supp. 731, 741 (D. Conn. 1972); *Northside Tenants' Rights Coalition v. Volpe*, 346 F. Supp. 244, 248 (E.D. Wis. 1972).

65. 362 F. Supp. 627 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974).

66. *Id.* at 630.

67. *Id.*

68. *Id.* at 631.

with *Greene County*.⁶⁹ As a result, the *Conservation Society* court invalidated the attempted delegation.⁷⁰

The majority view on the delegation question, which was just recently incorporated into NEPA, distinguishes *Conservation Society* and *Greene County* in situations where the federal agency has delegated some but not all its NEPA responsibilities.⁷¹ Courts have interpreted section 102 of NEPA⁷² as calling for good faith objectivity rather than subjective impartiality.⁷³ Neither the commitment of funds nor the EIS are deemed to be fatally contaminated, as a matter of law, because of direct involvement by a financially interested party,⁷⁴ state agency,⁷⁵

69. *Id.*

70. *Id.* at 632. Informal discussions or visits of federal officials with the VHD were not sufficient participation to meet the requirement of federal involvement under NEPA. *Id.* Cf. *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328, 335 (2d Cir. 1974), *aff'g* 360 F. Supp. 1057 (S.D.N.Y. 1973); *I-291 Why? Ass'n v. Burns*, 372 F. Supp. 223, 243-44 (D. Conn. 1974), *aff'd* 517 F.2d 1077 (2d Cir. 1975). *But see generally* Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 COLUM. L. REV. 963 (1972).

71. See 121 CONG. REC. H 2996-3001 (daily ed. Apr. 21, 1975). After the *Conservation Society* appeal was decided the Federal Highway Administrator stopped all federal-aid highway construction in Connecticut, New York and Vermont. The FHWA then backed legislation in the House which would have provided it with an exemption from all its environmental responsibilities. The House rejected that solution, and severely criticized the FHWA for its maneuvering, labelling it the "most uncooperative of Federal agencies" with regard to compliance with NEPA. *Id.* at H 3000 (remarks of Representative Ottinger).

To solve this problem the House adopted a two-pronged approach. First, it proposed a bill (H.R. 3787, 94th Cong., 1st Sess. (1975)) which provided that any EIS drawn up by a state highway department in any of the three states would be deemed to be an EIS prepared by the Secretary of Transportation for NEPA purposes. *Id.* Next, another bill was proposed (H.R. 3130, 94th Cong., 1st Sess. (1975)) to amend NEPA. This bill provided that an EIS will not be deemed legally insufficient merely because it was prepared by a state agency if the responsible federal agency actively participates, and makes an independent evaluation of the EIS prior to its approval. *Id.* at H 3001. The bills were consolidated and after revisions were approved by both houses, H.R. 3130 was signed into law by the President. *Id.* at H 8201 (daily ed. Sept. 3, 1975).

72. 42 U.S.C. § 4332 (1970), *as amended*, 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975).

73. See, e.g., *Life of the Land v. Brinegar*, 485 F.2d 460, 467 (9th Cir.), *cert. denied*, 414 U.S. 1052 (1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973).

74. *Life of the Land v. Brinegar*, 485 F.2d 460, 467 (9th Cir.), *cert. denied*, 414 U.S. 1052 (1973).

75. See, e.g., *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 854-55 (8th Cir. 1973); note 71 *supra*.

or new community⁷⁶ in the environmental review process. Abdication of a significant part of the particular federal agency's NEPA responsibilities, however, is forbidden.⁷⁷ Courts adopting this view of the delegation issue have repeatedly held that NEPA's requirement of giving appropriate consideration to environmental amenities and values⁷⁸ in the preparation and drafting process will not be satisfied by a "rubber stamp"⁷⁹ approval of a proposed major action without significant federal participation.⁸⁰

2. NEPA Superseded or Supported?

In HUD's view, the passage of the CD Act eliminated the delegation controversy regarding any applicant with legal capacity⁸¹ to assume HUD's NEPA responsibilities. While it is apparent that HUD's interpretation of the CD Act is not in complete harmony with prior judicial interpretations of a federal agency's duties under NEPA, HUD officials maintain that the CD Act supports and does not supersede NEPA.⁸² Evidence in the legislative history, however, may indicate that section 104(h) could be read to amend or repeal NEPA by implication.⁸³

76. *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

77. 121 CONG. REC. H 3001 (daily ed. Apr. 21, 1975). *See, e.g.*, *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir.), *cert. denied*, 414 U.S. 1052 (1973).

78. National Environmental Policy Act of 1969 § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1970).

79. *Brooks v. Volpe*, 350 F. Supp. 269, 279 (W.D. Wash. 1972), *aff'd*, 487 F.2d 1344 (9th Cir. 1973).

80. *See, e.g.*, *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 880 (D Ore. 1971) (HUD approval of a local group's environmental worksheet three days after it was submitted failed to show federal agency had lived up to its NEPA responsibilities).

81. 24 C.F.R. § 58.5(b)(1) (1975); *see* 40 Fed. Reg. 1392 (1975). An applicant having "legal capacity" is vaguely defined as one having the capacity to assume and carry out NEPA responsibilities, with the only limitation being that "[c]ommunity associations (other than public entities which are also community associations)," and certain private developers are deemed to lack "legal capacity" for environmental review. 24 C.F.R. § 58.5(b)(2) (1975).

82. Interview with Walter L. Eschbach, HUD Environmental Clearance Officer for St. Louis, in St. Louis, Jan. 28, 1975.

83. *See* text at notes 25 & 34 *supra*. In opposing the inclusion of section 104(h), Senator Henry Jackson, Chairman of the Committee on Interior and Insular Affairs and author of NEPA, argued that at worst it would provide HUD with total immunity from any responsibility to prepare an EIS, and at best § 104(h) would serve only to inject through legislative action an additional element of uncertainty in the administration of NEPA. 120 CONG. REC. S 14,884 (daily ed. Aug. 13, 1974).

The issue of whether NEPA was intended to repeal any existing laws by implication was recently considered by the Supreme Court in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.⁸⁴ The nation's railroads petitioned the Interstate Commerce Commission (ICC) for rate increases under a statutory provision allowing emergency rate increases for nearly all existing freight rates. Plaintiffs asserted that NEPA repealed by implication the prior statutory provision which would have enabled the ICC to grant the railroads' petition without filing an EIS. The court rejected this contention and held that NEPA's language⁸⁵ made it clear that it was not intended to repeal by implication any earlier statutes.⁸⁶

By analogy, an argument can be made that the language of the CD Act, like that of NEPA, does not repeal other statutes by implication. The main purpose of section 104(h)(1) is to ensure that the policies of NEPA "are most effectively implemented."⁸⁷ Although section 104(h)(1) then proceeds to authorize HUD to delegate its NEPA responsibilities to local applicants, it is arguable that section 104(h)(2)⁸⁸ limits this delegation by stating that HUD's approval of an applicant's certification shall satisfy HUD's own NEPA responsibilities only "insofar as these responsibilities relate to the applications and releases of funds."⁸⁹

Is it conceivable that Congress intended to allow delegation of environmental review responsibilities pertaining to the release of funds, but not to the ultimate use of those funds?⁹⁰ If section 104(h) is interpreted in light of prior sections, the argument that no full-scale retreat from NEPA was intended is strengthened.⁹¹ Section 104(d)⁹²

84. 412 U.S. 669 (1973).

85. See National Environmental Policy Act of 1969 § 105, 42 U.S.C. § 4335 (1970), which states that "[t]he policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies."

