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RESPONSIBILITY FOR PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

GOVERNMENT

DOCUMENTS

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AUG 14 1975

JOINT HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION

OF THE

COMMITTEE ON PUBLIC WORKS

AND THE

COMMITTEE ON ENVIRONMENT AND LAND RESOURCES

SUBCOMMITTEE

OF THE

COMMITTEE ON

INTERIOR AND INSULAR AFFAIRS

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 3130

AN ACT TO AMEND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 IN ORDER TO CLARIFY THE PROCEDURES THEREIN WITH RESPECT TO THE PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

H.R. 3787

AN ACT TO AMEND SECTION 109 OF TITLE 23, UNITED STATES CODE, RELATING TO THE PREPARATION OF CERTAIN STATEMENTS ON HIGHWAY PROJECTS IN THE STATES OF NEW YORK, VERMONT, AND CONNECTICUT

MAY 5, 1975

SERIAL NO. 94-H14

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NOTE

On April 30, 1975, the Subcommittee on Transportation of the Committee on Public Works held a hearing the subject of which was Federal matching funds for highway construction. Certain witnesses at that hearing, because of their inability to appear at today's hearing, were asked to express their views on the legislation being discussed today.

Copies of the above mentioned hearing may be obtained from the Senate Committee on Public Works.

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THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY

REPORT OF THE COMMITTEE ON THE PROGRESS OF CHEMISTRY
IN THE UNITED STATES OF AMERICA

FOR THE YEAR 1906

PREPARED BY THE COMMITTEE ON THE PROGRESS OF CHEMISTRY
IN THE UNITED STATES OF AMERICA

CHICAGO, ILLINOIS, 1907

PUBLISHED BY THE UNIVERSITY OF CHICAGO PRESS

CHICAGO, ILLINOIS, 1907

RESPONSIBILITY FOR PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

MONDAY, MAY 5, 1975

U.S. SENATE,
JOINT SUBCOMMITTEES OF THE
SENATE PUBLIC WORKS COMMITTEE AND THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The joint subcommittees met at 9:30 a.m., pursuant to call, in room 4200, Dirksen Senate Office Building, Hon. Lloyd M. Bentsen, Jr., presiding.

Members of the Public Works Committee present: Senators Bentsen, Baker, Buckley, and Stafford.

Member of the Interior and Insular Affairs Committee present: Senator Haskell.

Senator HASKELL [presiding]. The joint hearing of the Subcommittee on Transportation of the Public Works Committee and the Environment and Land Resources Subcommittee of the Interior Committee on H.R. 3130 and H.R. 3787 will commence.

Senator Bentsen, of the Public Works Committee, will be chairing this hearing with me today, but he is not here yet. So we will begin. I would like to ask Senator Stafford if he has a statement that he would care to make.

OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. Thank you, Mr. Chairman. I do have a brief statement as the ranking minority member of the Transportation Subcommittee.

The original impetus for these hearings was a U.S. district court decision enjoining a highway project in my State of Vermont. The effect of the decision by the U.S. Second Circuit Court of Appeals affirming the injunction was to halt major highway construction in the three States of Vermont, New York, and Connecticut.

On Thursday, another U.S. Appeals Court in the Seventh Circuit handed down an opinion, as I understand it, which agrees with the holding in the second circuit.

The courts in these decisions have ruled that a Federal agency itself—in this case, the Federal Highway Administration—must prepare the environmental impact statement required by the National Environmental Policy Act. Under current procedures, the States do the initial preparation of statements and modify them in accordance with FHWA direction.

The question of primary concern to members of the Transportation Subcommittee here today is the degree to which current FHWA procedures conform to the policy underlying NEPA.

If we are satisfied that these procedures, when properly implemented, carry out the intent of NEPA, we would like to make certain that there is language in the law assuring that projects properly approved under these procedures will not be enjoined by the courts.

If these procedures are not consistent with the National Environmental Policy Act, we perhaps will need to make clear what process would be acceptable.

Members of the Environment and Land Resources Subcommittee will be viewing the issue from a broader perspective. They will be responsible for insuring that legislative action, if necessary, does not weaken the protection afforded by NEPA for all Federal or federally assisted projects.

Members of the Transportation Subcommittee heard testimony from Governor Tiemann last Wednesday. He said that in his opinion, in the opinion of the U.S. Courts of Appeals in five circuits, and in the view of the Council on Environmental Quality, the environmental procedures of the Federal Highway Administration meet NEPA requirements.

It is my hope that witnesses today will respond to FHWA's position. If better implementation of existing procedures is felt to be needed, that is one thing. If the procedures themselves are believed to be deficient, that is something else.

There is one point, closer to my own State's problem, which I wish to make: No language under consideration by either subcommittee would lift the injunction on the project on U.S. Route 7 near Bennington, Vt. There were other bases for the injunction than simply the issue of delegation of preparation of the impact statement. The State and the Federal Highway Administration, in any event, will have to satisfy that district court that other criteria have been met in order that the injunction be lifted.

I look forward to hearing from our knowledgeable witnesses. With their help I am certain we can see that orderly progress in highway construction—and other areas of Federal endeavor—continues without sacrificing protection of the environment.

Thank you very much, Mr. Chairman.

OPENING STATEMENT OF HON. LLOYD BENTSEN, U.S. SENATOR FROM THE STATE OF TEXAS

Senator BENTSEN [presiding]. Thank you very much, Mr. Chairman. I am pleased to chair this hearing with my distinguished colleague, Senator Haskell, of Colorado, and to consider these two House bills before us. I don't look at this as a confrontation, but rather trying to accomplish the objectives of protecting the environment and also serving society through the completion of this project.

Of course it arises out of the decision of the Second Circuit Court on Route 7, and we know it isn't necessarily the legislative direction, but it may be an administrative direction that is needed here because some of the ambiguities and regulation, and perhaps in the legislation, too.

I don't believe that we come with any preconceived ideas as to what the solution is, but rather seeking answers and then trying to make the just determination of what can be done. I think it has much more far-reaching implications than just the court's decision on Route 7.

Therefore, we are looking forward to having the testimony on it. [H.R. 3130 and H.R. 3787 follow:]

94TH CONGRESS
1ST SESSION

H. R. 3130

IN THE SENATE OF THE UNITED STATES

APRIL 22 (legislative day, APRIL 21), 1975

Read twice and referred to the Committee on Interior and Insular Affairs

AN ACT

To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental impact statements.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 102 of the National Environmental Policy Act
4 of 1969 (42 U.S.C. 4332) is amended—

5 (1) by inserting “(a)” immediately after “SEC.
6 102.”; and

7 (2) by adding at the end thereof the following
8 new subsection:

9 “(b) A statement prepared after January 1, 1970,
10 shall not be deemed to be legally insufficient solely by reason

1 of having been prepared by a State agency or official if the
2 responsible Federal official furnishes guidance and partici-
3 pates in such preparation and independently evaluates such
4 statement prior to its approval and adoption. This procedure
5 shall not relieve the Federal official of his responsibilities
6 for the scope, objectivity, and content of the statement, nor
7 of any other responsibilities under this Act."

Passed the House of Representatives April 21, 1975.

Attest:

W. PAT JENNINGS,

Clerk.

94TH CONGRESS
1ST SESSION

H. R. 3787

IN THE SENATE OF THE UNITED STATES

APRIL 22 (legislative day, APRIL 21), 1975

Read twice and referred to the Committees on Interior and Insular Affairs and
Public Works jointly by unanimous consent

AN ACT

To amend section 109 of title 23, United States Code, relating to the preparation of certain statements on highway projects in the States of New York, Vermont, and Connecticut.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That subsection (h) of section 109 of title 23, United States
4 Code, is amended by adding at the end thereof the following:
5 "Any detailed statement required by section 102 (2) (C) of
6 the National Environmental Policy Act of 1969 for any
7 Federal-aid highway project in the States of New York,
8 Vermont, and Connecticut which was prepared by the State
9 on or after January 1, 1970, and which after analysis and
10 evaluation has been adopted or is hereafter adopted by the

- 1 Secretary of Transportation shall be deemed a statement
- 2 prepared by the Secretary of Transportation for the pur-
- 3 poses of the National Environmental Policy Act of 1969."

Passed the House of Representatives April 21, 1975.

Attest:

W. PAT JENNINGS,

Clerk.

Senator BENTSEN. The first witness I want to call is the Honorable Russell W. Peterson, Chairman, Council on Environmental Quality.

STATEMENT OF RUSSELL W. PETERSON, CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY

Mr. PETERSON. Good morning, Mr. Chairman, and members of the committee. I appreciate the opportunity to appear before you today to discuss the provisions of the two bills, H.R. 3130 and H.R. 3787.

At the outset, I would like to state that the administration is interested in maintaining the substantive integrity of the environmental impact statement process, while assuring that its administration by all agencies is efficient and trouble free.

NEPA is 5 years old now, and by nearly all accounts, its provisions for environmental impact statements have become an accepted and increasingly integrated part of the decisionmaking processes of the Federal agencies.

This is not to say that problems do not occasionally arise. It is such a problem of implementation that brings us here today.

At issue in the second circuit court case, which led to our hearing here today was, among other things, the degree of Federal agency involvement in the preparation of an environmental impact statement for a portion of the reconstruction of Route 7. The court held, on this issue, that genuine Federal preparation was required by NEPA and proceeded to find that such a test had not been met by the Federal Highway Administration.

At the same time the court quoted with approval long-standing provisions in the guidelines of the Council on Environmental Quality, which permit the Federal agency to rely on materials supplied by an applicant, but submitted to an independent evaluation by the Federal agency.

In a note the court quotes the CEQ as saying that such materials could be submitted by an applicant in the form of an EIS.

The *Conservation Society* case will soon be before the Supreme Court on a petition of certiorari by the Solicitor General. Meanwhile, a debate has arisen over the impact of the opinion. Some, including the Department of Transportation, believe that the decision disapproves existing guidelines and establishes for the three States of the second circuit a new burden of Federal responsibility.

Others, including the Council, believe that the decision upholds existing manageable guidelines and procedures established by CEQ and FHWA and upheld in several other circuits, but simply finds that certain underlying principles were not respected in the facts of these cases.

In short, there is a debate over whether the opinion changes the law for Federal actions in these three States, or finds that the facts in this case do not support generally accepted legal requirements.

Be that as it may, the Regional Administrator of FHWA called a halt to further processing of the significant number of major highway projects in New York, Connecticut, and Vermont.

The impact of his action on those concerned about unemployment problems in an already suffering construction industry in the three States was immediate and understandably distressing.

Soon thereafter, a number of Congressmen from affected districts introduced legislation to clarify the law and overturn those portions of the *Conservation Society* case, which led to the order by FHWA to stop processing highway projects.

Those bills served as a basis for the legislation before you today.

Soon after the problems resulting from the decision in the *Conservation Society* case were brought to our attention, we sought immediate remedies that could overcome the need to halt projects that would otherwise meet all requirements for funding by FHWA.

In particular, we attempted to develop workable administrative solutions by suggesting changes in DOT and FHWA procedures which we believe would permit continued processing of highway projects in compliance with the court's opinion without requiring a significant increase in FHWA manpower devoted to preparation of impact statements.

Directives were sent from FHWA's central office to the Regional Administrator and the affected States, providing guidelines under which the processing of some projects could continue.

When these bills were being debated in the House, it should be pointed out, further efforts were made by the appropriate committees to design an administration solution. But the DOT position was that an administrative solution was insufficient to overcome the requirements for genuine Federal preparation called for in the opinion.

As a result of these efforts, progress was made in the House on two bills, H.R. 3787, a bill to amend the Highway Act approved by the Public Works Committee, and H.R. 3130, a bill to amend NEPA approved by the Committee on Merchant Marine and Fisheries.

In both cases, the committee effort was to clarify the law and to assure that the longstanding EIS practices developed by FHWA and supported by CEQ guidelines could be carried out in every State. Neither bill would lessen the role of the Federal agency to assure the adequacy or accuracy of the statement in terms of scope, objectivity, and content.

I would like to summarize for you this morning a number of points concerning the two bills before us.

First, it is the position of the administration that H.R. 3130 should be enacted as the only acceptable resolution of this general problem. This position is based on a number of reasons:

1. H.R. 3130 provides better assurance of an undiminished standard of Federal responsibility in the EIS process. It specifically calls for

the Federal official to guide and participate in the preparation of the EIS. CEQ notes that H.R. 3787 calls for analysis and evaluation, but does not specifically call for guidance and participation. These new criteria in H.R. 3787 for defining the Federal officials' NEPA responsibility would probably invite additional litigation.

2. H.R. 3130 applies to all States and establishes a uniform statement of congressional intent. H.R. 3787 applies to only three States and does nothing to prevent future inconsistent adjudication in other circuits. The establishment of a special rule for one circuit also establishes the presumption that the law in other circuits is different, thus exacerbating any confusion among the circuits.

3. H.R. 3130 applies to all Federal grants to State agencies, whereas H.R. 3787 is limited to application to FHWA projects. As Congress moves to clarify the law with respect to Federal and State responsibilities for the preparation of impact statements, it should do so with respect to all grants to State agencies.

Second, I should point out that both the House committee report and CEQ agree that H.R. 3130 should be limited to grant recipients which are State government agencies operating throughout the State. To quote from the House committee report,

The language, "State agencies and officials" refers to those officials to whom the task of preparing statements has been appropriately designated at the present time. In no case would H.R. 3130 permit delegation to any State agency lacking sufficient resources, personnel, and interdisciplinary expertise to prepare an EIS that meets the requirements of NEPA. The bill is not intended to address practices of Federal agencies which involve any public or private entities other than Statewide agencies.

While such entities can also do much of the work of bringing together materials for impact statements, we should be particularly careful when preparation responsibilities are assigned to water districts, sewer authorities, airport authorities, public utilities, and other similar entities, when they are special purpose limited jurisdiction entities without statewide duties and responsibilities. We believe we should follow closely the language of the House committee report, and we concur in it from a policy standpoint.

Third, I wish to reiterate that neither H.R. 3130 nor H.R. 3787, if they were enacted, would in the opinion of the Council on Environmental Quality reduce the responsibility for completeness, objectivity, and accuracy of environmental impact statements placed by NEPA on the appropriate Federal official. Nor would it in any way reduce his responsibility to modify, relocate, or reject any project in response to the analysis provided in the impact statement or the comments received on it.

We believe this legislation will restate what we have all along believed and expressed in our guidelines and procedures were the duties of NEPA on all of us to improve Federal decisionmaking.

Senator BENTSEN. Thank you, Mr. Peterson.

You say it is the DOT's position that it had to be corrected by legislation. Do you agree with that, that it could not have been done by administrative action?

Mr. PETERSON. Originally, we contended that it could be done by administrative action, but DOT and CEQ failed to agree with DOT on what that administrative procedure would be.

Second, in the interim, some other court decisions have passed on the issue and add to the confusion. Thus, we now believe that legislation such as H.R. 3130 is desirable.

Senator BENTSEN. Mr. Peterson, some environmental groups say that an environmental impact statement submitted by the Highway Department would have some self-serving assumptions in it. Do you agree with that?

Mr. PETERSON. I think it certainly could, but I believe the mechanisms which we have provided in our guidelines and which have been practiced by FHWA around the country and, approved by several courts provides for adequate and thorough involvement of the Federal agency, which would check some bias in State-prepared documents.

Senator BENTSEN. Adequate safeguards and checks, do you believe?

Mr. PETERSON. Yes; we think so.

Senator BENTSEN. We had a statement last week made to us concerning the environmental impact statements in California, and what they were costing each year. The figure given to us was a shocking figure and one I find very difficult to believe.

I will get some more justification on it and backup. They were telling us that it was costing approximately \$50 million a year in direct costs for environmental impact statements.

Do you think there is any reasonable justification for such numbers and if those numbers are true, we have got to find a better way mechanically of doing the job on these environmental impact statements.

Mr. PETERSON. I do not know what that particular number refers to. So I cannot comment on it directly.

Senator BENTSEN. They told me that was the direct cost including court costs, I am sure.

Mr. PETERSON. I think that many times when people add up the costs of impact statements, they include the costs of doing some of the planning and staff jobs which they had been doing in the past and which are essential to the decisionmaking. Certainly, it would seem unwise for me, for any decisionmaker, to proceed without adequately considering the impact of his decision. That to me is an integral part of the decisionmaking whether you are in Federal, State, or local government or in the private sector. But when you add up all the costs of getting the facts relating to the impact of your decision, and then say that they were all caused by NEPA, I think that is an improper use of statistics.

Senator BENTSEN. We had one Governor testify before us that on the location of the bridge that they were trying to put it through one area and that had two eagles that were nesting there and so they wouldn't let them put it through.

They offered to build a new nest or a new house for the eagles, but they wouldn't agree to that. Finally, they spent \$4 million relocating the bridge and he swore up and down in his testimony that that was because of the two eagles; \$2 million an eagle? It seems to me that you might say that the taxpayer was given the bird.

Mr. PETERSON. I think, as I am sure you appreciate, that many people who are opposed to some operation like to find ridiculous examples.

Senator BENTSEN. That really is a ridiculous example, isn't it? Those things shouldn't happen.

Mr. PETERSON. Usually the timing of such construction projects, over the few weeks when the eagle is on the nest, could take care of the problem without relocating either the highway or the nest.

I would think the example given was one which typifies efforts to discredit the process, and does not bear any relation to the average case.

Senator BENTSEN. People who carry out that kind of an action discredit the process. That is why we have to get some judgment in the application of these things. Anyone who would allow that kind of a ridiculous result, the taxpayers get quite a backlash. It hurts the whole environmental program.

Mr. PETERSON. My point, Mr. Chairman, is that it is hard to believe that an eagle's nest alone, led to the relocation of a highway project.

Senator BENTSEN. That is what the Governor testified before us last week in our committee. Were you there?

Senator STAFFORD. Yes.

Senator BENTSEN. So all I am calling for is some judgment and reasoning in the application of these rules. Otherwise, we hurt the entire environmental program.

Mr. PETERSON. I think it is important that we get the hard facts behind each of the cases, so that the decisionmaker knows what he is doing, knows the impact of his decision, and bases his decision on information showing the problems that can arise. He must analyze alternative ways the project can be carried out so that he has the opportunity to make the best decision.

Some of the decisionmakers continue to fight this process of using the impact statement, looking at it mainly as a drudgery—a job which needs to be done. They do not look at it as an important asset to the decisionmaking process.

We are making headway throughout the country and people are beginning to realize this is an asset, not a handicap, in improving their decisionmaking.

Senator BENTSEN. It is an asset if you do it properly and expeditiously and use some judgment in the process. Then it is an asset.

Mr. PETERSON. I agree with you.

Senator BENTSEN. Senator Haskell?

Senator HASKELL. I would like to comment on Governor Mandel's observation. It is pretty hard for me to believe anybody would be foolish enough to relocate a highway because of an eagle's nest. I would like to know—I am sure Governor Mandel didn't know of his own knowledge—who told Governor Mandel and who told the person that told Governor Mandel and who told that person.

It is a little hard for me to discredit the Governor's statement. I am sure he said it in all sincerity, but we may be reverting to hearsay upon hearsay. I would hope anyway if anybody is doing that we ought to find out about it and do something about it.

Let me ask you this: I am told that the words used in H.R. 3130—"furnishes guidance and participates"—are lifted from certain judicial decisions, whereas the words used in the other bill, H.R. 3787—"after analysis and evaluation"—would require a further definition.

Is that a fact or not?

Mr. PETERSON. Yes. That is the reason why we believe that passage of H.R. 3787 would almost certainly lead to additional litigation,

to clarify the meaning of its terms. Not only are the words in H.R. 3130 backed up by previous court discussions, but some of its terms are used in our guidelines and procedures for the preparation of impact statements.

Senator HASKELL. Another thing that I am told that H.R. 3787 basically deals with one region of the country, one Federal program, and one Federal agency; whereas, H.R. 3130 has a greater universality. Is that also a fact?

Mr. PETERSON. That is true.

Senator HASKELL. It would occur to me that when we are addressing NEPA procedures, we should not sacrifice the very important attribute of NEPA—its universality, the fact that its application is general and that there are not separate procedures for individual Federal programs. In that particular regard—I don't know about other regards—it appears to me that H.R. 3130 takes the better approach. Would that be your conclusion?

Mr. PETERSON. That is our conclusion. Yes, sir.

Senator HASKELL. I don't think I have any further questions at the moment, Mr. Chairman.

Senator BENTSEN. Senator Stafford.

Senator STAFFORD. Thank you, Mr. Chairman.

Governor, if these joint subcommittees in their wisdom try to reach a Solomon-like resolution of the problem and pass out both of the bills, I would guess that you would recommend 3787 be amended so that it applied on a national basis, rather than to the three States named in the bill at the present time. Would that be correct?

Mr. PETERSON. We are opposed—that is, the administration is opposed—to H.R. 3787 and supports and encourages your support of H.R. 3130. Of course, one way to amend H.R. 3787 would be to make it identical to H.R. 3130.

Senator STAFFORD. That even occurred to the committee. We thank you. We wanted to clarify that.

Have you had an opportunity, Governor, to review the decisions in the Seventh Circuit Court of Appeals in *Swain v. Brinegar*?

Mr. PETERSON. I have just received a very brief report on it from my general counsel this morning.

Senator STAFFORD. Is there anything in that decision which changes the position of the Council on Environmental Quality?

Mr. PETERSON. No. It only makes us interested in having some legislation rather than waiting for an administrative procedure which we originally thought would be adequate to cover the matter.

Senator STAFFORD. That was to have been my next question. Then for emphasis the CEQ recommends a legislative rather than an administrative solution to this problem?

Mr. PETERSON. Yes.

Senator STAFFORD. If a legislative solution is adopted is it your position that there should be a limitation on the type of agencies granted authority to prepare initial environmental impact statements?

Mr. PETERSON. Yes. As I pointed out in my testimony, we think that the discussion in the report of the House committee calling for limitation to certain statewide agencies is a desirable one.

The reason for that is that the other agencies may rarely be involved

with impact statements, like once every 5 years or so. Thus, they do not have the expertise to do the job properly.

Senator STAFFORD. To come back for emphasis, would it be the recommendation of the administration that H.R. 3130 be the bill for that and H.R. 3787 be amended to be substantially identical to H.R. 3130?

Mr. PETERSON. Yes, sir, H.R. 3130.

Senator STAFFORD. Thank you very much.

Thank you, Mr. Chairman.

Senator BENTSEN. Thank you, Senator.

Senator BUCKLEY.

Senator BUCKLEY. Thank you, Mr. Chairman.

Thank you for your statement, Mr. Peterson.

I would like to volunteer the view that even if the language of H.R. 3787 were made identical with the language of H.R. 3130 that H.R. 3130 remains preferable. H.R. 3187 in effect involves a special modification of NEPA outside of NEPA. I think it continues along the tradition that I think is a better one of legislating exceptions, legislating special interests, special purposes, and modifications.

Sometimes it has even been done in San Antonio, Tex., I believe.

Senator BENTSEN. It isn't a matter of restoring equity, for the Federal Government had no business in it.

Senator BUCKLEY. But H.R. 3130 affects the generic NEPA legislation and I think that we must always be open to improving NEPA. To further clarify for my own understanding of your understanding of the impact of H.R. 3130, it will not weaken in any respect the effectiveness of NEPA?

Mr. PETERSON. No; it will not. It just restates what has been practiced and recommended.

Senator BUCKLEY. It in effect affirms how most circuit courts have been interpreting the law?

Mr. PETERSON. Yes, sir.

Senator BUCKLEY. Would it also be fair to say that although the report, the bill itself as submitted, does not specify statewide agencies, this concept, however, is supported in the report language, and the report language does not always prove to be the practice? But it is my understanding that there is nothing in 3130 that would impede the ability of CEQ to insist on statewide.

Mr. PETERSON. That is right; that is our understanding, too.

Senator BUCKLEY. So that this is new language but doesn't modify either the practice or the effectiveness of this legislation?

Mr. PETERSON. Yes, sir.

Senator BUCKLEY. This is not affected one way or another by the protection of the two eagles.

I have some sympathy for the eagles, I might say.

Thank you very much.

Senator BENTSEN. Senator Stafford.

Senator STAFFORD. Just so we understand, Governor—in the ultimate result in legislation in something like H.R. 3130, that would not resolve the injunction that is pending in connection with the Bennington, Vt., case, would it?

Mr. PETERSON. Excuse me; I didn't hear all your question.

Senator STAFFORD. In the event something like H.R. 3130 evolves as the legislative product of congressional action, such legislation becoming the law would not of itself dissolve the injunction which is currently pending in the cases in Vermont, would it?

Mr. PETERSON. No. It is my understanding it probably would not affect the outcome on the one project which was enjoined; neither would 3787. It would affect the validity of the statement on the other project in that case.

Senator STAFFORD. Thank you very much.

Senator BENTSEN. Senator Haskell.

Senator HASKELL. I am told, Governor, that last week Mr. Tiemann, who is the Administrator of FHWA, indicated support for both bills and I just want to underscore so the record is clear what the administration's recommendation is.

He said he supported both bills. Is that the official administration viewpoint as you previously articulated?

Mr. PETERSON. We had a number of meetings on this within the administration. The last one was on Friday, in which it was decided that the administration's position was to support H.R. 3130 as the only acceptable resolution of this general problem, and to oppose H.R. 3787.

Senator HASKELL. Thank you, Governor. I think that makes it very clear.

I have said I prefer H.R. 3130's more universal approach. However, I personally, and I think maybe others, would like to know what Federal programs might be affected, assuming we choose to report H.R. 3130. I wonder if it would be possible on pretty short notice to supply for the record what programs might be affected?