86. 412 U.S. at 694. See, e.g., *United States v. Welden*, 377 U.S. 95, 102-03 (1964); *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939); *Jamieson v. Weinberger*, 379 F. Supp. 28, 35 (E.D. Pa. 1974).

87. 42 U.S.C. § 5304(h)(1) (Supp. IV, 1974).

88. *Id.* § 5304(h)(2).

89. *Id.* (emphasis added).

90. Cf. text at notes 27-31 *supra*.

91. See Housing and Community Development Act of 1974 § 101(d)(4), 42 U.S.C. § 5301(d)(4) (Supp. IV, 1974), which states that one of the purposes of Title I is to foster the "undertaking of housing and community development activities in a coordinated and mutually supportive manner." This can be interpreted to involve continued active federal participation.

92. *Id.* § 5304(d).

seems to bolster this hypothesis. It requires that HUD at least on an annual basis "make such reviews and audits *as may be necessary or appropriate to determine . . . whether that program conformed to the requirements of this chapter and other applicable laws . . .*"⁹³ This reading clearly strengthens the argument that HUD's NEPA responsibilities *do not* cease with the release of funds, but continue to follow those funds through their actual physical uses.

Employing the *SCRAP* logic,⁹⁴ it would be anomalous if Congress had provided that the federal agency which has the primary responsibility for implementing the CD Act must simultaneously implement the policies of both the CD Act and NEPA, while at the same time providing that the courts may ignore the clear congressional requirement of ultimate federal accountability under NEPA.⁹⁵

3. Do Federal Funds Ever Cease Being Federal?

The question of when federal funds cease being federal, or indeed whether a federal agency has any NEPA obligations after releasing

93. *Id.* (emphasis added).

94. 412 U.S. at 694. The author recognizes the irony in utilizing an argument that previously defeated a broad NEPA interpretation in defending a broad NEPA interpretation in this instance.

95. *Cf. Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 389 F. Supp. 1171 (S.D.N.Y.), *aff'd*, 516 F.2d 378 (2d Cir. 1975). The U.S. Postal Service had planned to build a vehicle maintenance facility as part of a multi-story housing project in Manhattan. The project was to occupy an entire city block. After the Postal Service rejected a demand to abandon construction of the maintenance facility plaintiffs brought suit claiming the Postal Service had violated NEPA provisions. *Id.* at 1175. Plaintiffs alleged defendant's EIS had failed to consider the environmental impact of the housing, and had inadequately discussed feasible alternatives. Defendant's major claim was that under 39 U.S.C. § 410 (1970), the Postal Service was not subject to NEPA. 389 F. Supp. at 1176. The pertinent part of the statute stated that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, . . . shall apply to the exercise of the powers of the Postal Service." Postal Reorganization Act § 410(a), 39 U.S.C. § 410(a) (1970).

The court's reading of the statute differed from that of the Postal Service. The bench noted that the statute did not exempt defendant from *all* federal laws, but only those concerned with "public or Federal contracts, property, works, officers, employees, budgets, or funds . . ." 389 F. Supp. at 1178. Characterizing the preceding as "words of limitation," while concurrently viewing NEPA as a measure directed primarily toward environmental protection—not one dealing with contracts, property, employees or funds per se—the court held that § 410 did not prohibit or diminish the application of "such a broad expression of overriding national policy as NEPA." *Id.* at 1178-79.

funds to state or local agencies, remains unresolved. It has been argued that the federal agency is merely the funding agency and does not plan, construct or design the physical characteristics of the proposed project.⁹⁶ Some state or local agencies, in an effort to avoid the major federal action label and its accompanying obligations,⁹⁷ have alleged that *they* made the "major" decisions under NEPA.⁹⁸ This argument has been rejected.⁹⁹ The determination of whether actions by federal agencies are major federal actions within the broad purposes of NEPA¹⁰⁰ depends on whether the particular federal action serves as the catalyst for the resulting environmental impact, irrespective of who or what has actually caused the impact.¹⁰¹

Related to the issue of continuing federal agency responsibility following disbursement of federal funds are questions of state and local obligations upon receipt of these funds. Courts have asserted that a state or local agency should not enjoy the considerable benefits that attend an option to request federal funds without also being held accountable for the inherent federal statutory obligations.¹⁰²

The problem remains, however, whether these inherent obligations would cease upon transfer of funds under a Title I block grant ap-

96. *Conservation Soc'y v. Secretary of Transp.*, 362 F. Supp. 627, 631 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974).

97. It is well established that state or local authorities have no inherent NEPA responsibilities. *See, e.g.*, *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 327 (9th Cir. 1975); *Biderman v. Morton*, 497 F.2d 1141, 1146-47 (2d Cir. 1974); *City of Romulus v. County of Wayne*, 392 F. Supp. 578, 596 (E.D. Mich. 1975); *Tolman Laundry v. Washington*, 6 ERC 1264, 1271 (D.C. Super. Ct. 1974).

98. *Conservation Soc'y v. Secretary of Transp.*, 362 F. Supp. 627, 631 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974). *Cf.* *Ely v. Velde (Ely I)*, 451 F.2d 1130, 1133 (4th Cir.), *rev'g* 321 F. Supp. 1088 (E.D. Va. 1971).

99. *See* cases cited note 98 *supra*. *Cf.* *National Forest Preservation Group v. Butz*, 485 F.2d 408, 411 (9th Cir. 1973), *rev'g* 343 F. Supp. 696 (D. Mont. 1972). *But cf.* *Kings County Economic Community Dev. Ass'n v. Hardin*, 478 F.2d 478 (9th Cir. 1973).

100. *See* note 7 *supra*.

101. *Simmans v. Grant*, 370 F. Supp. 5, 14 (S.D. Tex. 1974).

102. *La Raza Unida v. Volpe*, 337 F. Supp. 221, 227 (N.D. Cal. 1971), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied sub nom.* *California Highway Comm'n v. La Raza Unida*, 417 U.S. 968 (1974).

The fact that enlistment by a state or local agency in a federal program offering financial assistance is purely voluntary has weighed heavily in decisions holding the volunteer to compliance with any applicable federal statutes or regulations. *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1028 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); *Simmans v. Grant*, 370 F. Supp. 5, 12 (S.D. Tex. 1974).

proach.¹⁰³ The issues in *Ely v. Velde*¹⁰⁴ (*Ely I*) regarding block grants administered by the Law Enforcement Administration Agency (LEAA) are directly related to this problem. Plaintiffs there sought an injunction to halt the proposed federal funding and construction of a state prison hospital in their neighborhood. They alleged that LEAA and the state had violated NEPA by not preparing an EIS.¹⁰⁵ Defendant LEAA maintained it was prevented by its own governing statute, Title I of the Omnibus Crime Control and Safe Streets Act of 1968¹⁰⁶ (Safe Streets Act), from complying with NEPA,¹⁰⁷ and that the basis of the Safe Streets Act was a "hands off" policy approach for federal funding to the states.¹⁰⁸ Defendant also argued that since the NEPA requirement of federal agency compliance "to the fullest extent possible"¹⁰⁹ was discretionary, while the Safe Streets Act requirements were non-discretionary, the latter controlled.¹¹⁰

The court rejected defendant's "hands off" argument. The congressional intent in the Safe Streets Act, as interpreted by the court, was to give the states more latitude in the spending of federal money while avoiding federalization of state and local law enforcement agencies.¹¹¹ The court refused to read the congressional response to the problem of protecting local police autonomy as necessarily including a retreat by Congress from the preservation of other societal values—namely, the protection of the environment.¹¹² The court also rejected defendant's allegation that provisions of the Safe Streets Act and of NEPA were irreconcilable, reasoning that the proper approach was to look to the

103. *Cf.* *Carolina Action v. Simon*, 389 F. Supp. 1244 (M.D.N.C. 1975); 40 C.F.R. § 1500.5(a)(2) (1975).