Mr. PETERSON. Yes. There are two other Federal agencies that now have programs where impact statements might be facilitated by having statewide agencies participate in the preparation. Those are certain Law Enforcement Assistance Administration programs, and certain Bureau of Outdoor Recreation programs—grants to States under the Land and Water Conservation Fund Act.

To our present knowledge, those are the only ones other than Highway Administration.

Senator HASKELL. Thank you, Governor.

Thank you, Mr. Chairman.

Senator BENTSEN. Thank you very much, Governor, for your testimony.

We will call on Congressman LaFalce at this time. We are very pleased to have you this morning, Congressman.

STATEMENT OF HON. JOHN J. LaFALCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. LaFALCE. Thank you, Mr. Chairman.

It is indeed an honor to be here today during your deliberations on H.R. 3787 and H.R. 3130. I know your time is limited and your list of witnesses is long, so I will try to be brief.

In the House I supported both H.R. 3787 and H.R. 3130, both of which were designed, in different ways, to accomplish the same goal: to enable construction workers in New York, Connecticut, and Ver-

mont to get back to work on highway projects which had been put in jeopardy by a court decision.

My reason for supporting both bills was that I felt the goal to be accomplished—to insure that these three States got their fair share of Federal highway funds and that they could spend them as rapidly as practicable—was paramount, and the legislative vehicle used to reach it was of lesser importance. I still think this way, and if in your judgment one of these bills can become law more quickly than the other then that's the bill which I support.

But if they are likely to move at an equal rate of speed, then I do believe then one of them, H.R. 3130, is somewhat better in terms of its long-term effects. You will hear later in this hearing detailed reasons why a solution is needed, and I will not go into that, but I will devote the remainder of my remarks to the reasons why I believe H.R. 3130 is a better approach.

H.R. 3130 applies to all 50 States; H.R. 3787 only 3. This would be fine for New York, but it leaves open the question for similar court decisions elsewhere. I think national legislation should apply nationally.

H.R. 3130 applies to all Federal agencies; H.R. 3787 only to the Highway Administration. It would be ironic if we made it possible for highway funds to be used and then, the next day, similar road-blocks arose in other important programs. I think that the rules under which environmental impact statements are prepared should apply with reasonable consistency to all Federal agencies.

Finally, H.R. 3787 could be read to change, substantially, previous practices of the Highway Administration—and, I suspect, many other agencies. This is because H.R. 3787 only requires Federal involvement with, and analysis of, environmental impact statements after they have been prepared by the State agency.

Yet the present practice has been to have Federal officials involved all along the way, providing guidance and counsel to the State personnel who were preparing it. This, to me, is a better approach more likely to address and respond to environmental questions.

To the extent that H.R. 3130 restates previous practice, which it is intended to do, it is more precise than H.R. 3787 and less subject to misinterpretation.

Gentlemen, I urge you to evaluate these bills carefully but as expeditiously as you can. The more quickly Congress acts, the more quickly the States of New York, Connecticut, and Vermont will be able to provide more jobs for their hardpressed construction workers. And that will be one step toward the national economic recovery we all so desperately desire.

Thank you again, Mr. Chairman.

Senator BENTSEN. Congressman, we are told that, from the time they start applying for highway construction jobs to the time the work actually starts, takes about 7 years. There are all kinds of additional problems, escalations of costs.

We are getting some backlash on environmental impact statements because they say they add to the time. Wouldn't it be a lot better to go along with H.R. 3130, as you say, where we have the Federal Government involved all the way in helping to draw those guidelines? Wouldn't that be much more expeditious? Wouldn't we save time in

getting our environmental impact statements by implementing them in that manner, rather than letting the State agency go on and then at a later time have the Federal Government get involved and say you did his one wrong?

Mr. LaFALCE. I would suggest this, Senator. First, I do want to emphasize the point that H.R. 3130 codifies the existing practice in all 50 States, at least the existing practice prior to the second circuit decision. It seems to me that if one agency, a Federal agency, is involved in a project, it is much more likely to have rendered that type of guidance which is going to permit it to give a quick, favorable decision than it would be if they hadn't been involved from the beginning and had to look at it anew and they might more likely have difficulties with it.

Senator BENTSEN. Yes, the point being that I feel very strongly that we have to pursue and implement the environmental impact statement but I want it done in the most expeditious and effective manner as we can. It seems where we are a part of that process from the beginning that it works much better and saves time.

Mr. LaFALCE. Yes.

Senator BENTSEN. Senator Haskell.

Senator HASKELL. Congressman, thank you very much for appearing. I find the logic of your statement overwhelming. So I have no questions.

Senator BENTSEN. Senator Stafford.

Senator STAFFORD. Thank you very much, Mr. Chairman.

Mr. LaFalce, I want to join in the welcome to you here. We appreciate your statement. Confessing ignorance on my part, what part of New York State do you represent?

Mr. LaFALCE. I represent the 36th Congressional District, Senator, the counties of Orleans and Niagara, part of the counties of Erie and Monroe.

Senator STAFFORD. Have any projects been halted, any Federal highway projects been halted, in your district as a result of the decision in the second circuit court?

Mr. LaFALCE. There certainly have been projects halted. That is the reason I authored H.R. 3130.

Senator STAFFORD. We have a certain community of interest then, Congressman. We appreciate your being here.

Senator BENTSEN. Senator Leahy?

Senator LEAHY. No, thank you, Mr. Chairman.

Senator BENTSEN. Senator Buckley.

Senator BUCKLEY. Thank you, Mr. Chairman.

First of all, I would like to congratulate Mr. LaFalce's leadership in this matter and I am glad he favors H.R. 3130 because it makes more sense environmentally in terms of national policy.

Is it your understanding, Congressman, that as the Conservation Society decision affects only projects in Vermont that the adoption of H.R. 3130 which in effect, as you say, would—recognizing existing practice—would therefore force to court the projects in New York State assuming that the procedures followed in New York State were pretty well comparable to those followed elsewhere in the country?

In other words, the basic process was sound?

Mr. LaFALCE. Yes. I don't think there would be any question. That is why we have the signoff on all of the individuals concerned on

H.R. 3130, both the individuals from the highway departments and environmentalists.

Senator BUCKLEY. I make the point because Governor Peterson, whom you heard testify, pointed out that it is not entirely clear whether the second circuit was objecting to the process involving cooperation with the States or whether they were saying that in a particular instance in Vermont the State did not or the Federal Government did not have sufficient preparation.

Mr. LAFALCE. As I read the court decision and as I looked at the process involved, it seemed to me that the only way the court decision could be read was requirement of Federal preparation as opposed to State preparation, because the Federal involvement in that particular case was very great. Individuals from the Federal Highway Administration had gone out a couple of times a week to consult with the State representatives. They had initially rejected the State EIS, at least the draft of it. It wasn't until it was redone and then given approval by the Federal Government that all signs were go. It was then that the court action was brought. It was that long process involving Federal participation from the beginning which was rejected by the second circuit.

Senator BUCKLEY. Thank you very much.

Senator BENTSEN. Thank you very much, Congressman, for your testimony. It will be helpful.

Senator BUCKLEY. Mr. Chairman, I had hoped that Mayor Martinelli of Yonkers, N.Y., would be able to be here to testify regarding this legislation. Unfortunately, scheduling problems have made it impossible for him to do so.

However, the mayor has prepared a written statement expressing his concerns about the important issues which we are discussing today. I would ask, Mr. Chairman, that his thoughtful remarks be printed in the hearing record.

Senator BENTSEN. Without objection.

[The statement referred to follows:]

STATEMENT OF HON. ANGELO R. MARTINELLI, MAYOR, YONKERS, N.Y.

Honorable members of the Public Works Committee and the Interior Committee of the United States Senate: I deeply regret that I am unable to be with you in person today to deliver my remarks. However, I appreciate the effort made by Senator Buckley towards that end, and the opportunity to present a written statement.

I deliver this statement today in two different roles. First, as the mayor of the fourth largest city in the State of New York, charged with promoting the general welfare of my constituents. Second, as the chairman of LIBRA—For a Balanced Economy, a group of Yonkers' labor, industry, and consumer leaders dedicated to the maintenance of a competitive economy in my city.

My remarks are aimed at the specific plight of Yonkers. It is there where my expertise lies. The legislation which you are considering today can have an enormous beneficial impact on my city.

Topographically, Yonkers is divided along north-south lines of high ridges between the Hudson River Valley, the Nepperhan River Valley, and the Bronx River Valley. These ridges have historically presented a great problem for those attempting east-west travel.

The Central Business District of Yonkers is located in the extreme west of the city, in the Hudson River Valley. For many years it has been the intent of the City of Yonkers to redevelop this downtown core. Huge urban renewal projects now provide housing for those who, it was felt, would need living space when the

most important part of this redevelopment effort moved ahead. This vital cog in the redevelopment program was the major arterial program which, for the first time, would allow easy access to the downtown core from the other sections of the city.

Today, we have the housing necessary to relocate those displaced by the arterial program, but we do not have the arterials. These roads are absolutely vital to the redevelopment effort.

It is necessary, especially in these trying economic times, for municipalities to strive to expand their tax base. Gladstone Associates, of Washington, D.C. has projected tax revenues for the redevelopment program which they consider to be economically feasible to be up to \$5.1 million, after deducting debt service on necessary public capital improvement. I do not have to explain to you the tremendous impact of such revenues on a city with a yearly budget of \$120 million.

I believe that my point is clear. In the City of Yonkers, the legislation you are considering today is absolutely vital. The arterials which have been stalled by the Circuit Court's decision in *Conservation Society of Southern Vermont, et al vs. Secretary of Transportation* will have a critical impact on the City of Yonkers. We have been waiting for these arterials for over twenty-five years. We have the housing ready for those who will have to be relocated.

I cannot stand idly by and allow the roads of Yonkers that are already constructed to become jammed with economic refugees. At the recent Economic Impact Hearings sponsored by LIBRA—For A Balanced Economy, the president of the operating engineers threatened to cut down trees across all major highways. He said, "If my people can't work, no one will get to work." I tell you this to illustrate the seriousness of this matter.

The action you take on this legislation means jobs for thousands of construction workers. Were this hearing held in the City of Yonkers, I could promise you that the hall would be packed with people whose very livelihood depend on the result of your deliberations. The Yonkers arterial system was stalled once before for environmental reasons. It is unconscionable to compound this delay. You must take swift action to allow our people to work and to reap the potential benefits from the completion of these roads. We cannot afford to wait another three years for Federal Environmental Impact Statements. This construction means jobs. If you are prepared to appropriate \$1 billion for public service jobs, can you not enact this legislation to put our construction workers back at their trade?

Consider the positive, long range implications of this legislation for the City of Yonkers as just one case in point. I submit to you that a positive vote on this legislation which would allow states to prepare Environmental Impact Statements is not a vote against our environment. It is a vote to help our citizens help themselves out of their current dire economic straits, and to help our cities expand their tax base.

Senator BENTSEN. Is Mr. Donald Lynch here? Mr. Lynch, if you would step forward, please.

Mr. Lynch is the executive director of the Connecticut Construction Industries Association.

STATEMENT OF DON LYNCH, EXECUTIVE DIRECTOR, CONNECTICUT CONSTRUCTION INDUSTRIES ASSOCIATION

Mr. LYNCH. Thank you, Senator. I appreciate being here today.

The Connecticut Construction Industries Association is a statewide association whose membership includes business and industry in the State representing over 60,000 Connecticut residents involved directly and indirectly in the various aspects of the construction industry and those industries allied to construction.

The C.C.I.A. stands ready to support immediate action on highway construction and mass transit based on sound planning and determination of the needs and desires of the public, conservation of energy, efficiency, and economic benefits to the State and its residents.

We appear here today, before this committee, to strongly urge favorable action on H.R. 3878 or H.R. 3130. Speedy passage of either of these bills means much needed jobs for the construction workers of Connecticut, jobs for supportive employees, and an economic boost for the entire State of Connecticut.

The purpose of such a bill appears to be the elimination of a wasteful and arbitrary technicality which requires FHWA employees, rather than State department of transportation employees, to prepare environmental impact statements. Speedy, favorable action on either bill is our prime need.

Construction period, in the State of Connecticut and New England, goes from about March to November. We are moving into that construction period with no new projects available.

Speedy passage of either bill will not in any way affect the ecological or environmental impact of construction projects on the surrounding area in any manner, shape, or form.

Speedy passage of either bill will not cause any damage to, but rather will assist our efforts to improve our environment and ecology.

In view of the fact that the environmental impact statements are now and always have been prepared by the State department of transportation in every State throughout the United States of America, and in view of the fact that the FHWA does not have the money nor personnel to prepare the EIS, speedy passage of either bill will prevent all the unnecessary costs and red tape involved in the creation of a brand new Federal bureaucracy which will only duplicate the existing State agencies.

Speedy passage of either bill will permit Connecticut to commence construction of many necessary and approved projects that comply with all substantive NEPA requirements.

Speedy passage of either bill will prevent the costs of these projects from continuing to rise and will stop the costs of partially completed jobs from continuing to mount.

Speedy passage of either bill will permit Connecticut, New York, and Vermont to be treated on a parity with the other 47 States of the Nation.

According to the Connecticut Department of Labor statistics as of January 1975, there are 60,000 construction workers in the State, 40,000 of which are employed and 20,000 of which are unemployed.

The total unemployment of the State of Connecticut is approximately 147,900 as of March 30, 1975, an increase of 10,800 from the end of February. This figure will continue to increase, and the unemployment projections for the construction industry are very bleak.

Various factors have combined to bring about this depressed condition in the construction industry, but the cruelest blow of all was the decision of the U.S. Court of Appeals, Second Circuit, in *Conservation Society of Southern Vermont v. Volpe*, which held that environmental impact statements that are required under the National Environmental Policy Act must be prepared by the Federal Highway Administration rather than the State.

This decision caused the FHWA to administratively impose a freeze on all project approvals for the Federal aid highway program—except for minor projects—only in Connecticut, New York, and Vermont.

FHWA specified it will not act on requests for approval of preliminary engineering authorizations for approval of preliminary engineering authorizations or plans, specifications or estimates, or rights-of-way acquisitions, nor would it take any other step in the process of developing highway projects.

Connecticut, known as the Constitution State, has always been a leader, but Connecticut does not enjoy being one of the select minority of three States, namely, New York, Vermont, and Connecticut, out of all 50 States of these United States, where this freeze on highway projects is causing layoffs and the stoppage of needed construction because of procedural technicality.

The Fifth Circuit, Eighth Circuit, Ninth Circuit, and Tenth Circuit Courts of Appeals covering 29 States have ruled that State authorities may prepare environmental impact statements. [Exhibit A.]

As far as we can determine, 18 States in the first, third, fourth, sixth and seventh circuits have not ruled on this issue.

The citizens of Connecticut, New York, and Vermont have paid their share of the highway taxes, yet they are the outcasts as far as Federal Highway Funds are concerned.

The release of \$2 billion by President Ford intending to stimulate the national economy in a positive manner meant absolutely zero as far as putting people back to work in Connecticut is concerned.

The freeze in Connecticut froze 50 projects with an estimated total construction cost of \$1,008,037,000. [Exhibit B.]

Jobwise, this \$1,008,037,000 means 35,000 direct and 35,000 indirect industry jobs, and it is fair to say that an additional 70,000 jobs would be developed in the towns and cities from these construction projects.

Eight of the projects, estimated to cost in excess of \$35 million, have already been completely designed with construction scheduled to start in 1975 and call for about 2,500 jobs and a weekly payroll of close to \$875,000.

Five more projects, estimated to cost in excess of \$128 million, are partially designed. This group of 13 projects with a total cost of \$164,398,000 is already funded and would generate over 10,000 jobs. Connecticut wants these jobs; Connecticut needs these jobs, and red-tape is certainly no reason to deny these jobs.

The Connecticut State Labor Department indicates a State unemployment rate of 9.9 percent and it is rising. [Exhibit C.]

In eastern Connecticut the unemployment rate is close to 20 percent. In that area over \$200 million of highway construction is affected. Again, this means 14,000 jobs.

Within the Second Congressional District the following two construction projects, one large, one small, could provide almost immediate employment: Project 160-101, \$1.2 million, 50 percent design complete, town of Willington, and project 76-89, \$36.4 million, 8.8 miles, I-86, Slater Road to Dobson Road, Manchester-Vernon.

Within the Sixth Congressional District, representing the second most depressed area, those projects that are 100 percent design completed with construction scheduled for 1975 are as follows: Project 131-116, 2.2 miles, rural-secondary road, \$2.4 million, North of WB exit ramp, I-84 to Middle Street, Southington, negative impact state-

ment, and project 96-114, 3.8 miles, \$10.3 million, Philo Curtis Road to Ichabod Road, Newtown-Southbury.

Within the three most depressed labor market areas of Connecticut, namely, Danielson, which has 16.8 percent unemployed, New Britain, which accounts for 11.9 percent unemployed, and Bristol, which has 15.6 percent unemployed, there are highway projects, large and small, that could be started now if the technicality halting the projects is corrected.

A slight crack has appeared in the freeze, but only a crack, and no construction and no jobs have surfaced.

Based on a memorandum of February 28 issued by the FHWA Regional Administrator, the Federal divisional engineer in Hartford, Conn., is currently reviewing his files with the intent of requesting approval from FHWA regional office to proceed with project actions where environmental impact statements have been prepared and submitted by the Connecticut Department of Transportation.

It is my understanding that he, the Federal divisional engineer, has made a review and is presently requesting approval to move ahead on three projects. There is no assurance, however, that these projects will not end up in court action.

The delay that is now being encountered is not only wasteful of energy, but it is also causing more air pollution. Many of these projects that are now frozen are designed to correct serious deficiencies in our road system that presently cause traffic jams, stop-and-go traffic, and unsafe driving conditions.

Construction delays also add to cost. Our records indicate that construction costs are rising at about 30 percent per year. A million-dollar job stopped this year will cost \$1,330,000 next year when it starts, and Connecticut, like all other divisions of government, is in no position to absorb this increased cost.

The only possible reason to have Federal rather than State employees prepare the environmental impact statements would be that State employees are either dishonest or incompetent when compared to Federal employees. This is not only stupid, but it is a vicious slur on dedicated State of Connecticut employees.

Passage of either bill will not adversely affect the environment. The checks and counterchecks, the regulations, the standards, the reviews by government agencies, and the public, still remain as is, no change.

H.R. 3787 and H.R. 3130 concern themselves with only authorship of the environmental impact statement (EIS).

Because NEPA specifically vests final responsibility for content, objectivity, and so forth, with the Federal Government, and because final responsibility will remain with FHWA under this legislation, I feel sure passage will not in any way chip away at any of the environmental safeguards.

Quite to the contrary, environmental concerns are more likely to be reflected in the State agency having intimate familiarity with local circumstances.

As I stated in my opening statement, we urge speedy approval of either bill. Chiefly for much needed jobs, but also because there is no logical reason why such a meaningless technicality should not be corrected.

I would like to add that the Connecticut Assembly Senate on Thursday last week passed a resolution which states in part, "urging Congress to amend the National Environmental Policy Act to permit States to prepare an environmental impact statement subject to Federal approval."

Thank you, Senator.

[Exhibits appended to Mr. Lynch's statement follow:]

EXHIBIT A

States in Federal court circuits where the court of appeals has ruled that State authorities can prepare environmental impact statements

Fifth Circuit, Alabama, Florida, Georgia, Louisiana, Mississippi, Texas; *Finish Allatoona's Interstate Right, Inc. v. Volpe*, 484 F 2d, 638.

Eighth Circuit, Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 489 F 2d, aff'g 387, F Supp 633.

Tenth Circuit, Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming; *Citizens Environmental Council v. Volpe*, 484 F 2d 870, aff'g 364 F Supp 286.

The Ninth Circuit Court of Appeals has held that a federal agency could employ consultants to prepare an EIS, indicating that it would agree with the Fifth, Eighth and Tenth Circuits. The *Ninth Circuit* includes, Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii; *Life of the Land v. Brinegar*, 485 F 2d 460.

The above list includes 29 states. The Second Circuit includes three states. There are 18 states in circuits which—so far as our research can determine—have not ruled on this issue. These are the First, Third, Fourth, Sixth and Seventh Circuits.

If the Supreme Court affirms the Second Circuit decision in *Conservation Society of Southern Vermont v. Volpe*, — F 2d —, aff'g 362 F Supp 627, then, of course, all fifty states would be affected just as New York, Vermont and Connecticut are now affected.

EXHIBIT B—LIST A

Project No., State/Federal	Project length (miles)	Total estimated costs (thousands)	Design status	Estimated date of construction	Project termini (town)	Impact of delay ¹	EIS approval status
Primary:							
105-31/F-FG-13(1)	0.4	\$2,538	Complete	April 1975	From intersection of Stage Rd. and River St. North to 0.1 mi. south of 952 on Ct. 155 (Old Saybrook).	1, 6	Negative, December 1974.
124-112/F-	5.8	41,220	40 percent	1976	From North St. to Ct. 63 (Seymour) Route 8.	2, 4, 6	FEIS; October 1974.
Urban: 92-162/U-UG-55(6)	1.0	7,024	Complete	1975	Beverly Bridge and approaches over PC RR. (New Haven).	1, 2, 4, 6	FEIS; September 1973.
Economic growth center: 107-87/DPF-163(4) and (5).	.8	2,649	do	1975	From Ct. 188 in Southbury east to Oxford Airport in Oxford (Oxford).	2, 5, 6	Negative; pending.
Secondary:							
151-130/SU-RS-158(1)	.7	827	do	1975	From 0.3 mi. east of S.R. 847 north to vicinity of Waterbury Rd. (Waterbury).	1, 6	FEIS; September 1974.
56-146/SU-161	.6	282		1975	Glennville St. from vicinity of King St. to vicinity of Glen Ridge Rd. (Greenwich).	2, 4, 6	Negative; pending.
Rural secondary: 131-116/RS-160(1) and (2).	2.2	2,149	Complete	1975	North of WB-exit ramp from I-84 to Middle St. (Southington).	2, 5, 6	Negative; February 1974.
Interstate:							
155-90/I-84-3(127)	.9	4,208	do	1975	I-84 Troutbrook connector (West Hartford).	1, 2, 4, 6	Negative; pending.
105-130/I-95-2	3.2	49,684	20 percent	1977	School House Rd. to Lyme St. (Old Saybrook, Old Lyme).	1, 6	FEIS; pending May 1975.
160-101/I-86-2		1,280	50 percent	1976	Rest area—east and west bound (Willington).	1, 4, 6	Negative; pending.
96-114/I-84-2(104)	3.8	10,357	Complete	1975	Philo Curtis Rd. to Ichabod Rd. (Newtown-Southbury).	1, 6	FEIS; May 1973.
76-89/I-86-1(37)	8.8	36,480	85 percent	1975	From Slater St. to Dobson Rd. (Manchester-Vernon).	1, 6	FEIS; pending.
96-115/RF-84-2(105)	.5	5,700	do	1975	Alpine Dr. to River Rd. (Newtown-Southbury) I-84.	4, 6	FEIS; May 1973.
13 projects	28.7	164,398					

¹ Impact of delay: 1. lapsing funds; 2. continued congestion and delays; 3. discontinuity of highway system; 4. continued safety problem; 5. long-term employment potential through industrial development realized; 6. short-term employment opportunities not realized.

EXHIBIT B—LIST B

Project No., State/Federal	Project length (miles)	Total estimated costs (thousands)	Design status	Estimated date of construction	Project termini	Impact of delay 1	EIS approval status
93-74/1-291-4(20) 1	1.5	\$36,350	Complete	1976	Willard Ave. east to Newington Wethersfield T.L. (Newington).	3, 5, 6	FEIS 1972; court injunction.
51-130/1-291-4(25) 1	4.0	36,775	do	1976	South Rd. to Willard Ave. (Newington).	3, 6	See 93-74.
142-110/1-88 2	8.6	40,990	50 percent	1976	0.7 mi east of Ct. 195 NE to Willington-Ashford T.L. (Tolland).	2, 4, 6	FEIS; Apr. 30, 1974.
63-213/1-91-3(67) 1	3.0	39,950	85 percent	1978	Morgan St. to vicinity Bina Ave. 1-95 (Hartford).	2, 4, 5, 6	DEIS; pending.
164-122/1-91-3 2	3.5	27,423	25 percent	1978	Road Ave. to Ct. 175 (Windsor).	2, 4, 5, 6	Do.
76-88/1-1G-86-1(28) 1	1.9	47,788	60 percent	1977	Middle Turnpike to Slater St. and Sec. 1-291 Clark St. to 1-96 (Manchester).	2, 4, 6	FEIS; approved.
151-112/1-84-2 2	1.1	36,963	61 percent	1977	South Elm St. to Hamilton on 1-84 (Waterbury).	2, 4, 6	FEIS; 1973.
146-100/1-86-2 1	4.4	18,541	60 percent	1977	Vernon-Tolland 1-86 (Vernon).	2, 4, 6	See 142-110.
146-99/1-86-2 1	3.5	19,894	do	1977	Dobson Rd. to Vernon-Tolland T.L. (Vernon).	2, 4, 6	Do.
42-161/1-84-4(50) 1	1.2	10,892	33 percent	1978	Simmons Rd. East to Forbes St. (East Hartford).	2, 4, 6	DEIS; pending.
42-146/1-84-4(51) 1	1.4	14,834	30 percent	1978	Forbes St. to Spencer St. (East Hartford).	2, 3, 4, 6	Do.
42-147/1-86-1(25) 1	2.1	12,415	do	1978	From Silver Lane to Middle Turnpike (East Hartford).	3, 5, 6	Do.
164-118/1-291-5 1	8.1	19,180	22 percent	1978	From Bina Ave. to Windsor Ave. (Windsor).	2, 4, 5, 6	FEIS; pending.
12-73/1-84-4 1	11.5	66,320	0 percent	1978	Manchester T.L. east Ct. 66 (Bolton).	3, 5, 6	Do.
162-94/1-84-5 1	26.0	100,700	do	1978	U.S. 6 east to Rhode Island State line.	2, 4, 6	Do.
63-135/1-84-1 1	3.8	44,357	40 percent	1978	Trinity St. to Commerce St. Hartford 1-484.	2, 4, 6	FEIS; approved.
164-134 and 135/1-91-3 1	3.6	do	do	1978	Ct. 5 to Ct. River Bridge (Windsor).	2, 4, 6	DEIS; pending.
46-180/1/1-91-3 2	7.8	38,000	0 percent	1978	Ct. River Bridge to Mass. State line (East Windsor).	2, 4, 5, 6	Do.
Urban extension: 109-72 and 73/U	1.3	33,500	Complete	1976	Bristol T.L. to vicinity Crank Rd. (Plainville) on Route 2, 3, 6.	Do.	Do.
42-182(4)/U-154	2.9	30,500	29 percent	1977	Route 5 from Governor St. East Hartford to vicinity 2, 6.	FEIS; pending.	FEIS; pending.
82-148/U	1	1,229	48 percent	1977	Old Mill Rd. to Ct. 157 on Route 66 (Middletown).	2, 4, 6	Negative; pending.
23-75(4)/U-RF	3.6	25,668	77 percent	1977	From 1-84 to Southington-Meriden T.L. Route 66 (Cheshire).	3, 5, 6	FEIS; pending.
82-163/U	1.0	6,900	0 percent	1980	Vicinity Camp St. to east at Penn Central RR. (Middlebury).	2, 4, 6	DEIS; pending.
102-125/U-UG-F-FG-30(10)	2.3	32,427	Complete	1976	From Seir Rd. north to Route 33-Route 7 (Norwalk).	2, 4, 6	FEIS; pending.
42-181/U-46	2.6	6,600	26 percent	1980	Main St. to Hebron Ave. Route 2 East Hartford-Glastonbury.	2, 4, 6	DEIS; pending.
Rural primary: 161-95, 87 and 93/RF-30	6.1	40,549	89 percent	1976	Raymond Lane N. Wilton-Ridgefield T.L. Route 7.	2, 4, 6	FEIS; pending.
137-92/RF-62	1.8	12,840	Complete	1978	From 1-95 east to Pawcatuck River Bridge (Stonington) Route 78.	2, 4, 6	Do.

See footnotes at end of table.

EXHIBIT B—LIST B—Continued

Project No., State/Federal	Project length (miles)	Total estimated costs (thousands)	Design status	Estimated date of construction	Project termini	Impact of delay ¹	EIS approval status
Rural secondary:							
139-76/RS	1.6	2,501	33 percent	1977	From S.R. 513 to Route 159 (Suffield) Route 180	2, 3, 6	Negative; pending.
128-97/RS	1.0	1,615	46 percent	1977	East Westogue St. to Bloomfield T.L. Simsbury Route 185.	2, 4, 6	Negative and 4(f); pending.
128-90	.3	1,031	Complete	1977	Simsbury-Bloomfield T.L. to Penwood Rd. (Simsbury).	2, 4, 6	Do.
Urban:							
17-97/M	.5	598	20 percent	1976	South St. from Mellen St. to Downs St. (Bristol).	1, 2, 4, 6	Do.
13-110/MT-113S(11)	3.1	770	60 percent	1975	Summer and Bedford Sts. Bullshead to Broad St. (Stamford).	1, 2, 4, 6	Negative; May 1974.
155-94/M-8453	.9	519	82 percent	1976	South Main St. from Bentwood to Park Rd. (West Hartford).	1, 2, 4, 6	Negative and 4(f); pending.
63-267/M	.4	6,230	90 percent	1977	Incinerator Rd. vicinity Main St. to Western St. (Hartford).	1, 2, 4, 5, 6	DEIS; pending.
148-61/M	.7	8,730	0 percent	1980	S.R. 706-U.S. 5 to Hartford turnpike (Wallingford).	1, 5, 6	Do.
152-91	.9	5,200	do	1976	Route 156 from Niantic River Br. east to Gardners Wood Rd. (Waterford).	1, 2, 4, 5, 6	FEIS; pending.
Primary:							
33-83	2.2	15,560	35 percent	1976	From I-91 in Cromwell to Route 4 in Berlin, Route 9	2, 3, 6	Do.
37 projects	120.0	843,639					

¹ Impact of delay: 1. lapsing funds; 2. continued congestion and delays; 3. discontinuity of highway system; 4. continued safety problem; 5. long-term employment potential through industrial development, not realized; 6. short-term employment opportunities not realized.

² These projects effect lapsing funds, but because of the uncertainties of court injunctions and interstate transfer requests the amounts were not included in our total of lapsing funds.

EXHIBIT C.—CONNECTICUT UNEMPLOYMENT (STATE LABOR DEPARTMENT, MARCH 1975)

Area	Percent	Total unemployed
Ansonia.....	15.4	4,200
Bridgeport.....	11.4	20,000
Bristol.....	15.6	5,100
Danbury.....	9.8	7,100
Danielson.....	16.8	4,500
Hartford.....	7.9	25,500
Meriden.....	11.5	7,000
Middletown.....	10.5	6,000
New Britain.....	11.9	6,600
New Haven.....	9.4	16,800
New London.....	6.0	4,000
Norwalk.....	8.8	5,200
Stamford.....	6.8	6,700
Torrington.....	13.0	5,300
Waterbury.....	12.4	13,200
Willimantic.....	7.5	2,500
Norwich.....	10.1	3,200
Total State unemployment:		
February.....	9.5	137,100
March.....	9.9	147,900

Note: March 1975, of 60,000 construction workers, weekly payroll of approximately \$20,000,000; 40,000 now employed, 20,000 unemployed.

Senator BENTSEN. Thank you very much. Senator Haskell will preside.

Senator HASKELL [presiding]. I have no questions. It is a very well prepared statement. All you want is to get to work, I gather.

Mr. LYNCH. Right, sir, speed right away.

Senator HASKELL. I have no questions. I think we are all cognizant of the necessity of speed. Time is of the essence in this case.

Senator Stafford?

Senator STAFFORD. Thank you, Mr. Chairman.

Mr. Lynch, in light of your testimony of the frozen highway construction jobs in Connecticut, has the situation changed at all in the last few months? Are all of the projects we discussed earlier still frozen?

Mr. LYNCH. I would say they are in the process of unfreezing four or five projects; I know they have been reviewed. I know the design has been complete. I know they are some place in the pipeline. But they haven't been advertised as construction projects yet.

Senator STAFFORD. Do you believe that, in general, environmental requirements should be relaxed at a time of high unemployment?

Mr. LYNCH. Speaking for myself, I would have to say no.

Senator STAFFORD. This Senator won't disagree with you on that answer at all.

But an important fact is that one of our principal problems in this country is current unemployment.

Mr. LYNCH. Very definitely, sir.

Senator STAFFORD. We need to have a balance between protecting the environment and getting people back to work. Is that correct?

Mr. LYNCH. I concur, sir.

Senator STAFFORD. Thank you very much. Thank you, Mr. Chairman.

Senator HASKELL. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman. As I am not a member of this committee I appreciate a chance to sit in on some of the hearings. I will not have questions. The senior Senator from Vermont, Sen-

ator Stafford, is a member of this committee. I know he has been following the hearings extremely close.

It is my intention subsequent to the hearing to spend quite some little time with the senior Senator in getting his views of the matter. But I appreciate the opportunity to be here this morning.

Senator HASKELL. Senator Buckley?

Senator BUCKLEY. Thank you, Mr. Chairman.

Thank you, sir, for your statement. I think it is complete. I think it presents the arguments fairly. I am delighted that you personally take the position that we don't weaken our environmental protections, but rather see if there are technicalities as you describe them, that stand in the way of moving forward with needed construction.

I think this is the perspective we need to follow.

Senator HASKELL. Mr. Lynch, were you here by any chance when Governor Peterson was testifying?

Mr. LYNCH. Yes, Senator.

Senator HASKELL. He expressed the concern that I happen to share. This relates to H.R. 3787; that is, that the language is ambiguous and, therefore, may lead to more litigation, whereas the language of 3130 has had traditional interpretation already and would not lead to more litigation.

Is this a concern you share by any chance?

Mr. LYNCH. Senator, I am concerned.

Senator HASKELL. That is a good answer. Thank you very much.

[A statement from the Connecticut Citizen Action Group follows:]

CONNECTICUT CITIZEN ACTION GROUP,
Hartford, Conn., May 12, 1975.

Senator JENNINGS RANDOLPH,
Chairman, Senate Public Works Committee,
Washington, D.C.

DEAR SENATOR RANDOLPH: Enclosed is a copy of a communication sent to Senator Ribicoff in reference to HR 3787 and HR 3130.

We respectfully request that this communication be made part of the Senate Public Works Committee record on these bills.

We would also appreciate your making the enclosed memo part of the record as well.

Very truly yours,

MARC CAPLAN, Director.

CONNECTICUT CITIZEN ACTION GROUP,
Hartford, Conn., May 6, 1975.

Senator ABRAHAM RIBICOFF,
Washington, D.C.

DEAR SENATOR RIBICOFF: As you know, the House of Representatives on April 21 passed two bills amending the National Environmental Policy Act (NEPA) and Title 23 of the U.S. Code. The bills were passed in reaction to the December 11 "Rt. 7" 2nd Circuit Court decision and the Federal Highway Administration's subsequent decision to hold up all federally aided highway projects in Vermont, New York and Connecticut. The general feeling among proponents of the measures is that such legislation is necessary in order to release funds for highway projects frozen by FHWA. A major factor behind this legislation has been the problem of unemployment among construction workers.

There appears to be a widespread misunderstanding about the current status of federally-aided highway projects and what effect the two bills will have on the court decision and FHWA's interpretation of it. First, the frequently made claim that 50 projects in Connecticut worth one billion dollars are being held up is at best misleading and at worst deliberate falsification aimed at weakening NEPA. (See enclosure for a detailed breakdown of these figures.) These two

bills, if passed, will not put a single construction worker back to work immediately. As noted in the enclosure, all highway projects slated for construction this year have already received approval by FHWA's Division Engineer. Further, the injunctions halting the construction of I-291 and parts of Rt. 7 will not be lifted by the passage of the legislation since both the I-291 and the Rt. 7 injunctions are not based solely on the EIS authorship issue.

Passage of these bills is totally unjustified. Any real or imagined problems created by the court decision can be taken care of administratively. FHWA should revise its procedures to comply with the court decision or appeal the decision to the Supreme Court. There is sufficient time for projects projected for construction far in the future to be brought into line with the court's decision.

It would be a serious mistake to tamper with NEPA—an act that has proven its worth in safeguarding our environment—in the mistaken belief that as a result jobs will be created. We urge you to resist efforts to bulldoze these bills through Congress.

Very truly yours,

MARC CAPLAN, *Director.*

MAY 12, 1975.

Re testimony of Don Lynch, Executive Secretary of the Connecticut Construction Industries Association, in support of changes in the National Environmental Policy Act (HR 3787 and HR 3130) on May 5, 1975.

To: Members of the Senate Public Works and Interior Committees.

From: Connecticut Citizen Action Group.

This memo is to correct certain misleading statements in Mr. Lynch's testimony. First, some background:

On December 11, 1974, the 2nd Circuit Court of Appeals upheld a lower court ruling in the case of Conservation Society of Vermont vs. Volpe—the Rt. 7 case. Under Federal Highway Administration (FHWA) guidelines, the Rt. 7 proposal was permitted to be submitted for approval in segments with environmental impact statements on each segment prepared by the states. The Court ruled that under the National Environmental Policy Act (NEPA), the federal government and not the states had to write the impact statements and that an environmental impact statement had to be prepared on the entire Rt. 7 corridor from Norwalk to Vermont.

On January 2, Robert Kirby, Regional FHWA Administrator directed that no further project approvals be given for projects requiring environmental impact statements (EIS) or negative declarations until he issued further guidelines (Exhibit A). Subsequent to this directive, Donato Altobelli, FHWA Division Engineer in Connecticut drew up a list of 50 projects affected by Kirby's directive with an estimated total cost of approximately one billion dollars. On January 29, Kirby sent another memo to his division engineers in Vermont, Connecticut and New York limiting the "freeze" to those projects requiring EIS's. In addition he outlined what could and could not be authorized (Exhibit B). On February 28, Kirby sent still another memo to his division engineers outlining conditions under which projects not specifically involved in the "Rt. 7" case could be approved (Exhibit C).

Attached to Mr. Lynch's testimony is the Altobelli list of 50 projects. As will be shown, this list is out-of-date. In his testimony, Mr. Lynch refers to the first thirteen projects on the Altobelli list—eight of them completely designed and estimated to cost approximately \$35 million and five partially designed and estimated to cost \$128 million. He implies that only passage of HR 3787 or HR 3130 will free these projects for construction. The following breakdown of the 13 projects shows that this is not the case.

1-6. six projects—those which have only a *negative declaration* rather than an EIS—were authorized by the January 29 Kirby memo. See also Exhibit D: Feb. 13 Altobelli memo. In particular, project No. 131-116 (Rt. 229, Southington) mentioned specifically in Mr. Lynch's testimony as being held up was advertised for bid on April 23. See Exhibit E. Also, project No. 160-101 (Wilmington rest area) mentioned by Lynch is expected to be advertised by June.

7. Project No. 151-130 (Rt. 262, Waterbury/Plymouth) received PS&E approval previous to Dec. 11, 1974 and therefore is not under freeze. See Exhibits B and D. Advertising is expected by June.

8. Project No. 92-162 (Boulevard Bridge, New Haven) has been given approval pursuant to the Feb. 28 Kirby memo. See also Exhibit F for the specific approval. Advertising is expected by June.

9-10. Project Nos. 96-114 and 96-115 (I-84, Newtown/Southbury) have been given approval pursuant to the Feb. 28 Kirby memo. See Exhibit G. Advertising is expected by June.

11. Project No. 76-89, mentioned by Lynch has, according to the Conn. Department of Transportation, an estimated construction date of 1979. 107 of 116 properties remain to be acquired.

12. Project No. 105-30 (new bridge over Conn. River) estimated construction date listed as 1977, is currently being reevaluated by ConnDOT because of local opposition.

13. Project No. 124-112 (Rt. 8, Seymour to Naugatuck) is not yet a federal aid project. Anticipated advertising date is 11/76. However 77 out of 77 properties have yet to be acquired.

In conclusion, all highway projects slated for construction this year have already received approval by FHWA. Passage of these bills in order to put construction workers back to work, as Mr. Lynch argues, is totally unnecessary.

For your information, the following is a summary of the 50 projects on the Altobelli list.

Fifty projects \$1 billion

Projects Requiring Only Negative Declarations.—Released from "freeze" by January 29 memo; 13 projects, cost of \$21,369,000.

Projects requiring environmental impact statements

Estimated construction date	Number of projects	Estimated cost (thousands)
1975 ¹	4	\$23,908
1976.....	5	136,470
1977.....	8	235,268
1978 and later.....	15	444,921

¹ All approved for construction as shown.

Interstate projects Nos. 93-74 and 51-130, estimated cost \$73,125,000 and Rt. 7 projects Nos. 102-125 and 161-86, 87, 193 estimated cost \$72,976,000 are halted by court injunctions and will not be affected by the proposed changes in NEPA.

The 50th project (Nos. 164-134, 135), widening of I-91 from Rt. 75 to the Conn. River Bridge had no estimated cost.

Pursuant to the Feb. 28 Kirby memo, Mr. Altobelli has requested approval for project Nos. 146-99, 146-100 and 142-110—widening of I-86 from Vernon to Ashford, estimated cost, approximately \$80 million, construction date 1977. See Exhibit H.

EXHIBIT A

MEMORANDUM

JANUARY 2, 1975

Subject: *Conservation Society of Southern Vermont, Inc. v. Volpe and Vermont Natural Resources Council, Inc. v. Brinegar*; Project and EIS approvals not in conformity with this Second Circuit Decision

From: Robert E. Kirby, Regional Federal Highway Administrator, Delmar, N.Y.
To: Mr. D. J. Altobelli, Division Engineer, Hartford, Conn., Mr. V. E. Taylor, Division Engineer, Albany, N.Y., Mr. D. B. Kelley, Division Engineer, Montpelier, Vt.

This is to confirm our telephone conversation of January 2, 1975. On December 11, 1974 the United States Court of Appeals for the Second Circuit, which includes the States of Connecticut, New York and Vermont, held that both draft and final environmental statements must be prepared by the Federal Administration, and not by the States, and that an overall corridor EIS must be prepared where there is expectation that the entire corridor will be improved to a superhighway. It also indicated that, where PS&E approval was given prior to its decision, the decision as to whether or not an injunction should issue would be made by the district courts on a case-by-case basis.

In view of the court's decision, no project approvals should be taken and no draft EIS's or negative declarations should be signed in your State until you receive further guidelines from this office. We expect to issue these guidelines within the next few weeks.

EXHIBIT B

MEMORANDUM

JANUARY 29, 1975

Subject: Conservation Society of Southern Vermont, Inc. and Vermont Natural Resources Council, Inc., cases Project and EIS Approval Not in Conformity With This Second Circuit Decision.

From: Robert E. Kirby, Regional Federal Highway Administrator, Delmar, N.Y.
 To: Mr. D. J. Altobelli, Division Engineer, Hartford, Conn., Mr. V. E. Taylor, Division Engineer, Albany, N.Y., Mr. D. B. Kelley, Division Engineer, Montpelier, Vt.

As a result of the above decision in the Second Circuit, we requested on January 2, 1975 that no further project approvals be given for projects requiring an EIS or negative declaration and that no EIS's or negative declarations be signed in your Divisions until you receive further guidelines from this office. After consultation with the Washington office, we have developed the following guidelines which supersede the instructions given on January 2.

For purposes of this memorandum the term "EIS" does not include negative declaration.

1. Projects where no EIS is required under the provisions of FHPM 7-7-2 (issued December 30, 1974) (23 CFR Part 771), because they are determined to be non-major actions, may be advanced in the normal manner, even if an EIS or negative declaration was previously prepared under the provisions of the former PPM 90-1.

2. Projects for the development of environmental information or for preliminary engineering, which is normally done prior to the preparation of a Draft EIS, may be authorized. This information could be used by the FHWA to develop an EIS, if it is determined that we must do so. The Vermont case implies that States may prepare environmental assessments or reports for FHWA's use in preparing EIS's.

3. Right-of-way authorizations, except for acquisitions, may be continued.

4. Construction projects where the initial PS&E approval for basic construction (drainage and grading) was given prior to December 11, 1974 and advertisement for bids were made within a reasonable time thereafter may be advanced and further PS&E approvals, where required, may be given to bring the highway project to completion.

5. Hardship acquisition and protective buying cases where approval was previously given may be advanced in the normal manner. On projects where general authorization for right-of-way acquisition has not been given, further requests for hardship and protective buying shall be submitted to the Regional office for prior approval.

The following projects may not be approved for Federal funding.

1. Preliminary engineering projects for the writing of Draft or Final EIS's.

2. Initial basic construction projects or right-of-way acquisition projects where PS&E approval or authorization to proceed was not given prior to December 11, 1974 where a Draft or Final EIS is required under FHPM 7-7-2.

3. Location and/or design approvals may not be given on projects which require an EIS, even if the Final EIS has been approved.

No Draft or Final EIS prepared by a State may be approved by FHWA. However, it is not envisioned that ongoing projects for the preparation of a draft or final environmental report must be terminated, since the information to be gathered will probably have future utility.

EXHIBIT C

MEMORANDUM

FEBRUARY 28, 1975

Subject: Project Approval.

From: Robert E. Kirby, Regional Federal Highway Administrator, Delmar, N.Y.
 To: Division Engineer Victor E. Taylor, Albany, N.Y. (06-36).

Division Engineer David B. Kelley, Montpelier, Vt. (01-50).

Division Engineer Donato J. Altobelli, Hartford, Conn. (01-09).

I have reviewed the restrictions placed on project approvals in your State by my January 29, 1975 memorandum. I have concluded that projects not specifically

involved in the *Southern Vermont* case may be approved where urgently needed to immediately forward the project if the following conditions, in addition to those in FHPM 7-7-2, are met:

1. The FHWA has made "its own evaluation of the environmental issues and taken responsibility for the scope and content of the draft and final environmental statement." CEQ Guidelines 40 CFR 1500.7(c).

2. An EIS, if physically written by FHWA, would have been substantially the same or a paraphrase of the document written by the State.

3. Review of development of the draft and final EIS indicates such substantive direction by FHWA to warrant it being considered an FHWA document.

Projects meeting the above criteria can only be approved by me on a case by case basis. A factual report and your recommendation on acceptance or rejection of the EIS under these criteria shall be made to me in relation to each project sought to be advanced by the State.

EXHIBIT D

MEMORANDUM

FEBRUARY 13, 1975

Subject: Evaluation of Federal-aid Projects in relations to Route 7 Court Decision and FHPM 7-7-2.

From: D. J. Altobelli, Division Engineer, Federal Highway Administration, Hartford, Conn.

To: Mr. Joseph B. Burns, Commissioner, Department of Transportation, Wethersfield, Conn.

We have evaluated anticipated Federal-aid projects in relation to FHPM 7-7-2 (Environmental Impact and Related Statements, 12-30-74) and the guidelines for processing projects in accordance with the Route 7 Circuit Court decisions. Shown in the attachments are the projects by categories of action which may now be taken.

I. Non-Major Federal Actions (See attached List I). The projects in this category have been determined to be non-major actions according to the criteria in FHPM 7-7-2, and these projects may now be advanced in the normal manner without the need for an environmental statement or a negative declaration. We will still require evidence that the air quality and water quality permit requirements of the ConnDEP have been fulfilled before the projects are advertised for construction. Noise pollution must also be evaluated as instructed in PPM 90-2.

II. Projects with Negative Declarations (See attached List II). Projects which have or will need a negative declaration may proceed according to normal Federal-aid procedures. Air, water and noise will be analyzed in the negative declarations and the required permits handled as described in "I" above.

III. Projects with Previous PS&E Approval (See attached List III). These projects have had PS&E approval before December 11, 1974 and may be advertised for construction without further delay.

IV. Projects Requiring Environmental Impact Statements (See attached List IV). The projects listed require a complete environmental statement in accordance with FHPM 7-7-2 and may be advanced only to the next step requiring a Federal approval. Federal approval will be forthcoming only after a resolution of the Route 7 court decision.

V. Special Cases (See attached List V). There are several projects which we are evaluating further before a course of action can be determined. You will be advised of our decision on these projects soon.

Public hearing requirements for Federal projects are to be found in FHPM 7-7-5 (Public Hearings and Location/Design Approval, 12/30/74). When a public hearing is needed the environmental consequences of the project should be presented and described in a draft/final EIS, draft negative declaration, or an environmental summary. A summary would be appropriate in the case of a project determined to be a non-major Federal action, or one in which the major/non-major decision is in doubt.

The projects shown in the attachments to this memo were taken from the FA Funds Programing Report (B-Schedules) and may not be all-inclusive. We would be pleased to discuss and evaluate any additional projects that you may propose as Federal-aid.

Attachments.

LIST I.—PROJECTS WHICH ARE NONMAJOR FEDERAL ACTIONS

State No.	Federal No.	Description	Remarks
Primary:			
82-170	F-GMF(2)	Statewide geodetic survey	PE.
	F-RF-000S(6)	Revised exit number system	
Secondary:			
56-146	SU-161	Greenwich, Glenville St.	
Urban extension:			
	BWU-47(11)	Beacon Falls, bikeway	PE.
	BWUS-139(7)	Waterbury, bikeway	PE.
	BWU-BWRF-59(9)	New Haven, bikeway	PE.
Various	U-000S(9)	Carpool lots	Force acct.
42-195	U-RF-46(33)	East Hartford-Marlborough, Rt. 2	
36-125	U-143	Derby-West Haven, Rt. 34 signs	
Interstate:			
Various	I-000S(9)	Carpool lots	Force acct.
	I-000S(16)	Greater Htfd. safety, photogrammetry	PE.
63-307	I-84-3(126)61	Htfd., Broad St. ramp	PE.
170-147	I-GMI(1)	Geodetic survey	PE.
104-134	I-95-3(27)81	Old Lyme-Waterford	
160-101	I-86-2()	Willington, rest area	
34-128	I-84-1(25)1	Danbury sewer	ROW/constr.
58-166	I-95-4(58)98	Groton, fixed objects	
	I-84-4(87)88	Mansfield	
	I-84-2(106)37	Waterbury, fencing	
75-91	I-95-2(15)66	Madison-Westbrook, barriers	
92-172		New Haven-East Haven, Route 80	
152-91		Waterford, Route 156	ROW.
63-308	MT-1063	Hartford—being requested by city	
76-126	MT-1076	Manchester—being requested by town	
92-211	MT-1092	New Haven, TOPICS	
135-124	MT-1135	Stamford, TOPICS	
135-123	MG-8798	Stamford, Elm St. RR UP	
Economic growth center:			
107-87	DPF-163(4)	Southbury-Oxford SSR 468	Utility.
107-87	DPF-163(5)	Southbury-Oxford SSR 468	
Roadside obstacle:¹			
82-167	ROS	Middletown, Route 9	
63-301	ROS	Hartford-East Hartford, Route 2	
126-111	ROS	Shelton-Derby, Route 8	
42-4H02		East Hartford-Norwich, Route 2	
19-4H01		Brooklyn-Killington, Route 6	
34-4H01		Danbury, Route 7	
53-133	ROS-46(34)	Glastonbury, Route 2	
High hazard:			
36-124	HHS-143(13)	Derby, Route 34	Force acct.
51-174	HHS-165(1)	Farmington, Route 6	
128-93	HHS-8(2)	Simsbury, Route 167	
125-112	HHS-58(6)	Sharon, Route 7	

¹ Generally all projects to eliminate roadside obstacles will be nonmajor.