104. 451 F.2d 1130 (4th Cir.), *rev'g* 321 F. Supp. 1088 (E.D. Va. 1971).

105. *Id.* at 1132.

106. 42 U.S.C. § 3701 (1970), *as amended*, (Supp. III, 1973).

107. 451 F.2d at 1133. The Safe Streets Act provided that LEAA was permitted to make grants to a state agency if that agency filed an approved comprehensive plan with LEAA. 42 U.S.C. § 3733 (1970), *as amended*, (Supp. IV, 1974). Under the statute defendant was able to withhold funds only if there had been a "substantial failure" of the applicant to comply with certain explicit provisions. 451 F.2d at 1135.

108. 451 F.2d at 1135.

109. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1970), *as amended*, 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975).

110. 451 F.2d at 1134.

111. *Id.* at 1136.

112. *Id.*

underlying purposes of each act, thereby allowing both statutes to operate if at all possible.¹¹³ The court determined that compliance with NEPA would not undercut the "sought-after efficiency" of local applicants,¹¹⁴ and thus required defendant to file an EIS.¹¹⁵

The purposes of Title I of the CD Act and those of the Safe Streets Act (litigated in *Ely I*) are substantially similar. Both acts, by use of the block grant approach, combine maximum local determination of how the federal allocation will be spent with minimal federal review of the local decision. Just as the concern of Congress in passing the Safe Streets Act was to avoid the inadvertent creation of a federal police force,¹¹⁶ the concern of Congress in passing the CD Act was to "reduce significantly the unnecessary 'second-guessing by Washington'"¹¹⁷ that had been criticized under prior programs.¹¹⁸ Yet the remaining "second-guessing by Washington" in housing and community development must be interpreted in light of HUD's requirements that the applicant coordinate its plans with the policies, standards and regulations of other federal and state laws.¹¹⁹ Thus it is clear that the otherwise unfettered nature of LEAA or HUD Title I block grants will not exempt full federal participation under NEPA.¹²⁰

The question as to whether HUD will be able to avoid the result in *Ely I* may be conditioned on a judicial resolution of when federal

113. *Id.* at 1134-35. *See, e.g.,* AFL-CIO v. Bedell, 506 F.2d 174, 188 (D.C. Cir. 1974); Fanning v. United Fruit Co., 355 F.2d 147, 149 (4th Cir. 1966).

114. 451 F.2d at 1137.

115. *Id.* at 1139.

116. *Id.* at 1136 n.16.

117. S. REP. No. 693, 93d Cong., 2d Sess. 55-56 (1974).

118. *See* notes 24-25 *supra*.

119. In addition to NEPA some laws with which a Title I project must be in harmony are the Preservation of Historic and Archaeological Data Act of 1974, 16 U.S.C. §§ 469-69c (Supp. IV, 1974); and the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (Supp. II, 1972). *See, e.g.,* Housing and Community Development Act of 1974 § 104(d), 42 U.S.C. § 5304(d) (Supp. IV, 1974); 24 C.F.R. § 58.1(a)(3) (1975).

120. *Compare* *Ely v. Velde (Ely II)*, 497 F.2d 252, 254 (4th Cir. 1974), *rev'g* 363 F. Supp. 277 (E.D. Va. 1973), *with* *Carolina Action v. Simon*, 389 F. Supp. 1244, 1247-48 (M.D.N.C. 1975). Plaintiff in *Carolina Action* attempted to obtain an injunction to stop a city and county from building a new county judicial building and city hall. It was alleged that even though the funds for the proposed project came from general federal revenue-sharing monies, the Secretary of the Treasury was still obligated to file an EIS. *Id.* at 1245. The court rejected this allegation, citing the distinction with regards to NEPA drawn in *Ely II* between block grants and general revenue-sharing funds. *Id.* at 1247-48.

funds cease being federal.¹²¹ At present any potential recipient of federal funds may choose to withdraw from the federally funded program rather than comply with NEPA.¹²² A potential recipient, however, may not feign withdrawal by making a mere shift in funds or a bookkeeping adjustment to avoid the requirements of NEPA, while retaining the federal funds initially allocated for its project.¹²³

A question remains, however, whether a project may be deemed at some point to have progressed to the stage that withdrawal can no longer be permitted. In one instance, in which many people had been "encouraged" to leave an area forecasted to be included in the route of a proposed highway, the court held "withdrawal must be clear and unambiguous and prior to causing significant harm either to those who might be displaced by the project or to the environment . . ." ¹²⁴ In another instance, however, emphasis was placed on the optional nature of a state's request for federal funding, which was deemed to be open "virtually until the concrete is poured." Withdrawal from a federally funded project under this latter view would not be restricted merely because the alternative use of state funds might result in an imperfect consideration of the environmental impacts.¹²⁵

121. If HUD's position that after certification approval its NEPA responsibilities are satisfied is accepted by the courts, does the Title I money released by HUD then become state money? This issue has never been litigated.

122. *See Ely v. Velde (Ely II)*, 497 F.2d 252 (4th Cir. 1974), *rev'g* 363 F. Supp. 277 (E.D. Va. 1973); *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); *Citizens for Balanced Environmental Transp., Inc. v. Volpe*, 376 F. Supp. 806 (D. Conn.), *aff'd*, 503 F.2d 601 (2d Cir. 1974).

123. *Ely v. Velde (Ely II)*, 497 F.2d 252, 255-56 (4th Cir. 1974), *rev'g* 363 F. Supp. 277 (E.D. Va. 1973); *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1028 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).

Although it may be impossible after withdrawal to prove that the shift and subsequent retention of allocated federal funds released state funds for the same project, because the state retained federal funds, obtained on the premise of compliance with federal environmental standards, it must either return all federal funds so obtained, or be held to compliance with federal law. *Ely v. Velde (Ely II)*, 497 F.2d 252, 256-57 (4th Cir. 1974), *rev'g* 363 F. Supp. 277 (E.D. Va. 1973).

124. *La Raza Unida v. Volpe (La Raza II)*, 488 F.2d 559, 563 (9th Cir. 1973), *cert. denied sub nom. California Comm'n v. La Raza Unida*, 417 U.S. 968 (1974).

125. *Citizens for Balanced Environment and Transp., Inc. v. Volpe*, 376 F. Supp. 806, 813 (D. Conn.), *aff'd*, 503 F.2d 601 (2d Cir. 1974). *Cf. Homeowners Emergency Life Protection Comm. v. Lynn*, 388 F. Supp. 971, 974-75 (C.D. Cal. 1974).

III. POLICY CONSIDERATIONS

A. *A Question of Maturity*

A key to the implementation of section 104(h) is the "environmental maturity" of the applicants. The requirement that the applicant possess both the legal capacity¹²⁶ plus *actual* ability to carry out environmental reviews could prove to be a major stumbling block for the use of Title I funds. Despite a curious statement by the Chairman of CEQ that the increased ability of localities to undertake environmental review was a "very significant development in recent years,"¹²⁷ there is substantial evidence to the contrary.¹²⁸

By disclaiming further responsibility after disbursement of federal funds, HUD apparently has intended a complete departure from the NEPA arena, leaving little substantive parting environmental advice

126. See 24 C.F.R. § 58.5 (1975). A criticism of this provision is that it contains a rebuttable presumption that the applicant *has* the capacity to conduct effective environmental reviews, rather than having a rebuttable presumption that the applicant *does not* have the capacity.