LIST II.—PROJECTS WHICH REQUIRE NEGATIVE DECLARATIONS

State No.	Federal No.	Description	Remarks
Primary:			
105-131	F-FG-13(1)	Old Saybrook, Route 1	
Urban extension:			
92-162	U-UG-55(8)	New Haven, Boulevard Bridge	
Interstate:			
155-90	I-84-3(127)57	West Hartford at Trout Brook	
Rural primary:			
	BWRF-57(17)	Essex-Haddam, bikeway	Historic land.
137-92	RF-162	Stonington, Route 78	
Rural secondary:			
139-76	RS	Suffield, Route 190	ROW/constr.
128-97	RS	Simsbury, Route 185	4(f), ROW/constr.
128-90	RS	Simsbury, Route 185	4(f), ROW/co.istr.
Urban systems:			
17-92	M	Bristol, South St.	4(f).
17-96	M-8125	Bristol, Maple St.	4(f).
135-110	M-1135	Stamford, 1-way system	
58-158	M-1058	Groton, Beach Pond Rd.	4(f).
155-94	M-8453	West Hartford, South Main St.	4(f).
102-166	M-8704	Norwalk, Ely Ave.	
63-267	M	Hartford, Incinerator Rd.	
148-61	M	Wallingford, S.R. 706	
88-80	M-8130	New Britain, Eddy Clover Boulevard	4(f).

LIST III.—PREVIOUSLY APPROVED P. S. & E.

State No.	Federal No.	Description	Remarks
Secondary:			
151-130	SU-RS-158(1)	Waterbury-Plymouth	Oct. 30, 1974.
Urban extension:			
887-505	BWU-27(5)	New Haven, bikeway	Nov. 15, 1974.
Rural secondary:			
131-116	RS-160(1) and (2)	Southington, Route 229	June 25, 1974.
Pavement marking:			
73-133	PMS-3073(1)	Litchfield	Nov. 26, 1974.
85-96	PMS-3085(1)	Montville	Dec. 6, 1974.
Interstate:			
155-98	I-84-3(125)	West Hartford, planting	Aug. 12, 1974.
58-164	I-95-4(55)	Groton-Stonington, Ill.	Sep. 19, 1974.
44-100	I-95-3(26)	East Lyme-Waterford	Nov. 8, 1974.
92-213	I-91-1(66)	New Haven-Meriden, signs	May 23, 1974.
79-123	I-91-2(57)	Meriden-Hartford, signs	May 23, 1974.
63-293	I-91-3(70)	Hartford-Enfield, signs	May 23, 1974.
34-149	I-84-1(34)	Danbury, signs	May 23, 1974.
96-129	I-84-2(97)	Newtown-Southington, signs	May 23, 1974.
131-120	I-84-3(118)	Southington-Hartford	June 21, 1974.
63-294	I-84-4(83)	Hartford-East Hartford	June 21, 1974.

EXHIBIT E

DEPARTMENT OF TRANSPORTATION, 24 WOLCOTT HILL ROAD,
WETHERSFIELD, CONNECTICUT

Notice to Contractors

Sealed bids for the construction of the following projects will be received by the Commissioner of Transportation in Room 148 at: 24 Wolcott Hill Road, Wethersfield, Connecticut until 2:00 p.m., Wednesday, May 14, 1975, after which time they will be publicly opened and read.

FEDERAL AID PROJECTS

Federal Aid No. M-8091(2)

Town of Enfield, 48-118.—About 13,400 L. F. of Two Course Bituminous Concrete Reconstruction of South Road from Route 5 easterly to Hazard Avenue including grading, drainage, traffic control signals, signs and markings. Engineer—J. S. Hird, District I, Rocky Hill.

Federal Aid No. RS-160(1)

Town of Southington, 131-116.—About 11,450 L. F. of Two Course Bituminous Concrete Reconstruction of Route 229 from the vicinity of I-84 northerly to Middle Street including Traffic Control, Signing and Pavement Markings. Engineer—J. S. Hird, District I, Rocky Hill.

The Department of Transportation, hereby notifies all bidders that it will affirmatively insure that in any contract entered into pursuant to this advertisement, minority business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

Note.—All prospective bidders must have on file, prior to receiving bid proposal documents, certification form CM32-34. This form is available in Room 150, Department of Transportation Office Building, 24 Wolcott Hill Road, Wethersfield, Connecticut.

STATE PROJECT

Town of Bridgeport, 15-101.—About 1146 L. F. of Two Course Bituminous Concrete Paving on N. B. and S. B. Relocated Water Street and local roads including grading and drainage. Engineer—W. E. Delahanty, District 3, New Haven.

TOWN AID PROJECT

Town of Colchester, 28-146.—Bridge Replacement on River Road. Engineer—Joseph D'Aquila, District 2, Norwich.

Prior to receiving bid proposal documents on any project, form E.O. 3-1 must be submitted.

The minimum rates of wages to be paid labor of the various classifications shall be in accordance with current schedule of wages established by the State Labor Commissioner, as provided in the General Statutes of Connecticut, as revised.

Plans and Specifications for the above projects may be examined in Room 150, Department of Transportation Office Building, 24 Wolcott Hill Road, Wethersfield, and in the District Offices in which the projects are located. All proposals must be obtained in Wethersfield. In order to avoid alterations, corrections, or erasures two (2) proposals will be issued to each bidder. Only one proposal will be deposited in the bid box.

Note.—Small-sized plans, approximately one-half original scale are available as well as the full-sized plans. Contractors may purchase either or both at prices listed below at Room 150, Department of Transportation Office Building, upon payment by check made payable to Treasurer, State of Connecticut, and there will be no refund.

COST OF PLANS

Cost	Small-size Conn. sales tax	Total	Project	Cost	Regular-size Conn. sales tax	Total
\$12.99	\$.91	\$13.90	48-118	\$48.64	\$3.41	\$52.05
13.55	.95	14.50	131-116	50.70	3.55	54.25
2.01	.14	2.15	15-101	7.52	.53	8.05
1.12	.08	1.20	28-146	4.21	.29	4.50

All bidders are required to inform themselves fully of the conditions relating to the construction and labor under which the work will be or is now being performed and the contractor must employ, as far as possible, such methods and means in the carrying out of this work as will not cause interruption or interference with any other contractor.

Note.—Surety Company Bond, on form furnished by the Department of Transportation, for at least one-third of the amount of the bid, must accompany each proposal, certified check will not be accepted. The Commissioner of Transportation reserves the right to reject any and all bids.

EXHIBIT F

MEMORANDUM

APRIL 2, 1975

Subject: FHWA-CONN-EIS-72-05-F, Project approvals per Regional Administrator's Memo of 2/28/75, Route 40—Boulevard Bridge, New Haven.

From: Robert E. Kirby, Regional Federal Highway Administrator, Delmar, N.Y.

To: Mr. D. J. Altobelli, Division Engineer, Hartford, Conn.

Your memorandum of March 13, 1975 requesting authority to approve a PS&E and authorize construction has been found to contain adequate justification to advance this project and you are granted such authority.

Our review further indicates that:

(1) You assume the responsibility for the scope and content of the draft and final EIS.

(2) Had the document been prepared by FHWA, it would have been a paraphrase of the document written by the State.

(3) Substantial input and direction was given by FHWA during the development of the documents.

EXHIBIT G

MEMORANDUM

APRIL 9, 1975

Subject: FHWA-CONN-EIS-71-07-F; I-84-2(44) 15 and RFI-84-2(90)17, Interstate 84, Newtown to Southbury.

From: Robert E. Kirby, Regional Federal Highway Administrator, Delmar, N.Y.

To: Mr. D. J. Altobelli, Division Engineer, Hartford, Conn.

Your memorandum of March 13, 1975 documents that substantial input and direction to the preparation of both the Draft and Final EIS was given by your

office. In addition, you have assumed the responsibility for the scope and content of that statement, and found that if written by FHWA, it would have been essentially the same. We therefore, concur in your request to advance this section of Interstate 84 in a normal manner.

EXHIBIT H

MEMORANDUM

MARCH 7, 1975

Re Project Approvals, Route 7, Southern Vt. Case.
To: D. J. Altobelli, Division Engineer, Hartford, Conn.
From: Mr. Robert E. Kirby, Regional Federal Highway Administrator, Delmar, N.Y.

In accordance with your memorandum dated February 28, 1975, on project approvals, we are submitting the following record with our recommendations for your review and action:

1. Background

Project Description

The project under review is I-86 between Vernon and Ashford. This project provides for the upgrading along existing location of a 4-lane limited access expressway to a six and eight-lane Interstate facility. The project is 17 miles long. On the north it ties into a 7 mile project which is under construction. To the south it ties into a 3 mile project which has final EIS in the Region awaiting some additional air study analysis. The project under review provides 16 miles at six lanes and 1 mile at eight lanes.

EIS Processing

The draft EIS was circulated on March 10, 1972. The final EIS was submitted by the Division Office to the Regional Office on February 15, 1973. It was approved by the Regional Office on August 20, 1973 and finally concurred in and approved by the Secretary on April 30, 1974. Please note this project included a 4(f) and required the Secretary's specific approval.

Significant Environmental Issues

Air Quality-EPA and DEP are concerned about the relationship of this project to the Transportation Control Strategy. The State has not developed, nor has EPA approved a transportation control strategy for the Hartford area. Since this project is still under design, we have agreed that even though the final EIS has been approved, it would not be advanced to construction until we received the indirect source permit. We have been meeting with DEP, and have reached tentative agreement that I-86 from Massachusetts Line to downtown Hartford will be included in State Implementation Plan as being consistent.

4(f) Lands

The project required the taking of six acres of land from Nipmuck State Forest. To mitigate this impact, the State DOT has agreed to transfer 28 acres to State Department of Environmental Protection.

Project Status

This project is under design. Design approval was given on June 14, 1974. Authorization to proceed with acquisition of total takes was given on September 30, 1974. We anticipate receiving a request for partial takes July 1975, and a request for P.S. & E. approval in December 1975.

2. Report on Approval Criteria

A. The Division Office of FHWA has made an evaluation of the environmental issues and taken responsibility for the scope and content of the draft. On October 5, 1971 the division office staff met with C.A. Maguire, the consultant working on the DEIS, to discuss content and Scope of Statement. A copy of these minutes are included, and marked as Attachment A. Examples of the type of comment and direction given by the Division involved alternates to be studied, areas to be investigated, scope of environmental issues, etc. In addition, the division engineer will not clear the document for circulation unless he accepts responsibility for its Scope and Content.

In regards to the final, the following documents clearly indicate FHWA actions to accept responsibility for the Scope and Content of the final EIS:

1. Memorandum dated 3/27/72 from R. O. submitting DEIS comments—Attachment B.

2. Memorandum dated 5/16/72 from D. O. to R. O. discussing comments received from BPA—Attachment C.

3. Area Engineer Bailey's updated review notes of draft final EIS—Attachment D.

4. Memorandum dated 2/15/73 transmitting FEIS recommending approval. Also discusses interim review procedure—Attachment E.

B. Our record clearly indicates that this EIS if physically written by FHWA would have been substantially the same or a paraphrase of the document written by the State. This conclusion is supported by the following:

1. Instructions were given to the State on what should be included in EIS.
2. Reviews were made of preliminary drafts of both DEIS and FEIS.
3. Meetings were held at our request where decisions were made on responses to comments, and steps to mitigate harm—See memorandum to File dated March 29, 1973 on 4(f) question—Attachment F.
4. Finally, the division office did clear the document for review, and recommend approval of FEIS.

C. We have reviewed the development of the draft EIS and final EIS and the record indicates substantive direction by FHWA which warrants it being considered an FHWA document. This conclusion is supported by the following:

1. Reviews were made of both preliminary draft EIS, and final EIS.
2. Meetings were held to provide instruction and direction to both consultant and State in preparation of documents.
3. Internal reviews were made of draft and final EIS by pertinent division staff offices to assure an interdisciplinary review of the documents.
4. Meetings were held with outside agencies to discuss methods to mitigate environmental consequences and gather data for inclusion in EIS documents.

In summary, we are satisfied that the record for this project clearly indicates that the division office has accepted responsibility for the scope and content of the FEIS. The documents, if prepared by us, would be substantially the same as the present document, and that there was extensive FHWA direction and involvement in preparation of the DEIS and FEIS.

I recommend that I be granted authority to advance this project in the normal manner.

Senator HASKELL. Our next witnesses are a panel, Harvey Carter of the Conservation Society of Southern Vermont; Len Arrow, director, Highway Action Coalition; Sarah Chasis, staff attorney, Natural Resources Defense Council.

Senator STAFFORD. Mr. Chairman, if you would indulge me for just a second, I would like to personally, as one of Vermont's Senators, welcome Mr. Carter here. He is a distinguished lawyer from Bennington, Vt. which is about 50 miles south of the city in which I was born and grew up.

He has played a distinguished role in environmental causes in Vermont. We are very happy to welcome him and his colleagues here this morning.

Senator LEAHY. I, Mr. Chairman, would certainly want to echo the words of Senator Stafford.

Senator HASKELL. We are very pleased to have you. I notice the young man in the room observing his father testify. It is nice to have your son here, too. Go ahead.

STATEMENT OF HARVEY CARTER, ATTORNEY, CONSERVATION SOCIETY OF SOUTHERN VERMONT

Mr. CARTER. Thank you very much, Mr. Chairman. Thank you, Senator Stafford, Senator Leahy.

I appreciate this opportunity to testify on H.R. 3130 and H.R. 3787. I have served as one of the lawyers in the *Conservation Society* case

and speak today in behalf of the individual plaintiffs in that case and for many other residents of Vermont, New York, New Hampshire, Connecticut, and Massachusetts.

I understand also that the Highway Action Coalition and the Natural Resources Defense Council which Ms. Chasis represents join in this statement.

At the time of NEPA's passage in 1969, the two chief Senate spokesmen on behalf of the act, Senator Muskie and Senator Jackson, stressed the necessity for legislation which would force Federal agencies to develop environmental expertise and evince genuine environmental concern.

Mr. JACKSON. Mr. President, the substance of these two initial titles of the Senate version of S. 1075 is not included in the House version. There are, in addition, a number of differences between Title III of the Senate version, establishing a Board of Environmental Quality Advisors and calling for an annual environmental quality report to the Congress, and the similar House provisions.

Titles I and II of the Senate version perform two functions which are essential for the realization of a sound national environmental policy.

The first of these functions is the statement of policies and broad goals to guide Federal decision-makers. The statement will represent the first comprehensive enunciation of national concern for environmental quality.

The second function is the provision of authority and direction which will permit the policies set forth in the act to become a real working part of all the activities of all Federal agencies and programs.

There are about 80 major Federal agencies with programs underway which affect the quality of the human environment. If an environmental policy is to become more than rhetoric, and if the studies and advice of any high level, advisory group are to be translated into action, each of these agencies must be enabled and directed to participate in active and objective-oriented environmental management. Concern for environmental quality must be made part of every phase of Federal action.

* * * * *

Mr. Muskie. . . Sections 102 and 103, and I think section 105, contain language designed by the Senate Committee on Interior and Insular Affairs to apply strong pressures on those agencies that have an impact on the environment—the Bureau of Public Roads, for example, the Atomic Energy Commission, and others.

This strong language in that section is intended to bring pressure on those agencies to become environment conscious, to bring pressure upon them to respond to the needs of environmental quality, to bring pressure upon them to develop legislation to deal with those cases where their legislative authority does not enable them to respond to these values effectively, and to reorient them toward a consciousness of and sensitivity to the environment.

Mr. CARTER. From my reading of the legislative history and from the clear language of section 102(2)(C) Congress envisioned the preparation of environmental impact statements by responsible Federal officials as the principal process by which Federal agencies would (1) develop agency expertise in environmental matters and, (2) inform themselves of the environmental and social consequences of their proposed actions.

The second circuit correctly construed the language of the act when it held, in *Conservation Society*—as I understand it has been followed by the seventh circuit, also, last Wednesday—that NEPA places a nondelegable duty on the responsible Federal official to prepare environmental impact statements. And the second circuit is not alone in this view.

In my statement I notice the district court in Wisconsin ruled in addition to the second circuit. In 1972 a U.S. district court in Wisconsin

sin ruled "it is the Federal agency which must prepare the impact statement and balance the project's worth in light of the environmental consequences." (*Northside Tenants v. Volpe*, 346 F. Supp. 244, 248, E.D. Wis. 1972.)

And recently the U.S. District Court for New Hampshire, in the *Franconia Notch* case, enjoined further construction on Interstate 93 in part on the ground that the responsible Federal agency had not prepared the environmental impact statement or evaluated the proposed major Federal action. The bill tends to reinforce the notion that NEPA's concerns are merely a procedural checklist and not underlying policies which must permeate an agency's consciousness and be meaningfully incorporated into its decisionmaking process.

Moreover, H.R. 3130 blurs the extremely important requirement that Federal agencies conduct an objective environmental evaluation.

In both Conservation Society and Franconia Notch, Vermont and New Hampshire, respectively, had absolutely committed their State highway departments to the construction of Route 7 and I-93.

It was, therefore, impossible for the State highway departments consistently to, on the one hand, implement a State mandated action and, on the other, effectuate the policies of NEPA.

Are we to cede to inherently biased State agencies, whether in highway construction or other major areas of Federal activity, the power to commit millions in Federal moneys to projects which may not serve the environmental and social goals NEPA seeks to establish?

Additionally, in Vermont at least, the man who would be charged with preparing the impact statement under H.R. 3130, Commissioner John Gray, has been quoted in newspaper accounts that passage of these bills quite clearly indicates that Congress favors progress on the construction of Route 7.

Can any member of the public reasonably expect that the Vermont Highway Department will now objectively and faithfully carry out the congressional mandate?

Furthermore, H.R. 3130 will only serve to inhibit meaningful public participation in the impact statement process. In reviewing draft impact statements: How will members of the public, and for that matter, commenting Federal agencies, determine whether a self-interested State agency or the disinterested Federal agency has prepared a section of the draft impact statement?

Will State agencies be forced to disclose their biases, and if so, how?

Will the public, other Federal agencies, indeed the FHWA, in reviewing draft impact statements, know whether environmental value judgments or social calculi reflect State decisions or Federal decisions?

In other words: How will draft environmental impact statements, unless they are prepared by the responsible Federal official, assure the public and other Federal agencies that in fact the Federal agency made the initial critical environmental decisions?

Without exhaustive disclosure within the impact statement, allocating specific responsibility for initial decisionmaking between State and Federal officials, the public and other Federal agencies may be forced to repeated litigation in order to discover whether the responsible Federal official has fully acquitted his mission under NEPA.

Finally, the Federal Highway Administration takes the position that its existing procedures, codified in 23 Code Fed. Reg. 771 comport with H.R. 3130.

On April 7, 1975, before the House Public Works Committee, Governor Tiemann, the FHWA Administrator, referred to these procedures when he testified:

We already critically review and, where necessary, change and supplement EIS's; we only adopt an EIS as our own when we are fully satisfied that it accurately, adequately, and without bias presents the environmental impact of a proposed project.

In both the *Conservation Society* and *Franconia Notch* cases the Federal Highway Administration maintained that they had scrupulously adhered to these procedures; yet, in both cases, the courts found that the FHWA had merely rubber stamped State-authored EIS's and in both cases FHWA had failed to note or examine the broader environmental and social impacts of its proposed actions.

The broader social and environmental impacts that FHWA failed to consider, notwithstanding its strict adherence to the procedures to which Governor Tiemann referred, include: (1) Failure to consider secondary land-use impacts; (2) failure to do any cost-benefit study; (3) failure to consider alternatives; and (4) failure to examine the consequences of its actions on public parklands as required by 23 U.S.C. 138, the Protection of Public Parklands Act.

Principal among the failures of FHWA to carry out NEPA's goals, however, was its failure to examine the full scope of proposed interstate highway construction by the States of Connecticut, Massachusetts, and Vermont about which only FHWA had full knowledge.

The responsible Federal official was willing to permit State highway departments to undertake segment-by-segment analysis and construction without the comprehensive environmental and social review called for by NEPA.

In the National Transportation Act Congress has called for the development of a comprehensive national transportation policy.

I submit that we cannot make meaningful transportation decisions or develop an intelligent national transportation policy if we adopt now a policy of turning over to three States the consideration of incremental highway construction.

The Department of Transportation is the only agency to carry out this function, and NEPA, particularly section 102, plays a critical role in helping it to develop an intelligent national transportation policy.

In its report accompanying the bill that became NEPA, the Committee on Interior and Insular Affairs stated:

To remedy present shortcomings in the legislative foundation of existing programs, and to establish action-forcing procedures which will help to insure that the policies enunciated in Section 101 are implemented, Section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act.

In the report, the committee also noted that "if the proposal is considered to have [a significant] effect, then the recommendation or report supporting the proposal must include statements by the responsible official of certain findings . . ." The report further notes "the committee expects that each agency will diligently pursue this review . . .".

Mr. Chairman, the decisions by the second circuit and the district courts of Wisconsin and New Hampshire fully and faithfully carry out this congressional intent.

The FHWA now seeks relief from its duties to prepare impact statements, principally on the ground that the second circuit decision has halted all highway construction in Connecticut, New York, and Vermont.

Any fair reading of the second circuit's decision will not support FHWA's position. The court's opinion does not go to all projects as FHWA maintains. The court was very careful to note that a violation of NEPA does not of right entitle plaintiffs to injunctive relief.

In the companion case decided with Conservation Society, the court found that a trial court retained equitable discretion to deny injunctive relief, notwithstanding NEPA violations. Accordingly, highway projects which have insignificant environmental effects, which serve a pressuring and overriding public need, and which have been advanced to a point where environmental review cannot be thorough and meaningful, are not affected by the second circuit's nondelegation rule. To my knowledge, FHWA has not inventoried the projects in Vermont, Connecticut, and New York to determine which, if any, of these projects meet these criteria.

In fact, in response to FHWA's freeze order we petitioned them on February 17 for rulemaking in accordance with the second circuit decision. To date, FHWA has taken no action to establish rulemaking procedures. It is our view that rulemaking would enable all parties in interest to identify those highway construction projects in the second circuit which meet the court's exemption test.

It would appear that FHWA has sought congressional relief without fully exploring available administrative remedies which might unburden them from NEPA responsibilities with respect to specific projects during the coming construction season.

Moreover, since it has already been judicially determined that some projects, such as Route 7 in Vermont, I-291 in Connecticut, and Franconia Notch in New Hampshire, have serious environmental consequences which have not been properly assessed, passage of either bill would appear to place Congress' imprimatur on highway construction activities which obviously warrant the most serious and thoughtful reexamination and analysis by Federal decisionmakers.

It clearly follows that in urging passage of these bills FHWA must assume that highway construction projects, now delayed by court injunction, have no serious environmental consequences. This simply is not the case. I should point out there are other serious issues in these cases which will delay advancement of these projects, even if these bills are passed.

Under NEPA a Federal agency cannot avoid hiring adequate staff to prepare impact statements. Such a staff should already exist within the Federal Highway Administration, if it has faithfully followed the expression of congressional intent in the report accompanying NEPA.

In that report, the committee clearly states that "Federal agencies [must] include, as part of their existing programs and their ongoing activities, certain environmental management functions which will be necessary to support the policies established by this act." Among the functions which the report expected Federal agencies to undertake are the following:

(A) To conduct investigations and research relating to ecological systems and environmental quality. It is intended that such activities will be undertaken by each agency when its activities would have an adverse impact on an ecological system or on the quality of the environment.

* * * * *

(E) To utilize ecological information in the planning and development of resource-oriented projects. Each agency which studies, proposes, constructs, or operates projects having resource management implications is authorized and directed to consider the effects upon ecological systems to be a part of the analyses governing its actions and to study such effects as part of its data collection.

It seems all too clear that H.R. 3787 and H.R. 3130 are designed to relieve, in whole or in part, FHWA (and other agencies which already prepare their own impact statements), of these vital and important functions.

Moreover, the second circuit was not unreasonable in defining the limits of nondelegable Federal responsibilities. It specifically held that Federal agencies may rely upon field research and factual studies conducted by State agencies.

It is generally recognized that such fieldwork and factfinding constitute the bulk of the time and expense involved in an adequate environmental assessment, and the delegation of these functions to State agencies, which is, I stress, permitted by the second circuit decisions, relieves Federal agencies of burdens which do not affect their roles as initial decisionmakers.

It is clear, however, that the preparation of impact statements is the very process by which the responsible Federal official informs himself and through which he reaches and expresses critical environmental and social value judgments.

That remains the sole responsibility of the Federal decisionmaker under the second circuit rule. By precluding self-interested State agencies from drafting impact statements, the second circuit has properly foreclosed the opportunity for them to frame issues, weigh values and establish emphasis, and so intrude into the decisionmaking role.

Consequently, in determining which environmental values are important, the Federal decisionmaker is not vulnerable to manipulation by self-interested State agencies and genuine Federal preparation creates a presumption of regularity which reassures both the public and other Federal agencies and obviates litigation in order to determine the extent of Federal participation.

Mr. Chairman, the FHWA is premature in seeking congressional relief from the requirements of NEPA. As I noted earlier, it has administrative rulemaking remedies available to it by which it can identify for all interested parties those projects which, under the second circuit rule, can proceed to construction this year and provide public employment.

Additionally, it has not exhausted its judicial remedies on the legal issues at stake. Since it has available to it adequate administrative remedies which will insure the protection of environmental values in those cases where such values play a major role, while, at the same time, advancing projects which will provide employment and needed public improvements, I suggest that the FHWA's proper forum is the Supreme Court of the United States.

I have been informed by its counsel that it has requested the Solicitor General to file a writ of certiorari, although no writ to date has been docketed, some 5 months after the second circuit decision.

Finally, I think it is generally well recognized that no one expected Federal agencies to implement NEPA's broad and comprehensive policy goals overnight. Hundreds of suits have been brought under the act, scores of them directed as were Franconia Notch and Conservation Society, at the issue of whether the Federal Highway Administration of one of these issues: The extent to which the responsible

It has taken time and money to sort out many of the questions which NEPA gave rise to. And we are now approaching a judicial determination of one of these issues: The extent to which the responsible official must involve himself in the preparation of impact statements.

Since there is no compelling need for congressional intervention now, I respectfully submit that the judicial process should be permitted to work its historic function. Unfortunately, H.R. 3130 does little to clarify the underlying dispute addressed by the second circuit, the two district courts which have supported its rationale or the four circuits contra.

Instead, it tends to muddy once again the issue of degree of Federal participation and to return us to the very state of uncertainty that the second circuit sought to avoid. If the public and other Federal agencies are not able to assume genuine preparation of impact statements by responsible Federal officials, the only way they can determine the extent of Federal participation is by further recourse to the courts.

Such a remedy is intolerable, not only for its impact on the court system but also its impact in terms of cost to the public and Federal agencies and potential unnecessary delay of federally assisted or licensed projects. As such, H.R. 3130 represents an 11th-hour blow to the clarifying process afforded by judicial review.

In closing, Mr. Chairman, let me implore you, the Senators present here today and the Senate as a whole, not to permit damage to NEPA's goals on account of the premature false alarm created by FHWA's own administrative inaction.

The courts are not insensitive to the need for public employment on public works projects which have little or no environmental consequences. The FHWA has available to it appropriate administrative procedures for protecting the environment, where it needs to be protected and providing employment, where environmental and social issues are insignificant.

It has a forum to decide the legal controversy raised by the conflict between the second circuit and other circuits. The legislation before you will weaken what the District of Columbia circuit, in the landmark *Calvert Cliffs* case, described as the "lynchpin" of the act. It seems such a shame to permit a Federal agency to so artificially structure the course of events, by administrative manipulation or inaction, that the Congress of the United States should feel compelled to weaken a statute which has played, and should continue to play, such a vital and important role in Federal policy decisions in this country.

Thank you.

Senator HASKELL. Thank you, Mr. Carter. Do your associates have separate statements or do they join in yours?

STATEMENT OF SARAH CHASIS, ESQ., STAFF ATTORNEY, NATIONAL
RESOURCES DEFENSE COUNCIL, INC.

Ms. CHASIS. Yes. I welcome the opportunity to testify. I am speaking on behalf of the National Resources Defense Council and a number of environmental groups throughout Connecticut, Massachusetts, and Vermont, who joined NRDC as amicus curiae before the seventh circuit in the Route 7 decision.

I join in Mr. Carter's statement, and have the following to add.

The Natural Resources Defense Council and the other groups for whom I speak are adamantly opposed to passage of either H.R. 3787 or H.R. 3130. The National Environmental Policy Act is the bedrock of Federal environmental law and regulation because it expands the mandate of every Federal agency and make environmental consideration a part of each agency's analysis and review.

The basic policies behind the act encourage objective, rational planning and the wise utilization of the Nation's resources. The mechanism to insure the incorporation of such policies in Federal decisionmaking is the requirement that the responsible Federal official make a detailed statement on any proposal for major Federal action which will significantly affect the environment.

This crucial mechanism and the purposes it is designed to achieve are undercut by the delegation of responsibility for EIS preparation to an applicant for Federal funds, licenses or approvals, a practice which both bills sanction to varying degrees.

The fact that delegation of preparation is to the State agency does not make the threat to NEPA any less great. An EIS prepared by a State DOT, for example, is likely to reflect the self-serving assumptions which exist by virtue of the fact that the State highway department's function is to build highways.

This potential for bias is vastly increased where the State highway department is charged with the legislative mandate to build the particular highway segment as is the practice in many States, including Vermont and New York.

Delegation of responsibility to the State agency violates the policies behind NEPA not only because of the potential for bias created, but because such delegation makes it impossible for the responsible Federal official to fulfill his duty to consider environmental factors at every stage of the decisionmaking process.

The EIS exists to produce an enlightened decisionmaking process rather than a mechanical bureaucratic exercise in drafting and filing papers. In addition, only the Federal agency can properly analyze a project's interstate significance, its impacts which extend beyond a particular State's jurisdiction, alternatives of a regional character, energy, transportation and land use issues which have national implications.

Most importantly, only the Federal agency can determine compliance with other Federal laws. For these reasons, H.R. 3787 and H.R. 3130 pose serious threats to the National Environmental Policy Act.

Moreover, H.R. 3787 represents the kind of special exception legislation which sets a dangerous precedent for the piecemeal undermining

of NEPA program by program, agency by agency. It also places the three States in a preferential position with respect to the other States in the country.

H.R. 3130 is a broad amendment to NEPA and as such is even more dangerous. This is true because of the delegation of NEPA responsibility which it sanctions and also because, if passed, it would be the very first direct amendment to the National Environmental Policy Act. The door to other amendments would be thrown open.

H.R. 3130 will affect dramatically NEPA procedures in numerous agencies and programs. For example, if the Power Authority of the State of New York (PASNY) which is a statewide agency, wanted to build a nuclear powerplant, the nuclear regulatory commission could allow them to prepare the environmental impact statement. This is contrary to the present procedures which that agency follows. As already discussed, there is no reason for distinguishing a State applicant from a private applicant.

Passage of H.R. 3130 will lead to years of litigation to determine the meaning of the requirements of Federal "guidance," "participation" and "independent evaluation." Thus, it will not expedite NEPA procedures.

Furthermore, it will not expedite projects in the three States affected by the Route 7 decision. Few of the State prepared EIS's could meet the standards set therein. Therefore, we would have an amendment to NEPA which would have been needlessly made in terms of accomplishing the objectives sought.

The most powerful of the arguments put forward for passage of either bill is that construction jobs now held up will be produced. But there has been no showing—and this is most important to underline—that a significant number of highway projects in the three States which would otherwise be under construction or imminent to construction have been held up solely by reason of the decision.

First, as far as can be ascertained, projects in Connecticut, Vermont, and New York are either proceeding as planned, are held up by reason of court injunction not solely related to the issue of delegation, or are so far back in the planning process that they will be unaffected in terms of producing jobs by passage of either bill.

Again, the environment is being used as the scapegoat for projects which are stopped for other reasons. Second, any significant slowdown which has resulted is due to administrative action rather than to the court decision.

Failure to read the decision sensibly and work it out administratively has been the policy which FHWA has followed. Rather than establish administrative roadblocks programs and projects can and should be processed pursuant to the three criteria which FHWA has established in its memorandum of February 26, which is appended to my written testimony.

Thus administrative means of dealing with the problem can serve while final resolution of the issues occurs in the U.S. Supreme Court.

In conclusion, tremendous policy sacrifices will be made by passage of either bill. FHWA, an agency which has time and again attempted to shirk its NEPA responsibilities, should not be allowed to benefit by

its recalcitrance and have NEPA undermined as it applies to the Federal highway air program, the largest public works program in the country, and in numerous other programs.

Judicial and administrative remedies for the current situation exist. The sooner Congress defeats both bills, the sooner the judicial and administrative remedies will be called into play.

A significant number of jobs will not be created now by passage of either bill.

Senators, I call on you to hold oversight hearings of FHWA's compliance with NEPA. I also wish to say that prior to passage of any legislation I would hope that there would be further exploration of the issues than these brief hearings could allow.

Thank you very much.

Senator HASKELL. Thank you very much.

[The written statement from the Natural Resources Defense Council, Inc., follows:]

Natural Resources Defense Council, Inc.

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NEW YORK, N.Y. 10036

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Testimony of the NATURAL RESOURCES DEFENSE COUNCIL

On H.R. 3787 and H.R. 3130

before the

SENATE PUBLIC WORKS COMMITTEE

and the

SENATE COMMITTEE ON INTERIOR
AND INSULAR AFFAIRS

This Testimony is Joined in by:

BERKSHIRE LITCHFIELD ENVIRONMENTAL
COUNCIL, INC.
CITIZENS FOR BALANCED TRANSPORTATION
AND ENVIRONMENT, INC.
THE HOOSIC RIVER BASIN CITIZENS
ENVIRONMENTAL PROTECTION ASSN.
THE HOUSATONIC AUDUBON SOCIETY
HOUSATONIC VALLEY ASSOCIATION
THE LAKE CHAMPLAIN COMMITTEE
SOUTH BERKSHIRE RESEARCH GROUP
MASSACHUSETTS PUBLIC INTEREST RESEARCH
GROUP
VERMONT PUBLIC INTEREST RESEARCH GROUP

SARAH CHASIS, ESQ.

Staff Attorney
Natural Resources
Defense Council, Inc.
15 West 44th Street
New York, NY 10036

May 5, 1975

I. INTRODUCTION

This statement is made on behalf of the Natural Resources Defense Council, Inc. (NRDC) and a number of environmental groups throughout Connecticut, Massachusetts and Vermont. These organizations have been requested to appear and present testimony by the Senate Committee on Public Works and the Senate Committee on Interior and Insular Affairs in connection with H.R. 3787 and H.R. 3130. NRDC is a national non-profit environmental law organization which has been involved in numerous cases interpreting NEPA. (A fuller description of NRDC's activities is appended to this statement). In the context of these activities, NRDC filed a brief amicus curiae on behalf of itself and eleven other environmental groups in Conservation Society of Southern Vermont v. Secretary of Transportation before both the district and appellate courts. Because of these involvements, NRDC is well qualified to address many of the issues raised by the proposed legislation.

The environmental groups on behalf of whom this statement is made are adamantly opposed to passage of either H.R. 3787 or H.R. 3130. This position is not taken without sensitivity to the present economic situation and the need for jobs. Passage of either bill would result in tremendous policy sacrifices in return for extremely elusive economic benefits. The costs of passage are clear -- the basic policies of the National Environmental Policy Act which promote objective, rational decision-making and the wise expenditure of funds will be undermined. The benefits of passage will be minimal for there is no evidence that a significant number of construction jobs will result in the near future.

Any need for clarification of the Federal Highway Administration (FHWA) responsibilities under NEPA can be resolved by appeal to the United States Supreme Court. In the meantime, the slow-down of highway projects in New York, Connecticut and Vermont can be ended administratively just as it was created administratively.

FHWA, which has attempted to bypass its NEPA responsibilities and, by its own rigid non-compliance with the law, created a road-block should not now benefit from its actions. Rather, Congress should hold oversight hearings on FHWA's compliance with NEPA. No legislation should even be considered until there has been much fuller exploration of the issues than these brief hearings can provide.

Judicial and administrative procedures exist for resolution of the present situation. FHWA, however, will not utilize the available procedures until Congress makes clear that H.R. 3787 and H.R. 3130 will not be passed. Thus Congressional defeat of both bills is imperative.

Specific objections to the two bills are detailed below.

II. H.R. 3787

H.R. 3787, though in form an amendment to the Federal-aid Highway Act, represents a major amendment to NEPA, for any significant change in the way NEPA is implemented in the highway arena constitutes a major change in the scope and thrust of the Act. This point is underscored by two facts. First, over the last decade the federal highway program has been the biggest and most pervasive of all the public works programs in the country. Literally billions of dollars are annually poured into highway construction which takes place in every region and state of the nation with immediate and dramatic consequences on the lives of every American citizen. No other program since the Second World War has done so much to change our physical landscape -- both in influencing the places that are accessible to an increasingly mobile population and in influencing the location of our homes, jobs and recreation and thus our entire pattern of living. This is a program with the most profound environmental impact.

The first fact is reflected in the second: in each of the last four years the Department of Transportation has been the federal agency filing the greatest number of environmental impact statements with the CEQ. This is as it should be. Those having the greatest effect on the environment should be under greatest scrutiny and review by CEQ, the environmentally interested agencies and private groups. H.R. 3787, therefore, must be approached as an amendment to NEPA.

A. Special Exception Legislation which Undermines Uniform Application of NEPA

The bill creates a special exception to NEPA for highway programs in New York, Vermont and Connecticut. Such piecemeal erosion of NEPA is unwise and sets a bad precedent for other agencies and programs. In addition, the legislation puts the three states in a preferential position with respect to all other states in the country. No federal court has sanctioned what H.R. 3787 sanctions, namely delegation of impact statement preparation to the states. All courts have required significant federal involvement in EIS preparation, each drawing the line on what constitutes sufficient involvement at different points. Thus though the stated intent of the bill is to relieve the three states of the position they claim to have been placed in by the decision in Conservation Society of Southern Vermont v. Secretary, relative to other states, the bill ends up by setting a looser standard for the three states than exists elsewhere.

B. Judicial and Administrative Remedies Exist

Special legislation is not needed for the three states. The question of FHWA's responsibilities under NEPA, which

has been answered differently by courts around the country, can be resolved once and for all by FHWA's appeal of the Conservation Society case to the U.S. Supreme Court. (By its own action the agency has so far delayed such an appeal.) In the meantime, the processing of projects in the three states need not be dramatically halted, but rather can be moved along through administrative action.

A critical point must be made. The Second Circuit did not put a stop to the processing of highway projects in the three states. Rather this was done initially by FHWA in an overly broad reading of the decision. FHWA's administrative roadblock of projects was subsequently modified. Now projects in the three states, not specifically involved in the Conservation Society case, may be processed on a case by case basis, provided they satisfy the following conditions:

1. The FHWA has made "its own evaluation of the environmental issues and taken responsibility for the scope and content of the draft and final environmental statement." CEQ Guidelines, 40 CFR 1500.7(c).
2. An EIS, if physically written by FHWA, would have been substantially the same or a paraphrase of the document written by the State.
3. Review of development of the draft and final EIS indicates such substantive direction by FHWA to warrant it being considered an FHWA document.
(See attached FHWA memorandum of February 26, 1975.)

In addition, FHWA has indicated that FHWA personnel in the three states are presently working to comply with the court order. (See attached letter from FHWA to Harvey Carter, March 28, 1975.) Thus administrative procedures exist for the processing of impact statements and projects.

C. A Significant Number of Jobs Would Not Be Created in the Near Future

The most powerful argument that the FHWA and the state DOT's use to force passage is that the decision cuts into sorely needed construction jobs. However, no state DOT has come forward with evidence to show that a significant number of projects planned for construction in the three states during 1975 are stopped by reason of the court decision, and therefore that a significant number of needed jobs have been lost. The state DOT's have obfuscated this fact. Their lists of projects allegedly stopped by the Conservation Society decision contain:

-4-

- projects so far back in the planning process that they would not be producing construction jobs for a long time anyway;
- projects which are under court injunction and therefore could not proceed to construction anyway;
- projects which are opposed by city or local government or which have been dropped for wholly unrelated reasons.

Below is a summary of the situation in the three states as can best be determined.

1. In Vermont:

- a. The Route 7 construction from Bennington to Manchester was halted not only because of improper delegation, but because the Secretary of Transportation failed to make the requisite 4(f) findings regarding incursion on public parklands, and because the EIS failed to contain an adequate cost/benefit analysis.
- b. The balance of Route 7 is not enjoined, but is years away from construction.
- c. The "Bennington Beltline" (a Route 7 - Route 9 connector) is under court injunction because no impact statement was prepared.
- d. Portions of Route 2 near St. Johnsbury are enjoined because no impact statement was prepared.
- e. Interstate 93 was enjoined because of its obvious relationship to the location of the I-93/I-91 interchange and the likelihood of construction of I-93 through Franconia Notch in New Hampshire.
- f. I-91 construction is proceeding apace.

According to Vermont's contribution to the "1974 National Transportation Study" and Vermont's 1974 "Priorities for the Primary System," completion of the Interstates, improvement of Route 2 from Montpelier to St. Johnsbury, and alteration of Route 7 from Massachusetts to Burlington are Vermont's highest construction priorities at this time, and the principal focus of the State's attention. If the proposed legislation were passed tomorrow, it would not enable any greater amount of construction on any of these routes to go forward. All are either under construction without

hindrance, years away from construction for planning or logistical reasons, or enjoined for reasons not solely related to the delegation issue.

2. In Connecticut:

Putting aside those projects which are enjoined on other issues (Route 7 and I-291), there is nothing scheduled for construction in Calendar 1975 that has been stopped. The total construction planned for 1975 (\$23.9M) appears to be proceeding as planned:

- a. Project No. 92-162 (Bridge in New Haven) has recently been completely approved for construction. (\$7M)
- b. Project No. 96-114 (upgrading of I-84) has recently been completely approved for construction. (\$10.5M)
- c. Project No. 96-115 has recently been completely approved for construction. (\$5.7M)
- d. Project No. 151-130 (reconstruction of Route 26 in Waterbury) is proceeding. (\$827,000)

3. In New York:

The list of projects contained in the press release issued by Commissioner Schuler on April 7, 1975 includes such projects as the Westside Highway, which is in litigation and years from construction; segments of I-88, I-390 and I-590 and the Southern Tier Expressway which are under court injunction; the White Plains arterial feeder, a project apparently withdrawn by the White Plains City Council; Ocean Parkway, a project which the City of New York is fighting. These are only a few examples of the state's misrepresentations. Most importantly, the list does not isolate those projects which, except for the Conservation Society decision, would be under construction or imminent to construction.

In order to see clearly through to the states' arguments regarding job loss, it should be determined what projects which would otherwise be going to construction in the next six months are held up solely because of the Route 7 decision. In addition, the number of jobs each such project will generate should be spelled out. This latter figure would be most telling. For example, for the \$35.M being expended on construction of Route 7 (north of Danbury, Connecticut), only ten percent will go to pay salaries. Of the remainder, 15 percent goes for right-of-way acquisition and 75 percent for equipment and material.

III. H.R. 3130

H.R. 3130 is more broadly based than H.R. 3787. In one respect, therefore, it is a less offensive bill since it is not the kind of special exception legislation which results in piecemeal undermining of NEPA. But for the same reason, it is much more threatening. If passed, it would be the first amendment to NEPA and would work major changes in the policies underlying the Act. The bill is applicable nationwide and, most importantly, affects not only highway programs, but all programs in which a state agency is an applicant for federal funds, licenses, or approvals. It would result in a major revision of NEPA procedures as applied to numerous programs and agencies.

A. Federal Preparation of Impact Statements is Essential to NEPA

Preparation of impact statements by the federal agency itself is the only way to "ensure that each agency decision-maker has before him and takes into proper account all possible approaches to a particular project" Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1114 (D.C. 1971), cert. denied, 404 U.S. 942 (1972). It is the only way in which the federal agency itself can "give serious weight to environmental factors in making discretionary choices" and ensure that the EIS is more than a "mere token effort." Monroe County Conservation Council v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972). NEPA places upon the federal agency, not the contestants of license applications, the burden of representing the public interest in the environment. It was for this reason that in an earlier case the United States Court of Appeals for the Second Circuit held that the detailed statement required by §102(2)(C) must be prepared by the Federal Power Commission ("FPC") itself with the actual work to be done by the FPC's own staff. The reasons of policy for following this approach were clearly enunciated:

"The danger of the procedure [whereby the Applicant would prepare the EIS], and one obvious shortcoming is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumption . . ." Greene County Planning Board v. FPC, 455 F.2d 412, 420 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972).

There is absolutely no reason why a state applicant which is seeking federal funds, licenses or approvals is likely to prepare a more objective impact statement or one less full of "self-serving assumptions" than a private applicant. In the highway context, the potential that the EIS

-7-

will reflect self-serving assumptions exists by virtue of the fact that it is the state highway department's function to build highways. This potential for bias is vastly increased where the state highway department is charged with a legislative mandate to construct the particular highway segment at issue. (New York and Vermont DOT's do function pursuant to such mandates.) Delegation of preparation of the EIS is thus boldly contrary to the purposes of NEPA.

The delegation of responsibility to the state agency violates the policy behind NEPA, not only because of the potential for bias that is created by such delegation, but because such delegation makes it impossible for the responsible federal agency to fulfill its duty to consider environmental factors at every stage of the decisionmaking process. Greene County Planning Board v. FPC, 455 F.2d 412, 420. (2d Cir. 1972), cert. denied., 409 U.S. 849 (1972), citing Calvert Cliffs. The EIS requirement exists to induce an enlightened decisionmaking process rather than a mechanical bureaucratic exercise in "drafting and filing" papers. The purposes of the EIS are thus frustrated where the federal agency need only "participate" and provide guidance in EIS preparation, a very ambiguous standard which will take years of litigation to define.

Only the federal agency responsible for an action is in a position to properly analyze the project's interstate significance, the impacts which extend beyond a state's jurisdiction, alternatives of a regional character, and energy and land use issues which have national implications. Most importantly, only the federal agency can assure compliance with the requirements of other federal statutes, for example, Section 4(f) of the Department of Transportation Act and Section 134 of the Federal Aid Highway Act.

It seems self-evident that an interstate highway should be reviewed and analyzed by the federal government. This is so not only because federal funds are at stake and because the project is for the benefit of all American citizens, but also because it would be inappropriate to have one state making decisions on development in another state. Is Vermont to make the judgment on where the road is to go in Massachusetts and Connecticut? Is Connecticut to be allowed to go forward with construction that effectively dictates to Massachusetts what sort of facilities and road construction program it must undertake? By sanctioning state preparation of impact statements, precisely that result would be encouraged.

B. Passage Will Not Result in the Benefits Claimed

For the same reasons that passage of H.R. 3787 will not immediately produce jobs, there is no evidence that passage of this bill will create the employment claimed.

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(See II-C above.) Moreover, the requirements of federal guidance, participation and independent evaluation will result in extensive litigation which could hold projects up even longer. Since there is at present an opportunity to have the U.S. Supreme Court resolve once and for all the issue of the level of federal involvement in EIS preparation required by NEPA, why allow this opportunity to pass in favor of passing a bill which will simply encourage more years of litigation.

Nor will H.R. 3130 provide the relief sought for highway projects in the three states affected by the Conservation Society case. The bill sets standards which few of the present state-prepared EIS's could meet. Thus passage of the bill will not remedy the present situation which has led to the tremendous pressures on Congress to act, but will result in tremendous sacrifices to NEPA, needlessly made.

C. The NEPA Procedures for Many Programs and Agencies Would Be Changed

H.R. 3130 applies to any program in which a state agency is an applicant for federal funds, licenses or approvals. This means, for instance, that if the Power Authority of the State of New York (PASNY) applies to the Nuclear Regulatory Commission (NRC) for a license to build a nuclear power plant, it can prepare its own EIS. This is in direct contravention of current NRC procedures. Such a change is totally unjustified, in terms of NEPA's basic policies, as much in other programs as in the federal-aid highway program if not more so.

IV. The Importance of the National Environmental Policy Act

The National Environmental Policy Act is the bedrock of federal environmental law and regulation because it expands the mandate of every federal agency and makes environmental consideration an integral part of each agency's analysis and review. The Act necessarily requires that time be taken in order to comply with its mandate of rational decisionmaking, but the history of the Act shows that this course is a wise one. The substantive benefits brought by the Act are legion and could make a history of the importance of environmental considerations in federal policymaking.

That passage of either H.R. 3787 or H.R. 3130 would seriously undermine basic policies and purposes of the Act is clear. Neither bill should be enacted.

C O P Y

Project Approval

Feb. 26, 1975

Chief Counsel

Mr. Robert E. Kirby
Regional Federal Highway Administrator
01-00 Delmar, New York

Les Lamm has approved the following memorandum:

SUBJECT: Project Approval
FROM: Robert E. Kirby-RFHWA
TO: Division Engineers
Victor E. Taylor, Albany, New York (01-36)
David B. Kelley, Montpelier, Vermont (01-05)
Donato J. Altobelli, Hartford, Connecticut (01-09)

I have reviewed the restrictions placed on project approvals in your State by my January 29, 1975, memorandum. I have concluded that projects not specifically involved in the Southern Vermont case may be approved where urgently needed to immediately forward the project if the following conditions, in addition to those in FHFM 7-7-2, are met:

1. The FHWA has made "its own evaluation of the environmental issues and taken responsibility for the scope and content of the draft and final environmental statement." CEQ Guidelines, 40 CFR 1500.7(c).
2. An EIS, if physically written by FHWA, would have been substantially the same or a paraphrase of the document written by the State.
3. Review of development of the draft and final EIS indicates such substantive direction by FHWA to warrant it being considered an FHWA document.

Projects meeting the above criteria can only be approved by me on a case by case basis. A factual report and your recommendation on acceptance or rejection of the EIS under these criteria shall be made to me in relation to each project sought to be advanced by the State.

(Signed)

David E. Wells

C O P Y



GENERAL COUNSEL

OFFICE OF THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

MAR 28 1975

Harvey D. Carter, Jr., Esq.
Williams, Witten, Carter & Wickes
115 Elm Street
Bennington, Vermont 05201

Dear Mr. Carter:

The Secretary has asked me to respond to your letter of February 17 to him and Federal Highway Administrator Norbert T. Tiemann, concerning the Second Circuit opinion in Conservation Society of Southern Vermont v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974), because the litigation has not yet been concluded. Your letter was acknowledged February 24 by the Executive Secretary.