127. 120 CONG. REC. S 14,888 (daily ed. Aug. 13, 1974).

128. S. CARTER, M. FROST, C. RUBIN & L. SUMEK, ENVIRONMENTAL MANAGEMENT AND LOCAL GOVERNMENT (1974) (prepared for Office of Research and Dev., U.S. Environmental Protection Agency) [hereinafter cited as CARTER]. EPA surveyed local government officials in medium to large size cities and counties. The officials were asked for their interpretation of the word "environment." The officials were given a choice of four definitions, and failed to reach a consensus on any one. *Id.* at 2. Furthermore, barely 30% of the nation's cities and counties responding to the survey had formal requirements for an EIS. *Id.* at 6. Excluding cities in California, the national percentage of cities requiring an EIS is only 17%. *Id.* at 47.

A quick canvass of the problems that city and county officials labeled as their major obstacles to environmental management brings to view nearly the whole spectrum of urban riddles. The key obstacle to environmental management, as viewed by the officials, was inadequate finances. Nearly 75% of the cities and over two-thirds of the counties named lack of finances as their foremost obstacle. *Id.* at 78; N.Y. Times, May 30, 1975, at 1, col. 8; *id.*, May 27, 1975, at 14, cols. 5-8. See generally Glendening, *Municipal Finances: Change and Continuity*, 6 URBAN DATA SERV. No. 12 (1974).

A substantial number of officials labeled lack of expertise, fragmentation of responsibility between levels of government, insufficient enabling legislation, inadequate methods to measure problems, and an absence of technology as other major obstacles. CARTER, *supra*, at 78-80. This multitude of unsolved problems explains in part why just over half of those cities using an EIS felt it was effective. *Id.* at 174. *But cf.* Bowie, Maryland Comm'n for Environmental Quality, *The Role of Environmental Impact Statements in Local Government Decision Making*, 6 URBAN LAW. 95 (1974); Henry, *A Local Government Administrator's View of Environmental Management*, in MANAGING THE ENVIRONMENT 57 (1973) (Office of Research and Dev., U.S. Environmental Protection Agency).

for local officials.¹²⁹ While HUD has offered to help the local applicants establish environmental review systems, it has done so only with the understanding that HUD "will not become involved in those systems."¹³⁰ The situation is particularly tenuous since the important decision of whether an EIS is required, and the process leading to that decision, is left "largely within the discretion of the applicant."¹³¹ Although courts have ruled that the degree of applicant discretion allowed in environmental reviews is not unlimited,¹³² it is well established that such discretionary decisions will not be reversed simply because the court would have attached different weights to the competing interests considered.¹³³ Whether applicants will be able to defend their discretionary decisions from charges of arbitrariness, however, remains to be seen.

At first glance the provision in the Regulations calling for the preparation and maintenance of a detailed Environmental Review Record¹³⁴ (ERR) seems to be a welcome addition to the area of discretionary applicant decisionmaking, an area too often plagued with unsubstantiated, dubious reasoning.¹³⁵ If this section were to operate at an environmentally effective level it could serve as an ever present check on an applicant's compliance with NEPA to "the fullest extent pos-

129. See 24 C.F.R. § 58.1(a)(2) 1975.

130. HUD Memorandum on Environmental Review Procedures from Walter L. Eschbach, Environmental Clearance Officer for St. Louis, Dec. 23, 1974, at 2 (supplementary information for Community Development Workshop) (on file with *Urban Law Annual*).

131. 24 C.F.R. §§ 58.5(d), 58.15 (1975).

132. See, e.g., *Jones v. District of Columbia Redev. Land Agency*, 499 F.2d 502, 510 (D.C. Cir. 1974); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir.), *rev'g* 359 F. Supp. 1178 (D. Wyo. 1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). See generally F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* (1973); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

133. See, e.g., *Citizens Ass'n v. Zoning Comm'n*, 477 F.2d 402, 408 (D.C. Cir. 1973).

134. Essentially, the ERR calls for the preparation and maintenance by the applicant of a detailed written account of each step in the environmental review process, and is to be available for review on request. Among other things, the ERR must (1) include a description of the project, (2) have documented proof that each step in the environmental review process has been made, and (3) be able to support the level of clearance finding that was made. See 24 C.F.R. § 58.11 (1975).

135. A good example of such dubious reasoning by an administrative agency is contained in a Draft EIS submitted by a highway department. The Draft EIS states, "Just as the old wagon road over Snoqualmie Pass was reclaimed by nature

sible."¹³⁶ The ERR, nevertheless, will prove to be only as effective in its NEPA "watchdog" role as those who are using it want it to be.

Despite judicial warning against mechanical compliance with NEPA,¹³⁷ there seems to be an unfortunate tendency on the part of agencies to permit participation in environmental reviews to become a kind of "bureaucratic gamesmanship," wherein more emphasis is placed on molding an EIS to fit the contours of a predetermined program and to withstand judicial review, than is put on composing a project in harmony with environmental needs.¹³⁸ An ERR could be a valuable environmental tool if put into the right hands. Yet, given the current state of environmental reviews on the local level¹³⁹ and evidence of an inclination on the local level toward environmental evasion,¹⁴⁰ applicants for Title I funds hardly seem to be the proper hands for such a tool.¹⁴¹

in less than 100 years, so also would this project revert back to nature in time." The project so described was a seven-lane concrete highway. *Brooks v. Volpe*, 350 F. Supp. 269, 278-79 & n.39 (W.D. Wash. 1972), *aff'd*, 487 F.2d 1344 (9th Cir. 1973).

136. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1970), *as amended*, 42 U.S.C.A. § 4332(2) (D) (Pamphlet No. 5, 1975).

137. *See* notes 78-80 and accompanying text *supra*.

138. Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511, 516 (1973).

139. *See* text at note 128 *supra*.

140. *See, e.g.*, *James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, 359 F. Supp. 611 (E.D. Va.), *aff'd mem.*, 481 F.2d 1280 (4th Cir. 1973). The Commissioner of the Virginia Highway Department testified that "wherever possible in Virginia, federal funds are used on rural rather than urban projects because there is likely to be more environmental controversy over urban projects and the federal law requirements may thus be more difficult to meet than they would be in a rural area." *Id.* at 631.

141. *See* Letter from East-West Gateway Coordinating Council to HUD, Nov. 8, 1974, on file with *Urban Law Annual*. To compound this problem, in a report just submitted to Congress by the Comptroller General, HUD itself was severely criticized for its failure to initiate and put into action "an adequate program for assessing the environmental impacts of projects proposed for its approval." COMPTROLLER GENERAL, ENVIRONMENTAL ASSESSMENT EFFORTS FOR PROPOSED PROJECTS HAVE BEEN INEFFECTIVE—DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 37 (1975). In a survey of five HUD field offices the General Accounting Office (GAO) reported that in the span of only 19 months the offices had approved:

- 114 projects, or 45 percent, without ever preparing any type of environmental clearance.
- 20 projects, or 8 percent, before preparing required clearances, and
- 5 projects, or 2 percent, after preparing only normal clearances rather than the required special clearances.

B. A Question of Economics

One great concern to local agencies is the economics involved in

Id. at 9. In sum, the five offices had followed required procedures for environmental clearances in only 36% of the total projects. *Id.*

The failure of these five offices to be environmentally responsible was not an isolated incident, but seems to exemplify HUD's whole attitude toward compliance with NEPA. HUD has recently stated:

HUD rejects the premise fervently held in some quarters that the conscientiousness of environmental protection can be measured by the number of . . . environmental impact statements (EIS's) produced by an agency. HUD has limited manpower for its workload, and we consider an EIS in association with a project proposal that ultimately will be rejected to be a waste of scarce manpower. We prefer to disapprove the environmentally unsound projects well before they reach the EIS stage, or to have modified them along environmentally acceptable lines to carry out the spirit of NEPA without an EIS review.

Id. at 41. As a statistical corroboration of HUD's philosophy, figures show that of an estimated 30,000 project proposals requiring environmental clearances processed by HUD over nearly a five-year span, only 81 were deemed to be "major Federal actions" and thus requiring an EIS. Even allowing for the fact that some of the 30,000 were quite small, such an environmental record was far from laudatory, and prompted a response from CEQ which stated the belief that "a much larger percentage" of EIS's should have been prepared. *Id.* at 11. Criticisms of HUD's environmental inadequacies have not emanated from strictly environmentally oriented agencies, instead serious criticism has come from a wide assortment of federal, state and local agencies, such as the Advisory Council on Historic Preservation, the National Park Service, the Virginia State Water Control Board, the U.S. Department of Health, Education, and Welfare, the Texas Air Control Board, the U.S. Department of Commerce, the City of Virginia Beach, Virginia, and the Southeastern Virginia Planning District Commission. *Id.* at 17, 25, 26. See also 5 ENVIRONMENTAL RPT. CURRENT DEV. 1199-1202 (1974).

The GAO Report continues by pointing out what GAO left were the three major contributing factors to HUD's environmental inadequacies, namely a lack of priority and emphasis on environmental problems, inadequate guidance from top HUD levels, and insufficient training for environmental clearance personnel. COMPTROLLER GENERAL, *supra*, at 31-35. In conclusion GAO stated:

HUD's view on the use of an [EIS] is not consistent with the spirit and intent of NEPA and is one of the factors contributing to the weaknesses noted in HUD's environmental clearance process. HUD's position strongly implies that it believes—even before it knows all the facts which NEPA requires it to obtain—that the projects it has determined should receive an [EIS] are environmentally sound. It implies that if critics raise questions or suggestions that the project be rejected or modified, that these questions or criticisms can be discounted because the HUD decisions are superior to these critics. This philosophy was clearly evident on the [EIS's] we reviewed.

Id. at 42. To remedy this situation four recommendations were offered to HUD: (1) that HUD raise the environmental function to as high an administrative level as would be practical; (2) that HUD make an affirmative effort to make NEPA compliance "an integral part of HUD's planning and decisionmaking process"; (3) that HUD make more efficient use in the actual environmental review process of other federal, state and local "environmental expertise"; and (4) that HUD establish a training program specifically aimed at assisting its environmental clearance personnel in drafting more adequate EIS's. *Id.* at 48.

conducting an environmental review.¹⁴² HUD has offered applicants up to ten percent of the Title I funds allocated to them in advance of certification and application approval.¹⁴³ These funds will be made available for a number of pre-project planning activities, including the planning and conduct of environmental reviews.¹⁴⁴ Whether an applicant already short of financial resources will feel disposed to sacrifice ten percent of its Title I allocation for what many cities and counties view as an impotent procedure, however, is doubtful.¹⁴⁵ Since litigation under NEPA can consume large amounts of time and money,¹⁴⁶ an applicant may decide that both would be better spent in the "manufacture" of a comprehensive, yet superficial, ERR.¹⁴⁷ Furthermore, the cost of an EIS may greatly exceed the allotted ten percent advancement.¹⁴⁸ In addition, after the initial environmental expenditure of the ten percent, an applicant may decide to forego the use of federal funds and withdraw its project from the Title I program. While this result might be considered a financial loss, HUD views the expenditure as a worthwhile gamble.¹⁴⁹ On the other hand, the ten percent allotment might be used as a probe to test public reaction to the project. If the reaction proved adverse, the applicant would still be safe in withdrawing from the Title I funding program. Because the only federal money spent was the ten percent advance allocation, the project would not be a major federal action. The applicant, however, could continue the project to completion by using its own funds—thus avoiding NEPA. If this were the case, then it certainly could be said the ten percent *was* lost.

142. See CARTER, *supra* note 128, at 78.

143. Final HUD Reg. § 570.302, 40 Fed. Reg. 24,700 (1975).

144. 24 C.F.R. § 58.9 (1975).

145. See CARTER, *supra* note 128, at 174.

146. A recent environmental suit was stated to have consumed over 4,500 hours of the lawyers' time. *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1032 (D.C. Cir. 1974), *rev'd sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

147. Compare *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 426 (5th Cir. 1973), with *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 880 (D. Ore. 1971). See also *Arizona Pub. Serv. Comm'n v. FPC*, 483 F.2d 1275, 1282 (D.C. Cir. 1973).

148. Recent GAO studies have shown that some federal agency EIS's cost as much as \$150,000 to \$250,000. 5 ENVIRONMENT RPTER. CURRENT DEV. 260 (1974).

149. Interview with Walter L. Eschbach, HUD Environmental Clearance Officer for St. Louis, in St. Louis, Feb. 4, 1975.

C. Retreat from Federal Accountability

The significance of the passage of the CD Act to NEPA must be viewed in conjunction with other current developments in environmental regulation. Acceptance of the Federal Water Pollution Control Act Amendments of 1972¹⁵⁰ and the adoption by the Federal Highway Administrator of Certification Acceptance,¹⁵¹ for example, if taken alone, offer only a hint of a general federal pullback in environmental vigilance. With the enactment of section 104(h) of the CD Act, the retreat can no longer be disguised.¹⁵²

The Federal Water Pollution Control Act Amendments of 1972 in effect exempt nearly all of EPA's water pollution control activities

150. 33 U.S.C. §§ 1251-1376 (Supp. II, 1972).

151. 39 Fed. Reg. 17,309 (1974). See generally Note, *On the Road Again: Certification Acceptance Forces NEPA to Adapt*, 4 ENVIRONMENTAL L. RPTR. 50023 (1974) [hereinafter cited as *On the Road Again*].

152. See 120 CONG. REC. S 14,883-89 (daily ed. Aug. 15, 1974). Senator Jackson warned that "last moment" inclusions in conference reports of provisions exempting NEPA must be stopped. *Id.* at S 14,883. Neither the House nor the Senate had seen § 104(h) prior to the report of the conference committee. By strategically inserting the NEPA provision into the conference report, the backers of § 104(h) were able to avoid having to go before the Senate Interior and Insular Affairs Committee chaired by Senator Jackson. Such a move could hardly be termed fortuitous. Senator Jackson stated that while he would not vote against the entire CD Act because of § 104(h), he asserted that he would fight a similar exemption in a mass transportation bill as reported by a House committee. *Id.* at S 14,888-89. It may be noted that the provision of the transportation bill Jackson opposed was conspicuously absent from that bill as passed. See National Mass Transportation Assistance Act of 1974 § 103(a), 49 U.S.C. § 1604 (Supp. IV, 1974), amending Urban Mass Transportation Act of 1964 § 5, 49 U.S.C. § 1604 (1970).