It is apparent from your letter that you misapprehend both the Federal Highway Administration's overall program and its policy on project approvals in the Second Circuit. I have enclosed a copy of the FHWA Regional Administrator's January 29 memorandum to his division engineers in Connecticut, New York, and Vermont. As you can see from the document, it did not bring all projects to a halt. It only directed that new projects that require environmental impact statements not be approved until we had worked out the impact of the Second Circuit's opinion. I think you will agree that that decision at least cast doubt upon the impact statements now in process that were prepared by state highway agencies under FHWA guidance.

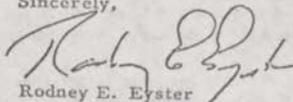
We have not undertaken to alter our procedures in response to the Conservation Society case because of its limited applicability. As you know, five other circuit courts have reached opposite decisions on the issue. We are convinced that the Second Circuit's decision is wrong, and have asked the Solicitor General to file a petition for certiorari in the Supreme Court. The Congress has also reacted to the situation. On March 5, we

testified generally in support of legislative relief from the court's mandate before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation.

Even if we had changed our procedures, impact statements could not be prepared overnight, whether by the states or the federal government. They take as long as a year or more to prepare and circulate. Thus we do not have time to redo the impact statements that would have been approved over the next six months or so without delaying the projects involved. I don't know what you would suggest we do other than withhold approvals of projects, the impact statements for which appear to be legally invalid.

In the meantime, FHWA personnel in the three states will be working to comply with the court order, even though we think the results duplicative and wasteful. The Federal Highway Administration is, however, treating your letter as a formal petition for rulemaking, and you should hear from the Chief Counsel soon.

Sincerely,



Rodney E. Eyster

Enclosure

Addendum

The Natural Resources Defense Council is a national non-profit environmental law organization, incorporated and existing under the laws of the State of New York, with its principal office at 15 West 44th Street, New York, New York 10036. NRDC also has offices at 917 15th Street, N.W., Washington, D. C. 20005 and at 664 Hamilton Avenue, Palo Alto, California 94301. NRDC seeks to promote its goals of environmental protection and natural resource preservation through monitoring the compliance of federal agencies with environmental protection laws and through legal action in test cases of national significance. NRDC has been involved in numerous cases interpreting the National Environmental Policy Act.

NRDC has nationally over 12,000 members. Its major involvements have been in the areas of air pollution, water pollution, nuclear safety, noise, mass transit, national Forest management, strip mining and stream channelization.

Senator HASKELL. Mr. Arrow, do you have a statement?

STATEMENT OF LEONARD ARROW, DIRECTOR, HIGHWAY
ACTION COALITION

Mr. ARROW. I have a prepared statement which I will submit for the record.

Senator HASKELL. It will be received.

[The statement appears at p. 66.]

Mr. ARROW. One of the advantages I think of going through it on the panel is pretty much everybody covered what I wanted to say. I wanted to make one very brief point. There is a subtle distinction being made about the way in which Federal Highway Administration can adequately implement NEPA by an independent analysis and review of the State-prepared impact statements.

The problem with that situation is basically that a Federal decision based on the State-prepared impact statement will depend on large degree upon the FHWA reviewers' knowledge of the particular project.

Impacts discussed in the EIS may not include all impacts the road would have as has been found in a number of trial courts and that in itself leads to a situation in which the analysis presented to the reviewing Federal people is colored.

We had this problem illustrated as a result of the court trial in the case of *Environmental Defense v. Volpe* in the State of Pennsylvania. The plaintiffs in that case deposed the former Director of the Office of Environmental Impact of DOT, Mr. Oscar Gray, who was Director of that office from 1968 to May of 1970. In his affidavit, Mr. Gray stated that he was unaware of several factors which he would have considered relevant in his advice to the Secretary of Transportation on a particular road project and he was unaware of those aspects of that decision because the routine sources of information considered them irrelevant for purposes of the decision.

In other words, as impact statements go through the line and each person higher up on the stage reviews them and cuts out things that he believes to be irrelevant, the final document that is placed before the Federal Highway Administration and the Secretary's Office in Washington may not include everything that they consider relevant to making the decision. That is the only other point I wanted to make.

Senator HASKELL. Thank you.

Mr. Carter, can you, succinctly as possible, tell me what the holding was in the case?

Mr. CARTER. The court held that the responsible Federal official must prepare, draft an environmental impact statement while he may rely upon factfinding, factual studies by the State agency, which is in the best opposition to do that kind of work, go through the process of preparing the statement, reaching critical judgments during that process, imposing his own social calculae upon the facts that are presented to him and in turn then circulating his judgments to the public and other Federal agencies for comment.

It is absolutely essential to carrying out the underlying policy of NEPA.

Senator HASKELL. In other words, in your opinion, and you were the lawyer for the plaintiff, so you ought to know: In your opinion the holding of the court was that the responsible Federal official must prepare the environmental impact statement?

Mr. CARTER. Yes, sir.

Senator HASKELL. I realize you don't like either one of the bills. But you find one less objectionable than the other?

Mr. CARTER. No, Senator, I do not.

Senator HASKELL. You find them both equally objectionable?

Mr. CARTER. I believe they both strike at the very heart of the policies of the Congress which, in my view, were very important public policies that the Congress enunciated in 1969.

Senator HASKELL. Then I would gather—I am going to read from H.R. 3130, the last sentence: "This procedure shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the statement." You find that—

Mr. CARTER. I have that language before me.

Senator HASKELL. You find that objectionable for the reason that?

Mr. CARTER. Two reasons: First of all, because the Federal official has not gone through the process of taking the facts and compiling them and imposing his own judgments upon them. He has got somebody else's judgments before him;

Second, because there is no way that I can find out or any other member of the public can find out whether a State or Federal official is speaking;

Third, because if this language were to be interpreted literally, perhaps by the courts, it would simply replicate the impact statement requirements.

Are we to have in those instances where a self-interested biased State agency prepares an impact statement, another statement prepared by the Federal official? It just doesn't make any sense. That is why I think it was clearly the intent of Congress that the responsible Federal official should go through this process.

Senator HASKELL. All right, sir. I get your viewpoint. As I would view it, and correct me if you find me in error, even if H.R. 3130 were adopted the courts could still find the impact statement inadequate and issue the necessary injunctive relief. Could you concur in that?

Mr. CARTER. Absolutely, because the Conservation Society has and the *Franconia Notch* case, this type of procedure was adhered to by the Federal decisionmaker. In both cases, notwithstanding that these procedures were adhered to, as Governor Tiemann testified to, in both these cases, the court said the Federal official did nothing but rubber-stamp the State-prepared EIS. He missed a couple of very terribly important issues.

Senator HASKELL. Mr. Carter, so I make myself clear, even if H.R. 3130 became law, it would be my view—I would like to get your thoughts—that a court could still review any given environmental impact statement, find it inadequate and therefore give injunctive relief.

Mr. CARTER. That is correct, Senator.

Senator, may I just amplify that quickly by saying that the reason for the second circuit's rationale was basically that it wished not to

have to have the public always have recourse to the courts to find out whether to do the reviews process.

The second circuit wanted to create a presumption of regularity, if you will, upon which the public and other Federal agencies could rely in reviewing impact statements. Here we are in a sense creating a presumption of irregularity. How are we to know when State bias has crept in if the State in fact prepares the impact statement?

Senator HASKELL. Of course I would point out, Mr. Carter, that any agency has its bias. The Federal Highway Administration also shares a bias toward highways; the Department of Defense when they prepare their impact statements obviously have a bias.

I don't know that we can keep bias out of these things. It is just whether the bias is ignored.

Mr. CARTER. The Secretary of Transportation must finally approve impact statements. I think, Senator, if the State agency has been mandated by a legislature to construct Route 7 it is asking a great deal of anybody to believe that that impact statement is not going to reflect bias when it comes through the process.

The Secretary of Transportation isn't in a position to see whether in the Route 7 corridor, which passes through Connecticut, Massachusetts, and Vermont, a highway is what is needed. He is in the position to find out whether it needs modal transportation. It is not the State of Vermont that should be making these decisions.

Senator HASKELL. I appreciate that. My only point was that any given Federal agency has its bias, presumably the Department of Transportation has a bias as well. I may have more questions. I think I see your point. But after the other Senators ask questions, I may come back. Senator Stafford?

Senator STAFFORD. Thank you, Mr. Chairman. I want to compliment Mr. Carter and his colleagues on their thorough statements.

I also was going into the matter of whether or not the FHWA wasn't also possibly biased in highway matters since it is under directive to at least expend Federal moneys in the construction of highways, but that has been covered. So I won't go into it further.

Mr. Carter, do you believe that any legislative solution which might be taken in this area should be nationwide in scope?

Mr. CARTER. Yes, I do, Senator.

Senator STAFFORD. Your colleagues would agree with that, I assume. So any bill that is targeted only on two or three States would be a mistake. Miss Chasis, is that correct?

Ms. CHASIS. I think you are caught between two problem areas, one is this kind of special exception legislation which I think sets an extremely bad precedent, and the other which is the broad amendment to NEPA, which is applicable not only to highway programs but to all programs where a statewide agency is an applicant.

For the same reasons that the broad amendment is preferable and it is not the special exception legislation, it is also going to affect and undercut NEPA in a much broader fashion.

Senator STAFFORD. In Governor Tiemann's testimony before this subcommittee, he indicated that 1,800 to 2,000 new employees would be required at the Federal level if FHWA were to do all of the work on preparing environmental statements.

Would you agree with that figure?

Mr. ARROW. I am just not exactly sure of the number of people they would have to hire. It seems to me there is very little difference between staff which can adequately analyze a document prepared by the State and a staff which can adequately draw its own document from factual information given to it by the State.

There is very little difference. If they have to hire 1,000 people to comply with the second circuit court's decision, then they must prepare their own, then it seems to me they have an inadequate staff to review the impact statements that they are getting now.

Senator STAFFORD. Mr. Carter and your colleagues, in your opinion can language be devised which would ratify FHWA's existing directives as codified in the Code of Federal Regulations?

Mr. CARTER. I think, Senator, as somebody who has a little experience in legislative drafting, that I would have to agree that language could be written that would accomplish our goal. Whether that is a wise policy decision is something else again. I don't think it is because the Federal Highway Administration, all Federal agencies—I have been litigating highway cases for 3 years now—has consistently either misinterpreted the congressional mandate in NEPA or I must conclude deliberately sought to thwart the fact that it could permeate.

It has always looked at itself as a funding agency to pass through funds to States. That particular function, it seems to me, is codified in present Federal Highway Administration regulations or at least the bias is there that they really are just passing through money to construct State projects and the States are the initial decisionmakers.

I think NEPA says that the Federal official must be the initial decisionmaker.

Senator STAFFORD. If FHWA had played a significant role in the preparation of the EIS statement in the *Conservation* case, itself, and had on its own earlier studies made the ultimate evaluation of the statement, then I gather that that case might have come out differently than it did.

Mr. CARTER. It might very well because Judge Oaks did find that they had rubberstamped the State EIS. If they did that they in effect probably prepared their own EIS. We were getting down to allocating very small periods of time since the bulk of the time is involved in factfinding and doing the factual studies.

The process, the intellectual process of preparing an impact statement and going through the weighing process, it seems to me, ought to remain exclusively with the Federal official. That is what NEPA is about. It is supposed to make these people think in those terms.

Senator STAFFORD. It has been said that both of these bills, rather than weakening NEPA, are merely a restatement of a Federal policy that already exists. I gather that you and your colleagues would not agree with that statement.

Mr. CARTER. Not if I correctly read the report that accompanied the bill that became NEPA where such language is bringing pressure on Federal agencies, making them think of what they are doing in environmental terms. That requires a process, if you will, and the Congress, it seems to me, said in preparing the impact statement is the process by which the Federal official does his thinking.

It is how he arrives at his conclusions. That is why I think it is terribly important that neither one of these bills pass.

Senator STAFFORD. A vote on both of the bills now before these two subcommittees in the House was a rather lopsided one in favor, with many Congressmen having strong environmental records voting in favor of the bill. Is that an indication, do you believe, that the environmental issues here are not as profound as you and your colleagues have advised this subcommittee?

Mr. CARTER. Senator, I don't mean to try to interpret, for example, what Representative Ottinger, who is now as an environmentalist did, but I think from reading the floor debate, he made a calculated policy decision that he would vote for the one that was special interest legislation because he did not want to ruin the fabric of NEPA, the underlying policy of NEPA.

I believe I have been informed there were a number of Congressmen who got together and faced with having to take the least palatable or the more palatable of two objectionable alternatives they made that decision.

Toby Moffett did it from Connecticut as well.

Ms. CHASIS. I think a tremendous pressure has been placed on both Houses of Congress by the construction industry, the State DOT's, and FHWA, by their claim that a significant number of construction jobs would be forthcoming this season, but for this decision. I think this argument, which is an absolutely powerful one, is being used to undercut NEPA.

I think that very close examination of it, in fact how many jobs are going to be generated, if either of these bills pass, has to be undertaken. I think that that was really the reason that votes were so overwhelming.

Mr. ARROW. I would like to point out that in Governor Tiemann's testimony before the House Merchant Marine Committee he listed in the testimony a series of projects which FHWA maintained would be advanced during the construction season, upcoming in three States involved.

The total for those projects, which was approximately \$2.750 billion, and I was intrigued to note that \$1.285 billion of that was for right-of-way acquisition on a single project in New York City.

I don't see how right-of-way situation is going to produce that many construction jobs.

Senator STAFFORD. I don't know how they got that much money away from the rest of New England and New York. Thank you.

Senator HASKELL. Senator Buckley.

Senator BUCKLEY. Mr. Carter, you and your associates have presented very thoughtful statements. I think that much of the questions that I would have asked have been covered already by my colleagues. You are concerned, Mr. Carter, with the need for Federal participation in the procedure; H.R. 3130 states that, specifically, it is the responsibility of the Federal official to furnish guidance and participates in the preparation and independently evaluates.

Doesn't that mean that there will be a responsible Federal official involvement from the very beginning in preparation of the data?

Mr. CARTER. Preparation it seems to me and independent evaluation is some safeguard, Senator, but again, I don't mean to be splitting hairs

necessarily. If they are going to really meaningfully do that, why not prepare the impact statement? Why not take the factual studies done by the State highway departments and without facing the potential of having your decision by participating with them in the decision-making process, being interlockably colored by the presence of the State officials, why not do it independently completely?

It makes sense to me. If you are going to spend the time to do this meaningfully and thoughtfully, go through that independent thought process, I can hardly think of one that is better than the preparation of an impact statement with the criteria that Congress has laid down.

Senator BUCKLEY. There are those who claim that perhaps the State authorities do have some judgments that are probably useful for Federal officials to have.

Mr. CARTER. There is nothing that says the Federal decisionmaker can't call upon the State authority to express its decision. In fact, that is what the function of the draft impact statement is, to give everybody an opportunity to comment upon it. That is the appropriate level of the process at which the State highway agency should be commenting upon the impact statement; making its views known so that they can be responded to and incorporated in, in whatever way a Federal decisionmaker thinks is important in the final impact statement.

Senator BUCKLEY. In effect, you are saying that H.R. 3130 is superfluous because it will not change things?

Mr. CARTER. I am not saying that. It will change things. I think what it does is it muddies the water. I like, as a lawyer, to have things clearly set forth so that people understand what the rules of the game are. This creates a situation, in which it seems to me, almost impossible for any reasonable man to sit down with an impact statement and know when he is getting State comments and when he is getting Federal comments, when he is getting the decisions that have been made by the responsible Federal official or by somebody in the State highway department.

If he has a draft impact statement that has the State comments appended to it, after it has gone through the review process, then he knows what everybody's attitudes are. There is no way that I can, as a reasonable man, look at a draft impact statement that is jointly prepared, if you will, and know when that interlockable coloring, if you will, of the State decisionmaker has crept into the impact statement. I just can't do it. The only way I can find out, perhaps, is by bringing a lawsuit and deposing everybody who is involved in the process of preparing the impact statement. I find that an intolerable situation.

Senator BUCKLEY. I think the thrust of your testimony was to the effect that FHWA had, in fact, failed in its responsibilities and obligations down the line.

Doesn't this suggest that we should make sure that FHWA and other Federal agencies, in fact, discharge their responsibilities under NEPA and, in effect, this amendment will change that?

Mr. CARTER. It will codify the failures because this is precisely what FHWA said and I was counsel in the *Franconia* case, also, said that they scrupulously adhere to this review process. Yet we have courts, not just Judge Oaks, but judges in other courts repeatedly saying this is a State impact statement. The biases are there.

It sticks out all over the place. You haven't considered major issues that are set out in the language of the act, such as secondary land use impacts, alternatives, sedimentation, and so forth. So, in effect what Congress is doing, it seems to me, if it passes this language, is codifying the failures of FHWA, adequately implementing not only what the courts but, I hope, the Congress feels is its policy when it enacted NEPA.

Senator BUCKLEY. I would not interpret any legislation as approving necessarily of the impact statement.

Mr. CARTER. No. The problem is the process that led to the preparation of the impact statement is this process and the impact statement, itself, speaks for itself. Unfortunately, I don't have a copy with me, but Judge Oaks appended certain portions of it.

This was after the scrupulous review by FHWA. This language does codify that.

Senator BUCKLEY. Except that I think, at least I concluded from your testimony that FHWA still scrupulously studies.

Mr. CARTER. The court didn't find that. The court found that, in effect, the procedures as they were implemented were tantamount to a rubberstamp. I suppose I am saying I am trying to look into a man's mind.

It seems to me the proper response so this is say to FHWA you must do your own impact statements. That way the public has an assurance that you are really going through this process and you are really doing it in good faith, rather than just buying what the State represents to you.

Senator BUCKLEY. Turning to another area, you speak on page 12 of your testimony—don't mean to not go to the other witnesses if they want to contribute something—you say that the FHWA has present authority to distinguish those projects clearly within the meaning of the second circuit rule and those projects that could proceed and provide employment, and so on.

Do you have any feel for what percentage of the existing projects could be proceeded with?

Mr. CARTER. No. I don't.

Ms. CHASIS. I think that, along this line, there was testimony from Mr. Lynch that in Connecticut, anyway, three projects had been found initially by the Regional Administrator to comply with certain criteria with which FHWA has set to review project by project, EIS by EIS, to determine compliance, the administrative mechanism does exist for projects to move ahead.

Senator BUCKLEY. Thank you.

Do I judge that any of you disagree with Governor Peterson's statement that the provisions of H.R. 3130, if enacted, would not make a substantive change in Federal policies, guidelines, or in NEPA itself?

Mr. CARTER. I do disagree. I do think it makes a profound change. Again, it is a subtle one. I suppose, but Congress it seemed to me really wished the Federal decisionmaker to have some process that it must follow in order to accomplish two underlying rules in the act, one to develop its own in-house expertise to use that phrase; force it to do that; second, to expose itself through review by other agencies and the public to the kind of intellectual process that it went through in talking

about the specific criteria that the act sets out as mandatory for the purposes of an impact statement.

I do think that there is a subtle butterfly important distinction between what I thought Congress wanted to accomplish in 1969 and what the administration apparently now thinks Congress intended.

Senator BUCKLEY. Is there some merit in the proposition that States should be encouraged to develop their own environmental impact expertise?

Mr. CARTER. There certainly is merit. In Vermont, at least, I am proud to say that we have some landmark legislation that forces State agencies to take a look at the environmental impacts. It is a question of decisionmaking. The act is quite clear that the initial decisionmaker should be a Federal official if it is a federally assisted project.

I think at this point we are getting into an area where I feel as Ms. Chasis that I would have quite a great deal to say in oversight hearings on NEPA and the Federal Highway Administration and other Federal agencies about how this act is being implemented by them, how much of an impact it has had. I think it is a shame in a sense to get the special, in the nature of special-interest legislation, or in the alternative in H.R. 3130, something that fundamentally changes something that is very important in the act without having gone through the rigorous process of subjecting myself and the members of my representative body to a lot of different things on NEPA and how it has worked and how it should work in the future.

Senator BUCKLEY. Thank you very much.

Thank you, Mr. Chairman.

Senator HASKELL. Thank you, Mr. Carter.

When does the time expire for the application of certiorari?

Mr. CARTER. Saturday.

Senator HASKELL. This Saturday?

Mr. CARTER. Yes. The Solicitor just ruled and Justice Marshall granted a 60-day extension. It is my understanding of the rules of practice that the Government is entitled to a right of 60-day extension.

It is not entitled to a further extension. The matter will either be taken up on certiorari by the court based upon an application or will be filed by the end of this week, I suspect, or it will become decisive in the second circuit. Maybe they will choose to take up the seventh circuit decision. I don't know.

Senator HASKELL. Thank you.

Senator Buckley?

Senator BUCKLEY. Mr. Chairman, my attention is called to a paragraph in Ms. Chasis full statement. I thought that I would ask her to elaborate on it because it refers to a statement issued by the next witness. It refers to New York.

In New York: The list of projects contained in the press release issued by Commissioner Schuler on April 7, 1975, includes such projects as the West Side Highway, which is in litigation and years from construction; segments of I-88, I-390 and I-590 and the Southern Tier Expressway which are under court injunction; the White Plains arterial feeder, a project apparently withdrawn by the White Plains city council; Ocean Parkway, a project which the city of New York is fighting. These are only a few examples of the State's misrepresenta-

tions. Most importantly, the list does not isolate those projects which, except for the Conservation Society decision, would be under construction or imminent to construction.

I wonder if you might elaborate.

Ms. CHASIS. There were listed something on the order of 45 projects. It was made to appear as though—and not for the Conservation Society decision—all of these projects would be moving to construction in this next construction year and providing a significant number of construction jobs.

The fact is that many are far back in the planning process. If the legislation were passed tomorrow, construction jobs would not be produced.

Then going down the list, it includes various segments, as I pointed out under a court injunction, some projects which apparently have been dropped or there is contention between the locality and the State as to, and the Feds, as to whether the project will proceed. So I think there has to be a very close examination of the projects that the States are coming in, claiming that they are being stopped because I think this is creating a tremendous amount of pressure for the Congress to act.

I think it may, to some extent, be baseless.

Senator BUCKLEY. Thank you very much.

Senator HASKELL. Thank you, Ms. Chasis and gentlemen. We appreciate it very much, indeed.

[Mr. Arrow's statement follows:]

STATEMENT OF LEONARD ARROW, DIRECTOR, HIGHWAY ACTION COALITION

Mr. Chairman and members of the Committee:

I am Leonard Arrow, Director of the Highway Action Coalition. The Coalition is comprised of local and national citizens groups interested in federal transportation policy and how it affects the environmental, energy and economic well being of the country. A great deal of our work concerns itself with the Department of Transportation's (DOT) implementation of statutes which affect the transportation decision-making process, and citizen rights and responsibilities under that process. Today I am also representing Environmental Action, the Sierra Club and Friends of the Earth, all of whom are members of the Coalition and who are particularly interested in these hearings because of the effect the proposed legislation would have on the National Environmental Policy Act (NEPA).

These hearings concern themselves with the applicability and implementation of NEPA in the decision-making process which decides whether or not federal funds will be used in the construction of highways. NEPA is particularly important to the highway program, and transportation in general, because transportation systems, their development and modal make-up are the core of any community or state developmental decisions. The type of transportation system a community develops has substantial impact on its economic growth, its land use patterns, and its environmental quality.

Recognizing these facts, Congress has over the years placed specific responsibilities on the DOT to consider the impacts that highway proposals will have on a community. With the passage of NEPA, Congress formalized requirements that federal agencies consider environmental impacts of proposed actions, alternatives to those actions and methods of minimizing a proposed action's impact on the environment.

Recent judicial construction of NEPA's requirements, particularly the Second Circuit Court of Appeals decision in *Conservation Society of Southern Vermont v. Secretary of Transportation*, —F.2d —7ERC1237 (2d Cir., 12/11/74), and how they relate to FHWA's procedures concerning approval of proposed highway construction have now resulted in the formulation of a question that Congress is being asked to answer. That question is: Should the FHWA be allowed to

delegate the responsibility for preparing environmental impact statements to the states? We believe the answer is no.

NEPA's role in the federal decision-making process is clear. It is designed to require that federal decision-makers articulate the reasons underlying a decision and through the impact statement, provide to the public and other interested government agencies a description of the environmental impact a decision will have. Through the requirement that alternatives to actions be studied, NEPA also forces federal agencies to consider methods of achieving a stated goal beyond the one being proposed, as well as whether or not the goal itself is a worthwhile one given identifiable benefits and environmental costs.

The infusion of NEPA into the decision-making process of the FHWA and the DOT has been a long and difficult task. This is true not because NEPA is in any way difficult to understand, but rather because the decision-making process of the FHWA is, to put it mildly, complex.

Most of FHWA's procedures are contained in various regulations which cover seven voluminous volumes of material. Until recently, these regulations were not published in the Code of Federal Regulations, and in fact, until 1972, they were generally unavailable to the public at large. Even in 1972, the only reason they became available was because they were inserted in the Congressional Record by Congressman Dingell. Further, as lawyers Robert Kennan and Ronald Peterson wrote in the Environmental Law Reporter:

"Even after one obtains copies, the operating procedures are difficult to interpret. Many terms are not defined, and some are used with obviously different meaning in different contexts. Some operating procedures still apparently in force have not been revised or updated for fifteen years."

"A 'project' may refer to various items of work and whatever lengths of a highway as are useful or convenient in obtaining the approvals necessary for federal reimbursement. A 'project' may refer to various items of work, such as planning, surveying, right-of-way acquisition, demolition, grading, paving, etc. But a 'project' may also refer to work on various lengths of a highway."