Further evidence of a general tendency toward relaxing environmental vigilance can be seen in a number of other recent developments. See, e.g., *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 496 F.2d 1017, 1022-23 (5th Cir. 1974) (court resigned itself to accept a congressional decision exempting an expressway from both NEPA and § 4(f) of the Department of Transportation Act); Strohschein, *NEPA's Impact on Federal Decisionmaking: Examples of Noncompliance and Suggestions for Change*, 4 ECOLOGY L.Q. 93 (1974) (discussion of a number of federal detours from NEPA, specifically describing the Prototype Oil Shale Leasing Program and the winter fuel shortage of 1974); Note, *The Trans-Alaska Pipeline and Strict Liability for Oil Pollution Damage*, 9 URBAN L. ANN. 179 (1975) (discussion of possible ramifications of congressional approval of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1651 (Supp. III, 1973)); 10 URBAN L. ANN. 297 (1975) (examination of the reasoning of a recent decision by Justice Rehnquist, *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), which allows states in certain situations to grant individual variances from national ambient air quality standards).

from NEPA's EIS requirements.¹⁵³ Although the Certification Acceptance procedures¹⁵⁴ did not exempt the federal-aid highway system from the preparation of an EIS, their similarity to the CD Act's section 104(h) is unmistakable. Like the basic premise of section 104(h), the Certification Acceptance procedures for the federal-aid highway system rest on the theory that "the State highway departments have reached a degree of maturity such that they no longer need careful and detailed scrutiny by the Federal Highway Administration."¹⁵⁵ FHWA, while sharply reducing federal involvement,¹⁵⁶ stopped short of attempting to renounce all its NEPA responsibilities.¹⁵⁷

Apparently, proponents of section 104(h) in Congress felt that the step from FHWA's Certification Acceptance to their own creation was a small one. In terms of NEPA's requirement of federal accountability, however, the two procedures are far apart. A primary purpose of NEPA was "to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at

153. See Federal Water Pollution Control Act Amendments of 1972 § 511, 33 U.S.C. § 1371 (Supp. II, 1972). The concern over the withdrawal of much of NEPA's applicability to FWPCA centers around patterns of development.

"Development of residential and commercial areas in previously undeveloped areas, or a change in intensity of development, may be viewed as a process of disruption and restoration of an ecological balance. . . . If an ecosystem balance is disrupted by the introduction of some new factor, a different ecosystem will be generated involving a new balance consisting of changed species, composition, interrelation, and function within the new environment." REAL ESTATE RESEARCH CORP., THE COSTS OF SPRAWL—LITERATURE REVIEW AND BIBLIOGRAPHY 10 (1974) (prepared for the Council on Environmental Quality; the Office of Policy Dev. and Research, U.S. Dep't of Housing and Urban Dev.; and the Office of Planning and Management, U.S. Environmental Protection Agency). Recognizing the potential effect of development, and that "[s]ewers and sewage treatment plants are replacing highways as prime determinants of the location of development . . ." leaves serious speculation as to whether removing NEPA from the FWPCA sphere was proper. See CEQ FIFTH ANNUAL REPORT, *supra* note 56, at 36. For a general discussion of the NEPA aspects of the FWPCA, see Phillips, *Developments in Water Quality and Land Use Planning: Problems in the Application of the Federal Water Pollution Control Act Amendments of 1972*, 10 URBAN L. ANN. 43, 94-100 (1975).

154. 23 C.F.R. pt. 640 (1975).

155. 39 Fed. Reg. 17,309 (1973).

156. 23 C.F.R. § 640.5(g) (1975).

157. *Id.* § 640.5(i). The long-range effects of the FHWA switch away from step-by-step review and approval of each individual local project action to Certification Acceptance, has yet to be seen. The immediate effects of the switch, nevertheless, have already served to blur state highway construction procedures, thereby making it almost impossible to choose the best time in the decisionmaking process to require an EIS. Note, *On the Road Again*, *supra* note 151, at 50030.

the same time maintain and enhance the quality of the environment."¹⁵⁸ While FHWA stayed within the perimeter of NEPA,¹⁵⁹ section 104(h), if allowed to operate under HUD's interpretation, will mark a pronounced departure from the NEPA sphere of federal accountability.¹⁶⁰

There are two inherent environmental dangers involved in a desertion of the NEPA concept of federal accountability. First, control over the cumulative effects of scattered local projects will be eliminated.¹⁶¹ Second, a local applicant, unlike a federal agency, is under no obligation to answer to Congress or the President¹⁶² for any of its discretionary actions.¹⁶³

The combination of these two dangers could result in the applicant not only determining its own community development policy, but indeed, affecting interstate and possibly international environmental policy.¹⁶⁴ An applicant could decide in its discretion that a particular

158. S. REP. NO. 296, 91st Cong., 1st Sess. 8 (1969).

159. See note 157 *supra*. For a recent indication of congressional interpretation regarding FHWA's relationship to NEPA see note 71 *supra*. Although H.R. 3130 as passed amends NEPA, the bill specifically states that the amendment will "not relieve the Federal official of his responsibilities for the scope, objectivity, and content . . ." of the EIS. 121 CONG. REC. H 3001 (daily ed. Apr. 21, 1975).

160. Compare 24 C.F.R. § 58.32 (1975), with 40 C.F.R. § 1500.6(a) (1975).

161. An applicant in eastern Missouri, for example, will have enough trouble preparing an adequate EIS for that area, let alone having to consider environmental effects resulting from other applicants' projects in other parts of Missouri, as well as in Illinois, Iowa or Kentucky. The fact that the local official in eastern Missouri consented to the jurisdiction of the federal courts is hardly a solution to environmental problems in Kentucky resulting from the cumulative effects of small projects in Missouri, Iowa and Illinois. Cf. National Environmental Policy Act of 1969 § 102(2)(C)(iv), 42 U.S.C. 4332(2)(C)(iv) (1970); Housing and Community Development Act of 1974 § 101(d)(2), 42 U.S.C. § 5301(d)(2) (Supp. IV, 1974); 40 C.F.R. § 1500.6 (1975).

162. *But cf.*, e.g., *Scientists' Institute for Pub. Information, Inc. v. AEC*, 481 F.2d 1079, 1088 (D.C. Cir. 1973), which held in part that a major federal action under NEPA exists "not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment."

163. *But cf.* *Molokai Homesteaders Cooperative Ass'n v. Morton*, 356 F. Supp. 148, 151 (D. Hawaii 1973), *aff'd*, 506 F.2d 572 (9th Cir. 1974).

164. See *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975), *rev'g* 378 F. Supp. 753 (S.D. Ill. 1974), where the court held:

[S]tate agencies simply are not in a position to evaluate environmental consequences of a national or worldwide scope. To require them to do so is to invite substantial duplication of effort and widely varying results. State agencies quite properly look first to the interests of their own state; this is inherent in the design of a federal union. And such agencies are subject to political

multi-purpose urban renewal project, while admittedly entailing the potential for considerable ecological damage and disturbance outside its jurisdiction, involved sufficient off-setting local economic and social benefits to justify approval.¹⁶⁵ HUD's interpretation of section 104 (h) would seem to tie congressional hands absent the initiation of supplementary legislation. Neighborhood opposition standing alone would not be determinative,¹⁶⁶ nor would arguments challenging the applicant's finding of alleged blight.¹⁶⁷ The applicant need only allege that while Congress may have expressed concern for protection of the natural environment, it has also articulated a strong national policy to eliminate blight and slums and to prevent blighting influences.¹⁶⁸ The problem, then, is that the very language of the CD Act presupposes that urban renewal has a beneficial, rather than a detrimental effect on the urban environment.¹⁶⁹ It has been stated that most environmental problems are a matter of aesthetics, and that only the affluent can afford aesthetics.¹⁷⁰ Yet surely the bulldozing of an urban neighborhood has just as much environmental impact as the construction of a highway through a rural area.¹⁷¹ Consideration of the environ-

pressures which can often make detached evaluation of their own projects quite difficult. The result is that state drafted impact statements may slight or completely ignore essential national concerns

Id. at 778; GEQ FIFTH ANNUAL REPORT, *supra* note 56, at 399-400, 427-32.

165. *Cf.* *Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975), *aff'g* 376 F. Supp. 987 (W.D. Wash. 1974); *Natural Resources Defense Council, Inc. v. TVA*, 502 F.2d 852, 854 (6th Cir. 1974); *Citizens Against the Destruction of Napa v. Lynn*, 391 F. Supp. 1188, 1190-95 (N.D. Cal. 1975). *See also* *Kings County Economic Community Dev. Ass'n v. Hardin*, 478 F.2d 478, 481 (9th Cir. 1973).

166. *See* *Citizens Against the Destruction of Napa v. Lynn*, 391 F. Supp. 1188, 1190-95 (N.D. Cal. 1975); *Simmans v. Grant*, 370 F. Supp. 5, 16 (S.D. Tex. 1974).

167. *See, e.g.,* *Berman v. Parker*, 348 U.S. 26 (1954); *Lyons v. Camden*, 48 N.J. 524, 226 A.2d 625 (1967).

168. *Housing and Community Development Act of 1974* § 101, 42 U.S.C. § 5301 (Supp. IV, 1974); *cf.* *Brooks v. Volpe*, 350 F. Supp. 269, 277 (W.D. Wash. 1972), *aff'd*, 487 F.2d 1344 (9th Cir. 1973).

169. *See* *Housing and Community Development Act of 1974* § 101(b)(1), 42 U.S.C. § 5301(b)(1) (Supp. IV, 1974); *Durchslag & Junger, HUD and the Human Environment: A Preliminary Analysis of the Impact of the National Environmental Policy Act of 1969 Upon the Department of Housing and Urban Development*, 58 IOWA L. REV. 805, 857 (1973).

170. *See* *Hagman, NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URBAN L. ANN. 3, 41 (1974).

171. *Durchslag & Junger, supra* note 169, at 858. *See* *Trinity Episcopal School Corp. v. Romney*, Nos. 75-7061, 7092 (2d Cir., July 24, 1975); GEQ FIFTH ANNUAL REPORT, *supra* note 56, at 12. *Cf.* *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, 359 F. Supp. 611, 631 (E.D. Va.), *aff'd mem.* 481 F.2d 1280 (4th Cir. 1973).

mental impact, consequently, should not depend on a factor as unrelated as the economic status of those affected.¹⁷²

The retention by HUD of a significant NEPA role in local projects would allow Congress and the President to maintain a check on applicants who stray from desired national environmental goals. Without this check, the major responsibility for protecting the environment will have to be shouldered by intervenors,¹⁷³ and, ultimately, by the courts.¹⁷⁴

172. Cf. *Garrett v. City of Hamtramck*, 335 F. Supp. 16, 25 (E.D. Mich. 1971). See generally M. KRIEGER, *THE POVERTY OF POLICY FOR THE ENVIRONMENT: A WORKING PAPER* (1969) (prepared for Center for Planning and Dev. Research & Dept. of Landscape Architecture, Univ. of Cal., Berkeley); P. MARCUSE, *CONSERVATION FOR WHOM* (1973) (prepared for School of Architecture and Urban Planning, U.C.L.A.); A. SOLOMON, *HOUSING THE URBAN POOR 178-79* (1974); Lampman, *What Does It Do for the Poor?—A New Test for National Policy*, 34 PUB. INTEREST 66 (1974).

173. Cf. *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328, 336 (2d Cir. 1974), *aff'g* 360 F. Supp. 1057 (S.D.N.Y. 1973). For a discussion of attorney's fees in environmental cases see *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *rev'd sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Rich v. City of Benicia*, 7 ERC 1439 (Cal. Super. Ct. 1974).

174. It was HUD's opinion that passage of the CD Act shifted the responsibility of overseeing a local agency's EIS to the federal courts. Interview with Walter L. Eschbach, HUD Environmental Clearance Officer for St. Louis, in St. Louis, Feb. 4, 1975.

A major aspect of the federal accountability issue disregarded by proponents of § 104(h) is that the inclusion of mandatory jurisdiction in the federal courts misses the goal NEPA was intended to accomplish. The harm courts are concerned with in alleged NEPA violation cases is not strictly harm to the environment, but instead the failure of administrative decisionmakers to consider environmental factors in the manner mandated by NEPA. *Jones v. District of Columbia Redev. Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974). Regardless of popular notions that many federal, state and local administrative agencies are merely the bureaucratic puppets of those they regulate, it is through this arm of government that Congress initially assigned the chore of environmental supervision. See Cramton & Berg, *supra* note 138, at 534; LeGates, *supra* note 24, at 229.

Courts have acted to sustain the status quo where an indefensible administrative decision has placed it in jeopardy. *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1323 (8th Cir. 1974), *aff'g* 358 F. Supp. 584 (D. Minn. 1973). In the final analysis, however, it is the administrative agency, acting through "action forcing" procedures intended to facilitate public participation and comment, that is to provide the initiative for necessary modifications of the status quo. See Cramton & Berg, *supra* note 138, at 534. See generally Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 61 GEO. L.J. 525 (1972).

D. *A Broad v. Narrow Interpretation
of Section 104(h) and NEPA*

If HUD retains its interpretation of section 104(h), and its view is not judicially accepted, the federal courts will have to determine at what point *after* the initial application for Title I funds an EIS by HUD could be required.¹⁷⁵ This determination could be made by utilizing the tiered impact statement approach.¹⁷⁶ This approach, while allowing for a broad initial EIS, would call for the filing of subsequent EIS's whenever "major *individual actions* . . . have significant environmental impacts *not adequately evaluated*"¹⁷⁷ in the broad initial statement required for all major federal actions.

Those who support HUD's withdrawal from any NEPA responsibilities and who oppose the tiered impact statement approach may argue that the approval of the application, request for funds, and the certification called for in the Regulations¹⁷⁸ delineate the only point at which a major federal action takes place.¹⁷⁹

If courts are to protect NEPA's primary purpose of coordinating the disparate environmental policies of different federal agencies,¹⁸⁰ how-

175. See 24 C.F.R. § 58.1(a)(2) 1975; text at note 183 *infra*.

176. See 40 C.F.R. § 1500.6(d)(1) (1975); Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 238, 362-65 (1974); Note, *On the Road Again*, *supra* note 151, at 50028-29.

177. 40 C.F.R. § 1500.6(d)(1) (1975) (emphasis added).

178. 24 C.F.R. § 58.30 (1975).

179. A similar argument was put forth in a recent decision involving municipal dam construction. The city had begun to build the dam while its application for federal assistance was pending. Plaintiff sought a preliminary injunction halting construction until an EIS was filed by HUD. The court held that a preliminary injunction was not warranted. The court distinguished the dam from a highway, saying that whereas highway construction has a number of discrete stages, the construction of the dam involved only one "major federal action," that being the actual point the federal funds were allocated. Since funds had not yet been allocated, the court not only found that there was no city-federal partnership, but went on to hold there was no federal involvement at all. Homeowners Emergency Life Protection Comm. v. Lynn, 388 F. Supp. 971, 974-75 (C.D. Cal. 1974). This case might be distinguished from cases arising out of an application of a tiered impact statement approach on the CD Act because of the specific statutory descriptions of distinct stages involved in those activities eligible for Title I funds. Housing and Community Development Act of 1974 § 105(a), 42 U.S.C. § 5305(a) (Supp. IV, 1974).