Besides the complexity of the process of constructing a federal highway, another reason that the issue of who should be preparing highway-related impact statements is only now being discussed is that the very nature of the FHWA decision-making process has worked to limit virtually all review of the substantive issues surrounding the impact of the highway, and instead concentrated on the more technical aspects of highway construction. Further, the entire process depends upon a state action to get it started.

Federal highway law explicitly states: "The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federal assisted State program." 23 U.S.C. sec. 145

Thus, states are responsible for developing construction proposals throughout the entire process of road construction. From the time that a "corridor" is placed on a "Federal-aid system" to the time that actual construction is begun, the state is the initiator of action. Federal review of such proposals for the purpose of giving the state authorization to proceed to the next stage of development is, for the most part, contingent upon a finding that the state has complied with various procedures, general in nature, designed to insure that standards relating to the engineering and design of the highway have been met. Until the implementation of NEPA (in combination with similar requirements now contained in highway law) to consider environmental impacts of the proposed construction, the question of extrinsic impacts of a proposed highway on the community were virtually ignored, except for those impacts which can realistically be called benefits.

With the enactment of NEPA, the FHWA's responsibility to look at the negative aspects of proposed highway construction was formalized. Further, DOT would be responsible for the consideration of matters of substance when deciding whether or not to sanction construction, including decisions as to whether an alternative mode of transportation would better suit the needs of the affected area, and the so called "do nothing" alternative which requires FHWA to examine several basic assumptions contained in any decision to seek new highway construction. However, FHWA has not responsibly implemented NEPA. Rather than performing its duties under NEPA—by *itself* preparing impact statements on Federal projects—it attempted to delegate all responsibility to

applicants for federal action, namely the state highway departments. It was precisely this activity that this committee would ratify if it approved H.R. 3787 or any similar legislation.

We do not believe that FHWA should be allowed to delegate the preparation of impact statements to the state highway departments. We believe that state highway departments are "applicants" in the sense employed by the Second Circuit in *Greene County Planning Board v F.P.C.* In that case the court ruled that when the Federal Power Commission reviewed and circulated an EIS prepared by a state agency it:

"Abdicated a significant part of its responsibility by substituting the statement for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions." 455 F. 2d 412 (2d Cir. 1972), *Cert. denied*, 409 U.S. 849 (1972).

In the *Conservation Society* case, the defendants attempted to distinguish NEPA delegation of highway impact statements as being different from that which the court found in *Greene County* by portraying state highway departments as not being an "applicant" for Federal approval.

The district court held: In Vermont, at least, the Vermont Highway Department has the duty, as testified to by speaker of the House Kennedy and by Commissioner of Highways Gray, to follow legislative mandate in regard to proposed highway construction, and the construction here contemplated was legislatively mandated in 1968. Thus, it is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency. This being true, delegation of the preparation of an EIS to the VHD raises the danger that the EIS will reflect "self-serving assumptions" and brings the case directly within *Greene County*. 362 F. Supp.——— (D. Vt. 1973)

We believe that the court in *Conservation Society* has identified a basic problem with delegation of impact statement preparation. All state highway departments are given mandates by state legislatures and executive officers. As the proposers of road construction, it is their duty to act as an advocate before the DOT. Failure to do so would necessarily place them in conflict with clearly defined state policy. Thus, if such practices are sanctioned by the committee, the self-serving nature of impact statements that the court has rightly been concerned about will continue to be present in impact statements prepared by the state.

The FHWA has a different mandate than the states. FHWA is not given the responsibility to construct any particular road. This mandate from Congress is to insure that state proposed actions are funded only when the standards for such construction that Congress has enacted are met. NEPA is one of these standards.

The distinction is not as subtle as it may first appear. Federal decisions based upon a state-prepared impact statement will depend in large degree on the FHWA reviewers' knowledge of the particular project. Impacts discussed in the EIS may not include all the impacts the road would have, a situation which in itself colors any analysis that could be done. Furthermore, who could point out to Federal reviewers that something was amiss?

One example of this problem has been illustrated as a result of court action. In the case of *Environmental Defense Fund v. Volpe*, plaintiffs deposed Oscar Gray, who was the director of the Office of Environmental Impact in DOT from December, 1968 to May, 1970. In an affidavit, Mr. Gray stated that he was unaware of several factors which would have been considered relevant in advising the Secretary of Transportation on a particular road project because routine sources of information considered them irrelevant for the purpose of the decision. Clearly, then, in order for the impact statement to be an accurate and objective consideration of the proposed project, the earliest possible federal intervention in the process is needed.

It has been alleged that current procedures of FHWA mitigate this problem by the existence of the public hearing process, at which local citizens and public officials can seek to point out error and poor analysis, and in fact to introduce materials which would rectify (or at least notify federal officials of) deficiencies in a state-prepared impact statement. Such requirements however, force the

public to shoulder the burden of proof, and in fact, in a number of cases, go out and do the analysis that NEPA clearly places upon the responsible federal official.

Finally, we recognize that under current procedures the state is responsible for the planning of highway systems, and that NEPA is inextricably linked to the planning process. On that basis, it is said, the states are in a position to do the best job. We disagree. The fact that FHWA does not question the substantivity of state plans is something that we believe to be contrary to the federal policies in energy and environmental areas. If our transportation systems are to be coordinated and developed in a manner consistent with national goals, then the Federal government must insure that such state actions do in fact comply with those goals. NEPA is one tool for accomplishing that goal. It is one of the few decision-making procedures which requires the bureaucracy to determine priorities, study alternatives and arrive at decisions which are consistent with national policies. At a time when the country is faced with the need to determine such priorities, particularly in the area of energy consumption, I believe it would be unfortunate for this Committee to recommend to the Congress that the responsibility for implementing this tool be given to the very state agencies whose priorities must be examined.

Senator HASKELL. Our next witness is Hon. Ray Schuler, Commissioner of New York Department of Transportation.

STATEMENT OF HON. RAY SCHULER, COMMISSIONER, NEW YORK DEPARTMENT OF TRANSPORTATION

Mr. SCHULER. Thank you very much, Mr. Chairman. I also appreciate the efforts that you have made to adjust your schedules here to accommodate a group of us arriving together in Washington for other efforts that we are making here.

I have submitted to your committee copies of my formal statement.

Senator HASKELL. That will be reproduced, of course.

[The statement appears at p. 79.]

Mr. SCHULER. I would prefer to use my time to make an informal statement and then be available to you to answer questions.

I would like to thank, also, Senator Stafford and, of course, our Senator from New York, Senator Buckley.

I know that the three of us over many years here have been joined in a most important effort in working for the passage of the National Environmental Policy Act. While I am here today representing Governor Carey—I am the commissioner of transportation for New York State—I am also speaking for him on behalf of his other concerns; social, economic, and environmental. I will try to address my answers from that broad context.

As you know, New York State led the way in the effort toward providing environmental protection in the advancement of its public works projects and very specifically played a most active role in developing a system within our State that provides for a cross-exchange of data among our various agencies, such as conservation, commerce, and agriculture and markets where we use the expertise of many agencies to review projects.

This happened long before we had a national environmental policy act. As a matter of fact, these methods and procedures and memos of understanding were by Executive order, and made part of the full weight of law in our State. It is on that basis that we have progressed our projects.

It was from that base that we worked nationally to help bring about a national environmental policy act for many reasons.

First, we knew that the goals were desirable for our State, for the region and for the Nation. Also, because as we advanced our projects, we would advance them in a similar manner as did other States and keep New York State economically competitive in the marketplace.

So we were long advocates and workers on behalf of this program, this policy, this act. Senator Buckley has been a leading advocate in our own State for this kind of a program.

Governor Carey, who today sits as a Governor, was a Congressman I worked with when we were lobbying here in Washington on that act, not just for the New York region, but for the entire country.

As I said, I will represent the Governor today answering questions across a long range of concerns.

I would like to take a minute to explain our role with the DOT. It is probably the most comprehensive department of transportation in the Nation. We have within one house the planning responsibility, the promotional responsibility, the development responsibility, and the economic regulation responsibility for all modes and phases of transportation. This is the only State in the Nation where it is done this way.

We have, since 1967, had in law, the requirement for total transportation planning, both public and private, and the ability to bring about those policy changes by use of both our capital programs, our operating programs, and our regulatory programs.

We administer not just a highway program, but we have the ability to move and operate in all modes of transportation. We own and operate a canal system. We have historic legislation that provides for the owning and operating of railroad systems in our State.

In addition, we provide the programs for the transit capital construction in the city of New York and it is through our agency that we provide the operating assistance for running the subway systems and the commuter rail systems in New York State.

This was followed with your historic legislation of last year, S. 386, which now is in our State—a Federal, State, and local program.

So I don't, even as a commissioner of transportation, sit here with a narrow view of a single mode, nor is our State agency constructed that way, developed that way, nor is that its policy.

As a matter of fact, when I accepted the role of being commissioner for transportation in New York State under Governor Rockefeller, I said that I would work to create a responsive and responsible agency for transportation, that I would be responsive to each region of our State and all its needs and responsible in using our great resources, the land, the air, the water, and importantly, our tax dollars.

I have continued that philosophy under Governor Wilson and I am pleased to say that Governor Carey asked me to remain as commissioner of transportation. I am now serving him. So I now have worked directly for three Governors as commissioner, and under a fourth, Governor Harriman, who was Governor when I started my career in the State government.

So it is from a broad view that I speak and work as a commissioner of transportation.

We have had an open process in our State. We have been an advocate for it and from the conceptual stages of a project, the process is open with participation by citizens and community groups from throughout our State.

Additionally, in all of our projects today, we move with a task force which includes citizen representation at the table and as part of the early policymaking and development process for transportation.

This has worked well and we intend to continue to do this in all of our projects.

This open process is a good example of the work we are doing in developing transportation projects in a way that will enhance and complement our greater program, and we are extending that into other areas of our State.

As I said, we have worked for and in support of this act. Governor Carey worked for it and advocated it. I know that you two worked for it and supported it as Senators. We don't want to diminish in any way the goal of NEPA, the role of this act, but we must seek legislative clarification due to the inequities that are now being caused in our program, not just in our State, but we believe it will have an impact in many other regions of the country.

We also don't want an administrative process to solve the problem that we are now facing because it was the administrative process that got us into the problem that we are in today.

It was by an administrative decision that we were told that on certain projects we should prepare EIS's, and on other projects we should not prepare them, and on those we should do air quality studies, and others we should not.

This is why we are seeking the legislation to clarify who may, who should, who shall prepare environmental impact statements within the constraints of the responsibility resting with the Federal agencies.

In our State we have followed every law, rule, procedure, process, IM and PPM, issued to us by the Federal Government in administering the National Environmental Policy Act.

I would like to say that it has led to total confusion. It has led to inordinate delay. It has led to delays in advancing needed projects. We have followed these administrative orders as they have been imposed to a point that we are now practically stopped in meeting the responsibilities that we have, specifically in our highway mode.

As I said, in following our process, we followed the directives of the Federal Government. One thing I would like to make clear is that we are trying to respond to communities.

It is not a bias toward highways that leads us to try to build highway facilities. We have in our State, besides our five major urban areas of Buffalo, Rochester, Syracuse, Albany, and of course Metropolitan New York, many urban areas where over the last 10 to 15 years we worked in cooperation with the local governments to develop urban renewal areas and to provide arterial access to those urban renewal areas so that they could be opened up, so that they could be redeveloped, so that housing and job opportunities could be provided for communities who wanted to rebuild.

We started the process of providing those arterials, pre-NEPA, and into the NEPA period and now in the current process that we have.

I would like you to know that at this time we have spent the last 3 years catching up with, and preparing federally imposed requests for environmental impact statements to serve communities like Yonkers, Newburgh, Beacon, White Plains, Kingston, Elmira, Corning, Ogdensburg, Utica, and on through our north country, in Watertown, across the top of the State to Plattsburgh, where the communities have already torn down parts of their downtown areas. They are waiting for us to provide the arterial access to reuse them and we are stopped while we are preparing environmental impact statements.

We have now prepared those environmental impact statements and we are submitting them in drafts to the Federal process. We are again impacted because we have an administrative decision that impacts these projects, with the possibility that we may be going back to start again to have some other process imposed to prepare us to advance them.

I would like some of you—I know the Senator does this regularly—to go back to Wellsville, N.Y., and tell Mayor Gardner, who is the current president of our State Conference of Mayors, the Wellsville arterial, which is already two-thirds constructed, to provide a bypass of downtown Wellsville, a community that was devastatingly hit by the storm Agnes in 1972, and where every Federal official from the President of the United States on down went to and promised assistance and help in speeding up projects that they needed to rebuild. I would like you to now go back to the mayor of Wellsville and tell him he must wait while we find a new process to develop an environmental impact statement. He has now waited for 2 years while we prepared one and moved it through the Federal process, only to have it returned to do some additional air quality studies. Now I have to go back to the mayor and say:

Well, we should not have been preparing these environmental impact statements. The second circuit has ruled they should be prepared by the Federal Government. So we will now stand by and wait while the Federal bureaucracy plays catchup for 3 years and prepares your impact statement.

This is repeated throughout our State in many, many projects.

As a matter of fact, in my own home town of Kingston, N.Y., we convinced the mayor that we could help him in his urban renewal projects by locating our arterial to serve the community. It was agreed to. We started work.

In the process of doing this he placed a city hall in this urban renewal area to show a commitment to urban renewal, and we are now some 12 years later still trying to advance the arterial to serve that area.

We have recently completed the environmental impact statement. Now we are faced with a court decision that says that environmental impact statement may not stand for that project and should have been prepared by the Federal Government.

I think the delays are not needed in this instance. We are not talking about projects that are not needed. We are not talking about creating jobs for the construction industry. We are talking about providing services to communities who have been waiting for 10-12 years for these projects to be developed and placed on the ground and be put into use.

It is not for construction jobs today, but it is for the future of our State, for the future of these communities, for their future jobs, but also for their social, economic, and environmental well-being.

I mentioned the Wellsville example. Had the other one-third of the arterial project been completed it would have provided the embankment to protect Wellsville from the devastating flood. It may be of interest to you to know that, speaking of Wellsville, we already own all of the rights-of-way. It has already been cleared.

I am sure that the mayor must think I am out of my mind when I go back to his community and tell him that we are still doing an environmental impact statement and now that it is completed it must be redone by another agency while he waits for the rest of the one-third of that arterial.

In summing up, I would like to just say that we don't want NEPA destroyed, changed, revised, or diluted in any way. But we do need clarification of the language as to who should, and who should not, be preparing these statements.

We are not seeking any more administrative relief. We have already had enough of the INE's, the PPM's, and the system, and the process on how to develop the advanced projects to the process that we have today.

I have heard some testimony concerning projects in New York State and those that are or are not impacted. For the record, and it is included in my statement, and I will have amended to it a list of projects, that there are some 77 projects with a value of \$1.275 billion, with 78,000 jobs at stake in those projects that will be and are being impacted by this court decision.

If any Federal official comes to this table and tells you that he can simply pick this up and do the work, he must keep in mind that he has a tremendous backlog to start with. We have been doing these for more than 3 years and these statements would not be used today.

So I ask that you give, as you are, very careful consideration to the bills before you, to provide us the clarification and language that we need so that we can have an orderly process, but not to, at the same time that you do this, throw out the act, dilute it or destroy it, because we not only believe in it, but we have fought for it and we think we need it.

Thank you very much.

Senator STAFFORD [presiding]. Thank you very much, Mr. Schuler, for a very good statement, very helpful to both of the subcommittees which are meeting jointly this morning on the two bills that have come over from the House.

I gather from what you say that you consider a legislative solution to the problems which are being faced to be a desirable one?

Mr. SCHULER. Yes, I do, Senator. I cannot speak clearly enough on this issue. We have had enough of the administrative relief. We need clarification in language. We need it clarified in law so that we can end the continuing proliferation of interpretations as to what was meant by the act.

Senator STAFFORD. Incidentally, do you want your full statement to be made a part of the record here?

Mr. SCHULER. Yes, Senator, I would request it be made a part of the record with the attachments.

Senator STAFFORD. Without objection, it will be and any additions to it you care to make in terms of listing projects in New York, will also be made a part of the record. [See p. 79.]

Thank you very much.

Senator STAFFORD. Have you had a chance to examine H.R. 3130, and H.R. 3787, the two bills which passed the House and came to the Senate?

Mr. SCHULER. Yes, we have.

Senator STAFFORD. Do you have a preference between the two?

Mr. SCHULER. Senator, I would like to again speak very clearly, that the Governor and I, and I report now for the Governor, that as a Member of this Congress he would not assume to tell you which law would be best or act would be best to be passed.

We need clarification in the law. We would defer to you in the matter of how to best clarify it. Both of these bills will provide clarification as pertains to New York. But you may find it more desirable to address the problem in its broader context of all of the States because while it may solve our immediate problem, it may extend itself across the region and across the country.

Senator STAFFORD. We won't interpret it as any attempt on your part to tell us what to do. If I ask you if you prefer a national solution to one which would impact only on three or four States?

Mr. SCHULER. Yes. We support both bills and would accept a national solution provided it clearly continues to insure that the Federal responsibility is included and I know that your national legislation does provide for that.

Senator STAFFORD. In your written statement you seem to say that FHWA does work closely with the States in the preparation of impact statements for highways, particularly your State.

Do you feel that the Federal agency has a sound basis for an independent evaluation of the projects proposed based upon its association in preparation of the statements?

Mr. SCHULER. Yes. Senator, we in our State—I cannot testify for how the division and regional offices may operate outside of our region, but within our region there is close participation with us through all of the steps in the preparation, the data collection period, the open review process, the publication period, the meeting with local officials.

There is that involvement. I do think that not only are they participatory with us, but that further the independent review can take place because it can take place by other than those who are doing the participating.

I don't consider there is an in-built bias in this matter anymore than there would be in the decision process for an attorney who is preparing a legal case. He is looking to prepare the best possible case as he sees it from the facts in front of him. He calls all the facts as we do in our projects.

The day of the compulsive concrete program has ended. It has ended in all of our States and it has particularly ended in New York State, where our own environmental action plan which by way, was cited as one of the best in the Nation, is used for Federal aid as well as State projects where that kind of a process does take place.

Senator STAFFORD. Federal Highway Administration claims that it would have to hire some 2,000 new people to prepare environmental impact statements unless the legislation pending before these subcom-

mittees is enacted, that it would delay projects long beyond the average 7-year period that they now take.

Do you accept the FHWA's evaluation?

Mr. SCHULER. With due respect to Governor Tiemann and his estimate as to the number of people that would be required to prepare and make review of the EIS's, I think 2,000 is an underestimate of the requirements for the Federal bureaucracy to handle this, because in our own State in the last 3 years, we have more than 2,000 people involved in the data collection, the involvement, preparation, or advancement of the environmental impact statements.

I will be happy to furnish to you a letter which I filed with the appropriate House committees which details the numbers of people we have had involved in this process.

I don't think that 2,000 would provide the catchup that would be needed in this process if we were to turn around today and follow the dictates that they be prepared by the Federal agency without our participation.

Senator STAFFORD. Thank you. If you will furnish that letter to this committee and our companion committee, we would appreciate it.

Senator Buckley?

Senator BUCKLEY. Thank you.

I welcome you to this hearing. I think your presentation is a very thoughtful one. Obviously the second circuit decision has presented very practical problems that you have to cope with. Nonetheless, if I may, I would like to ask you a question perhaps theoretically.

If the decision hadn't come about or if we were starting from scratch with NEPA, where will you prefer to see the responsibility for the preparation of the impact statements, State and Federal?

Mr. SCHULER. I believe the way that we have been proceeding where the State is doing the basic data collection, the basic drafting preparation has been proper and I think that this is an effective way to advance this kind of a program because theoretically I think it is important to keep in mind that this is a Federal aid program.

This highway program is not, nor was it ever, conceived to be a Federal program. We do see the interstate program as being of national significance. But I think how and where we proceed between Belvedere and Jericho is not an issue of national significance, provided we do it within the constraints of national guidelines that do have some national significance.

But we have wandered from the days in the concept of this being Federal aid, a Federal-aid program, and we are more and more in a Federal program of highway building and highway projects. I think it is time that we as States and our Representatives in Washington, start looking at: Do we really want a Federal highway program or should we not return to the days of the concept of it being a Federal aid program?

But in view of the fact that this is a Federal aid program, I believe preparation by the States of data is proper, it could work that way, but it should not in any way be done to remove the responsibility in the Federal agency, because I think that was your intent—that the Federal agencies act responsibly in this program.

As a matter of fact, if I might just throw in for you a comment on that, several of the active environmental agencies in our State have made it very clear that they prefer the State to prepare the environmental impact statement for we are not only closer to the scene, to the ground, but we are more responsive to the people in their communities, and further, that they are getting a better product than if it were imposed or made a part of the Federal bureaucracy.

Senator BUCKLEY. You pointed out at the outset, commissioner, that we have a unique situation in New York in that the transportation department is far more comprehensive and is designed to take into consideration the full impact of its activities. This is, of course, not true of most other States.

Mr. Carter, whose testimony I believe you heard, made a point of the fact that the Vermont Legislature had mandated construction of a certain highway and that under those circumstances one could not expect a totally uncolored viewpoint in the preparation of the impact statement.

Would you care to comment on that?

Mr. SCHULER. Yes; I would. We have many highways, as a matter of fact, a total system legislated in our State law. This does not, though, preclude the process through which we also go in response to State law of coordination with all of the other agencies involved who have a special interest, whether it be environmental conservation or agriculture and markets, nor the fact that we advance our projects in cooperation and consultation with the local governments and local authorities, nor the fact that in the planning process in New York State we have an open process with both local officials and citizens at the table with us in the development of our projects.

I think I need not go into some of those projects in our State, but specifically were legislated to be built, wherein our development process these projects were either abandoned, shelved or not produced on the ground.

Senator BUCKLEY. Would it be your judgment that under the language of H.R. 3130, which stipulates that the responsible Federal official furnish guidance and participate in such preparation and independently evaluate, that that would provide CEQ and the Federal authorities with the ability to make judgment as between the Vermont situation?

Mr. SCHULER. Senator, I would hope that it would. I would think that it would be and it certainly should be because the decisionmaking as you move through the process always becomes more and more removed from those people who are preparing the data, analyzing it and making recommendations on it.

If not, we will come to a point in time that it would be expected that the Secretary of Transportation go out in each State and count traffic and measure noise, decibels and so on, in order for him to make a decision.

This responsibility of preparation and its accumulation of data and so on has to be moved through a process for review and independent decisionmaking.

I think the bill that you have under consideration would provide for that kind of a protection.

Senator BUCKLEY. You made a strong plea for certain clarification for getting away from the administrative regulations to something that is crystal-clear.

Mr. Carter argues that the second circuit decision accomplished precisely that, in that the alternatives that we are now considering will give rise to further muddying or further litigation, because we would open up explicitly the whole line of investigation as to whether or not the responsible Federal official is in fact furnishing adequate facts. Would you care to comment on that?

Mr. SCHULER. I might ask you to eliminate the law. If Mr. Carter is here, I am sure he will take it as a kind reference. My problem is that there will always be interpretations made. But in this particular instance, the law is drawn in a way that has left it open for question and all we are asking is that it be settled as to who to do it.

I could even accept as a program administrator your decision to tighten the law right down and specifically say that the Secretary of Transportation physically prepare it so long as we come to point that we know who is responsible.

I am not asking for that action. It would be very helpful to us in law to have it clarified, have that responsibility clarified.

I am sure there will be further questions and interpretations about it as our American legal process works its natural course. Certainly there will be questions about it.

I don't mean to be light about passing this off, but we have been at work earnestly preparing environmental impact statements for 3 years; if we don't get clarification in language those impact statements may have no value and the process may have to start over again.

I don't want to go back to Kingston and Wellsville and Elmira, and Amsterdam and Ogdensburg and tell these communities who have worked with us for several years preparing these that all of that was a game and that now you may start over as soon as the Federal organization develops its bureaucracy and comes around and starts developing its studies and its plans.

Senator BUCKLEY. That is why I phrased my first question in the abstract because you do have practical problems, as you point out. But in the abstract you are asking for certainty, whether it be Federal responsibility or the State responsibility initially, although you have opted in favor of the State approach?

Mr. SCHULER. I believe it is the Federal responsibility, Senator, for the preparation, involvement and the having of environmental impact statements that in no way should the Federal Government be absolved from this, but that it can be accomplished by having the States prepare and submit, that there should be Federal participation in that as we have it.

There should be Federal review and there should be Federal approval if we are going to continue the program as we have been having the program over the last several years.

Senator BUCKLEY. In their testimony, both Ms. Chasis and Mr. Carter stated that within the existing FHWA authority and within the meaning of the second circuit decision it would be possible to sort out the pending projects and determine that a large number of them

may proceed because they do not involve serious environmental problems.

Have you explored this with FHWA?

Mr. SCHULER. Yes, Senator. I welcome that statement in their testimony very much for the reason that I already have been advised by several attorneys that they intend to take our projects to the second circuit to seek an injunction to stop the program.

It has directly come from a representative of the National Defense Council who advised me that he is opposed to highway building, period, that there should be no more highways built in America, that it is part of the national policy there should be no more highways built.

I asked him if he would like to go to Wellsville or Kingston and tell the locality who are waiting to rebuild their communities that that is truly his position. I doubt that he will.

So I think that this question of reviewing the challenge comes to the heart of whether the facility is needed, and we make that in a clear and good judgment to proceed, but not to use the process though that what is the desirable project to serve a locality and procedurally there has not been a case in New York State decided on its merits.

Everyone of the projects stopped in New York are stopped on a procedural question. We haven't tried any yet on procedural merit, on the merits themselves.