180. See, e.g., Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 380 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

ever, NEPA must be broadly, not narrowly interpreted.¹⁸¹ Courts should allow enough flexibility in the CD Act and NEPA to enable both acts to function "to the fullest extent possible."¹⁸² This goal would be best accomplished by the tiered impact statement approach, which would make continuing environmental review possible during definite stages of development, such as acquisition of real property, relocation of the inhabitants, clearance, demolition, removal of solid waste, disposition of any real property acquired under Title I, and, finally, actual construction, reconstruction, rehabilitation or installation of public works.¹⁸³

CONCLUSION

NEPA need not be an all or nothing proposition. Champions of NEPA are not prevented by their alliance to the cause of environ-

181. *See, e.g.*, Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 375, 380 (D.C. Cir.), *rev'g* 359 F. Supp. 1178 (D. Wyo. 1973); Citizens Organized to Defend Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (S.D. Ohio 1972).

182. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1970), *as amended*, 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975).

183. *See* Housing and Community Development Act of 1974 § 105(a), 42 U.S.C. § 5305(a) (Supp. IV, 1974). A practical example of the tiered impact statement approach might involve an initial broad EIS covering the release of funds for the entire project. This in turn might be followed by a more specific EIS dealing particularly with the effects relocation of the inhabitants would have on low-income housing supply. Next, another EIS might take a "hard look" at the adverse effects clearance or demolition might have on local noise and air quality levels. The removal and disposal of solid waste might also be deemed a stage of sufficient magnitude in that, without adequate attention in an EIS on the subject, future development in the area might be hampered. In addition, an EIS might be called for to examine whether or not undesirable increases in housing costs for low-income residents, evictions or abandonment might result from a construction, reconstruction or rehabilitation program. *See* Bois D'Arc Patriots v. City of Dallas, as reported in Community Dev. Digest No. 11-16, Aug. 19, 1975, at 2. For an example of an EIS by HUD in which this very approach would have been functional and probably advisable if done by a local applicant see Draft Environmental Impact Statement, Rpt. No. HUD-R07-EIS-74-06D (May, 1974) (prepared by St. Louis Area Office, Kansas City Regional Office, U.S. Dep't of Housing and Urban Dev.) (impact on the environment of the proposed demolition of the Pruitt-Igoe public housing complex in St. Louis). *Cf., e.g.*, Sierra Club v. Froehle, 392 F. Supp. 130 (E.D. Mo. 1975), which held that the river basin in which the Corps of Engineers planned to build a dam could be divided into three sub-basins. Each sub-basin was described as having "distinctive hydrologic, geographic, demographic, environmental, economic and sociological characteristics," and therefore was "an appropriate unit for a separate environmental evaluation." *Id.* at 135. *But see* Robinswood Community Club v. Volpe, 506 F.2d 1366, 1370 (9th Cir. 1974); Citizens Against the Destruction of Napa v. Lynn, 391 F. Supp. 1188, 1193-95 (N.D. Cal. 1975).

mental protection from backing comprehensive legislation aimed at solving other dilemmas faced by urban communities. NEPA was meant to reconcile conflicts, not eliminate needed projects.¹⁸⁴ The question is, nevertheless, whether the CD Act will be construed in an analogous manner.

Section 104(h) may very well turn out to be the pivotal section for Title I of the CD Act. Expenditures of Title I funds may rise or fall depending upon how this section is eventually interpreted.¹⁸⁵ In light of a slumping housing industry¹⁸⁶ and the desperate need for aid to our dying central cities,¹⁸⁷ it is unfortunate that HUD has taken the CD

184. See 120 CONG. REC. S 14,889 (daily ed. Aug. 13, 1974).

185. Over 70% of all the EIS's filed by HUD through the first quarter of 1974 would have been subject to the procedures in § 104(h). *Id.* at S 14,884. In addition, figures show that upwards of 80% of all city activities which would have required a federally supervised EIS prior to the passage of the CD Act, will now also fall under § 104(h). See CARTER, *supra* note 128, at 188. If these procedures as implemented by local applicants fail to satisfy judicial standards for an adequate EIS, the applicant will find itself tied up in litigation while 90% of its allotted Title I funds remain beyond its reach. The most recent development on this issue is a suit pending in Dallas, Bois D'Arc Patriots v. City of Dallas, as reported in Community Dev. Digest, No. 11-16, Aug. 19, 1975. Plaintiffs there, while challenging nearly every aspect of the procedures followed in the granting of \$4 million in Title I funds to Dallas, include an allegation that Dallas' filing of a "Notice of Finding of No Significant Effect on the Environment" was a breach of its NEPA responsibilities. The suit specifically charges that "plans to expand a code enforcement and housing demolition and code violation removal project will have numerous adverse effects" and therefore an EIS should be filed. *Id.* at 1. While this suit is pending Dallas will not be able to receive more than 10% of its \$4 million grant.

The void left by HUD in the area of environmental reviews may not be filled by the applicants for some time, leaving one to wonder whether much if any of the CD Act Title I funds will be used in harmony with environmental considerations. Unfortunately, it is not likely that the states will rush to fill the environmental void. A recent survey shows that only Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Carolina, Puerto Rico, South Dakota, Texas, Virginia, Washington and Wisconsin have environmental measures that approach being effective. 5 102 MONITOR, No. 5 at 15-23 (1975). See also T. TRZYNA, ENVIRONMENTAL IMPACT REQUIREMENTS IN THE STATES: NEPA'S OFFSPRING, (1974) (prepared for Office of Research and Dev., U.S. Environmental Protection Agency); Hagman, *supra* note 170.

186. See generally N. KEITH, POLITICS AND THE HOUSING CRISIS SINCE 1930 (1973); 121 CONG. REC. E 1894-96 (daily ed. Apr. 21, 1975) (remarks of Representative Harrington).

187. See generally G. Sternlieb, The Abandoned Building as a Clue to the Future of the American City, July 23, 1970 (testimony prepared for the Senate Subcomm. on Housing and Urban Affairs of the Banking and Currency Comm.); Moore, Livermore & Galland, *Woodlawn: The Zone of Destruction*, 30 PUB. INTEREST 41 (1973).

Act as a mandate to assign the foregoing problems to a group of environmental neophytes.¹⁸⁸

The goal of providing decent housing and maintaining viable urban communities involves just as many perplexing dilemmas as that of providing and maintaining a quality environment. Perhaps this is the best argument for allowing the CD Act and NEPA to operate conjunctively, on a separate but equal basis.

Title I of the CD Act may represent an effort by Congress to stay abreast of today's housing and tomorrow's environmental problems. Congress' best intentions, however, may be for naught if self-interest groups succeed in stymieing NEPA by promoting an overly localized environmental cost-benefit analysis¹⁸⁹ derived from a narrow interpretation of section 104(h).¹⁹⁰ The magnitude of such a development, although not immediately discernible, would be inescapable. A narrow interpretation could only result in cutting out the heart of urban environmental review by setting the stage for the probable transformation of the EIS into a bureaucratic formality. If this were to occur, the end of NEPA's effective life would surely be soon to follow.

188. "Considering HUD's lack of priority and emphasis on assessing the environmental impacts of projects which it approves, the Congress may wish to question HUD during future hearings on how effectively the localities are carrying out their responsibilities for environmental review of proposed projects." COMPTROLLER GENERAL, *supra* note 141, at 49. After considering the state of environmental review on both the local level (under the potential Title I applicants) and the federal level (under HUD) it seems the logical resolution of the problems this Note has examined would be a *transitional period* during which HUD and those eligible local entities interested in obtaining Title I funds would work together in developing thorough environmental review procedures fully within the spirit of NEPA.

189. *See* text at note 165 *supra*.

190. *See* 24 C.F.R. § 58.32 (1975); text at notes 54-55 *supra*. For a discussion of a broad interpretation, see text at notes 87-95, 180-183 *supra*.