I heard the testimony earlier, that I am making misrepresentations about projects that are impacted and maybe I am anticipating a question of the Senator. But that list is legitimate, it represents those projects that are impacted by this decision and very specifically I will talk about West Side Highway where we have completed an environmental impact statement, a draft, that is this high. It was fully participated in daily by the Federal Highway Administration with the Governor and the mayor working with our steering committee for the project which includes all of the community boards of the entire West Side of Manhattan, where the community boards, through which 60 percent of the groups passes and supports the project, that a draft environmental impact statement prepared, we are now at the process of sending that for location approval if the Vermont division impacts that.

That is one of the reasons why the West Side Highway project is not moving today and on the litigation questions, yes. We are in litigation and the points that have been raised in that litigation are being addressed point by point as they should be, and that process should be there.

But we don't need to further complex the system by now saying this EIS or this draft should go back to start and be prepared by a Federal agency.

Senator BUCKLEY. Thank you very much.

Senator STAFFORD. Thank you very much, commissioner. We appreciate your help.

We will now call the next witness.

Mr. SCHULER. Thank you very much, Senator.

[Mr. Schuler's statement and attachment follows:]

STATEMENT BY
RAYMOND T. SCHULER
COMMISSIONER, NEW YORK STATE
DEPARTMENT OF TRANSPORTATION

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION
UNITED STATES SENATE COMMITTEE ON PUBLIC WORKS
AND THE UNITED STATES SENATE INTERIOR COMMITTEE

MAY 5, 1975

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Senator Bentsen, members of the Subcommittee:

Speaking for Governor Carey, may I say that we appreciate the opportunity to testify before the Subcommittee on the issues which have lead to the legislation you are considering. The issues are very important to us in New York State. So too are the solutions which may be developed to meet them.

I am here today to plead New York's case for legislative relief from an intolerable situation. I am here as Governor Carey's spokesman. He has asked me to speak to the issues of environmental protection, energy conservation, economic development and the other factors and considerations that surround the questions raised by the decision of the Second Circuit Court in the Southern Vermont case as well as the issue of the impacts of the decision on the State's highway program and employment.

I can speak to this broad range of issues because of the day-to-day involvement we have in addressing the natural and human factors influencing and influenced by our transportation programs, which cover all modes of transportation. My agency is responsible for a precedent-breaking rail preservation program, a program of operating assistance to bus lines, subways and commuter railroads throughout the State, including metropolitan New York City, providing capital funds for buses and other transit and commuter facilities we regulate common carriers, operate a canal system and plan and help fund an aviation development program. Under State law, we have the responsibility for balanced transportation policy and planning and the coordination of the development of transportation facilities and services. Included in our responsibilities is that to build and maintain highways.

Obviously, such a broad transportation program has wide impact on the State's social and physical development. We deal constantly with questions revolving around the role of transportation in fostering social well-being, supporting economic growth, conserving energy and protecting the environment. We address such questions with confidence because we have the capacity and capability - as well as the responsibility - to combine the provision and support of both public and private transportation facilities and systems with their economic and safety regulation. No other transportation agency in the country has this broad span of authority and responsibility.

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The legal setting of my department is not the only - or even the principal - reason for our deep involvement in the environment surrounding transportation. Long before the National Environmental Policy Act was adopted, we had formal interagency memoranda of understanding with New York's departments of environmental conservation and agriculture and markets as well as with the office of parks and recreation and the public service commission to ensure that transportation projects were subjected to expert examination and review from the initial planning stages to the operation of those projects once they were built.

From the very beginning, I set the goals for my department to be responsive and responsible. We've opened the transportation decision-making process to everyone with a legitimate interest. Local citizens, officials and environmental leaders sit with us at the table. Our planning process and our environmental action plan are models for others. As a matter of record, our environmental action plan has been cited as the best in the Nation. Typical of our activity is our program for the five million acre Adirondack Park. We set up the Adirondack Highway Council with local participation and the partnership of the Adirondack Park Agency, the Department of Environmental Conservation, the Public Service Commission and outside environmental organization to coordinate efforts to preserve the Adirondack environmental value and to enhance and preserve scenic and recreational values in the Park wherever this can be done without environmental damage.

The environmental movement is one of the bright lights in our society today. What we already have accomplished is significant; the potential for the future is immeasurable. Much of the success in last year's passage of New York's Rail Preservation Bond Act belongs to the environmental groups from all over the State who joined with me to get our the railroad story to the voters the railroads' contribution to our environment, economy, and energy needs.

On the national scene, New York fought for passage of NEPA. Governor Carey, then Congressman Carey fought for it. Our Congressional Delegation supported it. My department and I fought for it. We not only saw a need for environmental action at a national scale and were concerned about active protection of our environment, we also had a selfish reason. We wanted effective and uniform standards and processes across the country which would not only do the job needed to be done, but also to prevent New York State from being put at a disadvantage because its environmental program might be stronger and more vigilant than those in other states competing with us for economic development.

And yet, the environmental movement is threatened today and New York is disadvantaged despite the fact that NEPA is on the books. It is not that NEPA is at fault. NEPA is good legislation. In my view, NEPA is intended to reform the way Federal agencies develop and implement their programs and projects to insure that there is real and substantive evaluation of possible environmental consequences of Federal actions before decisions are made. With the wide range of Federal actions, NEPA became, necessarily a statute of broad scope with general language. Unfortunately, this has invited litigation and hair-splitting judicial interpretations. All too often a well-conceived approach to achieve the goals of NEPA has been wrecked by interpretations of form.

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Our problems stem from the way in which NEPA has been interpreted by the Federal executive agencies and the Courts. The complex and time-consuming procedural process that has been promulgated and the rulings that have been made on NEPA by the various Federal district and circuit courts have led to frustrations, delays and confusion of public purpose. The environment is threatened not only by the oil drillers, the developers and the highway builders who are being kept under control by NEPA but also by the administration of this core legislation, the National Environmental Policy Act. We have reached a point where some would throw out the environmental baby with the administrative mess.

We must not destroy NEPA; nor must we let it die in a sea of judicial rulings and counter-rulings. What we must do is to make clear what the law means. We are looking for procedural clarification to put New York State on the same footing as the rest of the Nation outside of the Second Circuit Court. What we don't want is a change or dilution of NEPA. On this issue Governor Carey said, "...I strongly urge the Congress to adopt the necessary legislative language that provides for our dual objectives of continuing to protect the environment while allowing New York State to prepare environmental impact statements for Federal review and approval."

There are those who say that if the problem is in administration of the law, then administrative change will clear everything up. So far, this has not been the case. Administrative tinkering has only made things worse.

The New York State Department of Transportation has followed every directive and ruling by the Council on Environmental Quality and the United States Department of Transportation and the Federal Highway Administration in the development of highway projects. We have dotted every "i" and crossed every "t" - not just once but often, as changing administrative procedures have required. Through all the procedural memoranda and instructional memoranda and their amendments, revisions and corrections, we have tried to stay abreast of the shifting highway program procedures, including the essential environmental component. And when we've found ourselves in Court, we have followed the court orders even though they were not all consistent. Throughout all of this we have tried to meet the highway needs of our people, but the recent Second Circuit Court decision has frustrated even that objective. This decision is penalizing not only the transportation program in New York State, but also the taxpayers of the State. They are being unfairly singled out for penalty because of a Court action to which they were not even a party and where they did not have an opportunity to be heard. We should not be faulted for having followed Federal rules and regulations.

At no step in the entire process did the Federal Highway Administration leave us to our own devices. At every step they did their work and met their responsibilities. New York State has a great volume of complicated, difficult and important projects to build. Because of this the Regional Office of the Federal Highway Administration has been staffed with diligent, talented people. As a result, there has been extended and substantial involvement in the environmental impact statement preparation for our highway-environment program,

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we understand to a greater extent than in any other Federal highway Region.

An example of this Federal follow-through is the Poughkeepsie East-West Arterial.

Over a period of slightly less than two years, my Department prepared and the Federal Highway Administration reviewed, participated with us and commented on:

- a pre Draft Environmental Impact Statement
- an "Advance" copy of the Draft Environmental Impact Statement
- the Draft Environmental Impact Statement
- comments by others on the Draft Environmental Impact Statement
- three separate progress reviews on the preparation of the Final Environmental Impact Statement
- the Final Environmental Impact Statement

At this point, the Federal Highway Administration has discontinued processing of the Final Environmental Impact Statement as a result of the Southern Vermont decision. Two years' work is gone and a needed, publicly desired project which is the keystone to the community's urban renewal and redevelopment program is stopped. Under the Court's ruling the project must now retrace its steps through a Federally executed environmental process. Who can tell how much these delays will cost in dollars, adverse environmental impact, highway safety, community disruption, lost opportunities for community development - not to mention the costs of inflation? And the irony is, the Federal product will probably be exactly the same as the already completed Federal-State product.

Our experience with Interstate Route 88 between Binghamton and the Capital District is an example of the penalties of leadership. We launched this project long before NEPA came into existence. Nonetheless, we employed an environmental assessment at least as rigorous as NEPA requires. Through our memoranda of understanding with the Departments of Environmental Conservation and Agriculture and Markets and the Division of Parks and Recreation we were able to insure the effective cooperation of these expert agencies in the review of the proposed project. When we went to the Federal Highway Administration, they told us that no environmental impact statement was required. Later, we supplied them with an Environmental Reassessment as part of their process for pre-NEPA projects.

After construction work was well underway, a legal action resulted in the Federal District Court enjoining any further Federal funds for the project. On two sections of the route the Court subsequently relented somewhat to permit the closing out of projects that were already more than 90 percent complete

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after we testified that the injunction would cost New York State taxpayers almost \$5 million.

Construction of two other sections were terminated at a point of more than 30 percent completion. We've spent \$15.7 million for construction of these half completed sections of highway that have no functional use to anyone. The cost and claims in terminating this work total \$10 million, not counting the continuing environmental cost of unprotected slopes and grades, and the lack of a needed, safe, and economic new route.

With the Second Circuit Court decision, we go back to the beginning again. How long it will take and what the costs will be we do not know. What we do know is that communities all along the route are stymied in their development plans and the outmoded highway in the corridor continues as a safety risk for travelers. More than 10,000 people have petitioned us to resume work.

Our initial proposal for I-88 was for an environmental impact statement for the entire route from one end to the other. By no means do we favor a piecemeal approach to environmental analysis. The Federal government, however, required that we break the route into three segments. We complied, performing special analyses for specific localities and problems.

This conflict is highlighted in the case of the Southern Tier Expressway, a noninterstate route across the southern portion of the State. The project predated NEPA and, although specifically exempted from the environmental impact statement requirement by the Federal Highway Administration, was brought into Federal court on account of environmental procedures. At the District Court, we were directed to prepare a restricted, segmented impact statement for that part of the route crossing Chatouauqua Lake on a bridge. However, in complying, we have initiated an environmental impact statement for 85 miles of the Southern Tier Expressway route instead of preparing an impact statement for the bridge itself, as the Court mandated. We are paying \$950,000 for a single Environmental Impact Statement where the new highway within the corridor which is half built to where we had already performed an Environmental Reassessments. Yet, in the Southern Vermont Case, the Second Circuit Court ruled against segmented environmental impact statements. We agree fully with the Circuit Court on this point. New York State is opposed to the segmented, piecemeal approach.

The larger issue, however, is the matter of Federal responsibility for preparation of the environmental impact statement. As you know, five Circuit Courts have found that states may prepare environmental impact statements in the first instance with the Federal agency having responsibility for the scope, objectivity and adequacy of the statements while the Second Circuit Court alone holds otherwise. It ruled that only the Federal agency is to prepare the statements.

This ruling has horrendous effects on the communities of New York State.

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How would you like to go back to the pleasant little village of Wellsville in the southwestern portion of the State and tell them that the projects promised them by everyone from the President on down must wait for an additional indefinite number of years?

Prior to 1970, we had built more than half of a new arterial route for Wellsville in conformance with State environmental requirements. The remainder of the arterial was designed to provide flood protection for the Village. We acquired the rights-of-way and had it cleared. However, when NEPA was passed, because it applied retroactively to projects already underway we were required to prepare an impact statement for the remaining unconstructed portion of the route. While the statement was in preparation, Tropical Storm Agnes hit the Southern Tier in 1972. A part of Wellsville was wiped out by the storm. A part of their only hospital - Jones Memorial - was destroyed. Part of the effort to rebuild - and part of the assistance promised - was the building of the remaining half of the arterial system to be located along the river. It would provide both transportation and flood control. Today, however, there still is no road, despite the fact that all the right-of-way has been acquired and cleared.

We completed the required environmental impact statement, forwarded it to the Federal government and then had it returned with the order that we conduct an air quality study. Anyone who has been in the Southern Tier counties of New York knows that the air in Wellsville has to be about the cleanest in the State. The arterial would have made it even cleaner by taking trucks and cars off the downtown streets with their stop-and-go driving. Nonetheless, we undertook the air quality study.

But now the Court tells Wellsville to wait its turn for a Federal repeat of the work that has been done. Wellsville would have to wait its turn, as well as many other communities also held up by the decision, while the Federal Highway Administration staffs up to do the environmental field work and analyses already completed by the State in addition to its usual review functions.

In Elmira, the same storm washed out the bridges over the Chemung River. Those bridges are not yet rebuilt because, although there was the possibility to exempt them from the environmental impact statement requirements because of the emergency of rebuilding after the flood, as is permitted by NEPA, it was not granted. I am talking here about a community that literally pulled itself out of the mud of that flood by its own bootstraps, but cannot finish the job because of the Federal procedures.

On the shores of Lake Erie, the City of Buffalo is also having problems. The East-West Arterial there has been planned for years, and those in the path of the proposed highway know it. So they have neglected their property in anticipation of its being purchased by the State. But the environmental impact statement has not been approved, and we can purchase no right-of-way because it has not been approved. Meanwhile, the local environment continues to deteriorate as a consequence, and the local residents are resentful of the failure of government to act decisively and in timely fashion.

Page 7

And in my hometown of Kingston, urban renewal was undertaken in conjunction with a planned arterial. But the environmental impact statement for the arterial is not being processed by the Federal Highway Administration and the urban renewal program is stopped in its tracks.

No matter what progress we were able to achieve, the Court decision wipes it out and returns the projects to the starting line.

It is not just Poughkeepsie, Wellsville, Elmira, Buffalo and Kingston. There are priority needed projects in Syracuse, Rochester, Jamestown, Niagara Falls, Albany, Schenectady, Troy, Little Falls, Corning, Hornell, Yonkers, Newburgh, Binghamton and New York City. Gloversville, Amsterdam, Ithaca, Canandaigua, Olean, Salamanca, Dunkirk, Potsdam, Ogdensburg, White Plains, Beacon, Oneonta and in Nassau and Suffolk counties are also waiting for arterial projects.

The decision of the Second Circuit Court is blocking \$1,275 billion in construction in New York State for the next two years. When one evaluates all of the projects affected by this decision, that is where we have either completed or are preparing environmental impact statements, we are talking about \$3.3 billion.

In these days of recession, the decision means the loss of 122,000 construction jobs and 300,000 jobs in all industries and businesses. It also means the waste of millions of State and Federal taxpayer dollars for studies and reports which will have to be repeated, not counting the inflationary cost of delay on these projects.

I want to submit for the record, a detailed listing of those projects in New York State affected by the decision and their status. It documents the enormous impact of the Second Circuit Court decision on New York State.

Since 1970 we have been at work preparing environmental impact statements. We estimate their cost at some \$9 million, involving more than 200 projects. You may be hearing from other witnesses that these situations can be cleared up by administrative actions. Well, we have been following those administrative actions to begin with and look where it has brought us. Through administrative action we were advised that environmental impact statements were not needed for projects that had passed the point of Federal approval. And through subsequent administrative actions we were told that the statements were required. Then we were told to do them for segments, then for complete lengths. We can no longer depend on administrative action. We need clarification that will stand the test of time. We need clarification so that we can get on with the process to protect the environment and to meet our transportation goals.

Thank you, I will be happy to respond to your questions.

DETAILED LISTING OF NEW YORK STATE HIGHWAY
PROJECTS AFFECTED BY THE VERMONT COURT DECISION
AND THEIR PRESENT STATUS

Submitted to the Joint Meeting of the
Senate Interior Committee and the
Senate Transportation Subcommittee

In support of testimony presented by
Raymond T. Schuler, Commissioner
New York State Department of Transportation
May 5, 1975

PROJECTS AFFECTED BY THE VERMONT COURT DECISION

Fiscal Year 75-76

<u>NYS DOT Region*</u>	<u>Description</u>	<u>Cost in Millions</u>	<u>Status</u>
2	Rt. 5 Amsterdam E-W Arterial (Caroline St.-Wall Street)	\$3.0	Will need an approved Negative Declaration by 9/75 for contract letting.
4	I390 & I590, Rochester Outer Loop, Winton Rd.-Lehigh Valley RR	\$54.9	Will need an approved FEIS by 8/75 for resubmission for design approval in compliance of Federal Court of Appeals Decision.
4	I390, Genesee Expwy. Rochester Outer Loop-E. Henrietta	\$17.7	Will need an approved FEIS by 6/75 for resubmission for design approval in compliance of Federal Court of Appeals Decision.
4	I390, Genesee Expwy. NYS Thruway-E. Henrietta	\$23.4	Will need an approved FEIS by 6/75 for resubmission for design approval in compliance of Federal Court of Appeals Decision.
4	I390, Genesee Expwy., Rt. 251-NYS Thruway	\$10.4	Have FEIS by NYS DOT approved. Need design approval by 8/75.
4	Rt. 104, Irondequoit-Wayne Co. Line R250-to Co. Line	\$7.1	Have FEIS by NYS DOT approved. Need PS&E approval by 12/75 for contract letting.
5	University Access Road & Construction to Vineyard	\$1.2	Will need FEIS or negative declaration approved by 3/76 for design approval.
5	Rt. 60, Jamestown N-S Art. S. Main and Allen Sts.	\$3.1	Will need FEIS or negative declaration approved for right of way acquisition. FEIS to be submitted in 1 month.

*New York State Department of Transportation Regions, see last page
for map showing Regional boundaries.

April 4, 1975

Fiscal Year 75-76 (Cont.)

<u>NYS DOT Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
5	Niagara Falls, LaSalle Art., Sect. 3	\$0.1	Have FEIS by NYSDOT approved. Need PS&E approval for contract letting 10/75.
5	Rt. 394, Jamestown-Ashville	\$1.2	Have FEIS by NYSDOT approved. Need PS&E approval for contract letting 8/75.
6	CR 9, Scio-Knight Creek (Bridge over Genesee River)	\$0.9	Will need an approved FEIS by 12/75 for design approval.
6	Rts. 17 & 19, Wellsville Arterial	\$4.4	Will need an approved FEIS as soon as possible. PS&E approval by 2/76. FEIS is submitted.
7	Rt. 11, Richville-Red Rock Crossing	\$6.9	Have FEIS by NYSDOT approved. Need PS&E approval by 10/75 for contract letting.
8	I-684, Interchange (Goldens Bridge)	\$2.5	Let 3/20/75, subject to possible interruption.
8	Poughkeepsie E-W Arterial N-S Art., New Market Street and Hamilton Street	\$4.5	Will need an approved FEIS as soon as possible for right of way acquisition. PS&E by 12/75 for contract letting. FEIS is submitted.
8	Kingston N-S Arterial, Bridge over Rondant Creek	\$6.0	Will need an approved FEIS by 4/75 for design approval. Need PS&E approval by 12/75 for contract letting.

Fiscal Year 75-76 (Cont.)

<u>NYS Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
8	Yonkers, Nepperhan Arterial Walsh Rd. to Lake Ave.	\$4.4	Will need an approved FEIS by 3/76 for design approval.
9	I-88 E. Worcester-Richmondville	\$23.0	Have FEIS by NYS approved. Need authorization to acquire right of way now. Need PS&E approval by 2/76 for contract letting.
9	I-88 Worcester-E. Worcester	\$21.4	Have FEIS by NYS approved. Need authorization to acquire right of way now. Need PS&E approval by 8/75 for contract letting.
9	I-88, Sanitaria Springs- Harpersville	\$20.5	Will need an approved FEIS by 11/75 for PS&E approval to let contract.
9	I-88 Cobleskill-Shad Point	\$19.4	Have FEIS by NYS approved. Need authorization to acquire right of way now. Need PS&E approval by 1/76 for contract letting.
9	I-88, Schenevus-Worcester	\$16.5	Have FEIS by NYS approved. Need authorization to acquire right of way now. Need PS&E approval by 7/75 for contract letting.
9	I-88, CR 47-Colliersville	\$16.3	Have FEIS by NYS approved. Need authorization to acquire right of way now. Need PS&E approval by 5/75 for contract letting.
9	I-88, Colliersville-Maryland	\$14.9	Have FEIS by NYS approved. Need authorization to acquire right of way now. Need PS&E approval by 5/75 for contract letting.

April 4, 1975

Fiscal Year 75-76 (Cont.)

<u>NYS Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
9	I-88, Schenevus-Schoharie Co. Line	\$12.6	Have FEIS by NYS DOT approved. Need authorization to acquire right of way now. Need PS&E approval by 9/75 for contract letting.
9	I-88, Richmondville-Cobleskill	\$10.0	Have FEIS by NYS DOT approved. Need authorization to acquire right of way now. Need PS&E approval by 1/76 for contract letting.
9	Rts. 28 & 23, Oneonta Art. So. City Line-Chestnut St.	\$5.0	Will need an approved FEIS as soon as possible for right of way acquisition. DEIS 80% complete.
10	Ocean Pkwy.	\$15.0	Will need an approved negative declaration by 9/75 for PS&E approval to let contract.
10	Westside Hwy. (Miscellaneous Const.)	\$10.0	Will need an approved FEIS by fall '75 for PS&E approval to let contract.
Total Projects Fiscal Year 75-76		\$336.5	

Fiscal Year 76-77

<u>NYS DOT Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
1	I-787, Hoosick St. Bridge	\$31.7	Will need an approved FEIS by 8/75 for design approval.
1	I-87, Alt. 7, Interchange	\$10.7	Will need an approved FEIS by 12/76 for contract letting.
1	Alt. 7, I-87 to I-787	\$13.5	Will need an approved FEIS by 12/76 for contract letting.
1	I-88 Schoharie/Schenectady Co. Line - Quaker Street	\$14.0	Have FEIS by NYSDOT approved. Need design approval 8/75.
2	Rt. 5, Amsterdam N-S Arterial	\$5.7	Will need an approved negative declaration by 4/76 for contract letting.
2	Rt. 49 & 365, Rt. 233 Junction	\$13.0	Have FEIS by NYSDOT approved. Need PS&E 12/76 for contract letting.
3	I-481, Forrest Interchange Jonesville Rd.	\$30.6	Have FEIS by NYSDOT approved. Need PS&E 2/76 for contract letting.
3	I-81, Park Street - North end	\$21.0	Will need an approved FEIS by 9/75 for design approval.
4	I-390, Genesee Expwy. Dansville Rt. 258	\$27.2	Have FEIS by NYSDOT approved. Need PS&E approval by 3/76 for contract letting.
4	I-390, Genesee Expwy., Rt. 258- Rt. 408	\$15.5	Have FEIS by NYSDOT approved. Need design approval 9/75.

Fiscal Year 76-77 (Cont.)

<u>NYSDOT Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
4	I-390, Genesee Expwy. Rt. 408- Rt. 20A	\$24.0	Have FEIS by NYSDOT approved. Need design approval 9/75.
4	I-390, Genesee Expwy., Rt. 20A - Rt. 20	\$22.2	Have FEIS by NYSDOT approved. Need design approval 6/75.
4	I-390, Genesee Expwy. Rt. 20- Rt. 251	\$23.9	Have FEIS by NYSDOT approved. Need design approval as soon as possible.
4	Rochester Outer Loop - Ridge Rd. Loop. Rt. 47	\$12.0	Will need an approved FEIS by 9/75 for PS&E approval to let contract.
4	Rt. 104, Irondequoit-Wayne Co. Line contract 3	\$10.6	Have FEIS by NYSDOT approved. Need PS&E approval by 3/76 for contract letting.
4	Rt. 5 & 20, Canandaigua S.W. Connector	\$9.0	Have FEIS by NYSDOT approved. Need PS&E approval by 1/76 for contract letting.
5	Rt. 31, Ward Road-Town Line Road	\$1.8	Will need an approved FEIS by 5/76 for design approval.
5	Niagara Falls, LaSalle Art. 5th - 10th	\$6.9	Have FEIS by NYSDOT approved. Need PS&E 12/76 for contract letting.
5	Southern Tier Expressway Rt. 219, Town of Allegany	\$33.0	Will need an approved FEIS about 20 months after consultant agreement approved. (As of this date FHWA has not approved agreement for FEIS.)

Fiscal Year 76-77 (Cont.)

<u>NYS Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
5	Southern Tier Expressway Salamanca-East City Line Rt. 219	\$13.6	Will need an approved FEIS about 20 months after consultant agreement ap- proved. (As of this date FHWA has not approved agreement for FEIS.)
5	Southern Tier Expressway Rt. 219-Town of Allegany	\$7.8	Will need an approved FEIS about 20 months after consultant agreement ap- proved. (As of this date FHWA has not approved agreement for FEIS.)
5	Southern Tier Expressway Salamanca-West City Line- East City Line	\$18.4	Will need an approved FEIS about 20 months after consultant agreement ap- proved. (As of this date FHWA has not approved agreement for FEIS.)
5	Rt. 62 Hamburg-No. Collins	\$5	Will need an approved negative declaration by 12/75 for design approval.
5	Rt. 277, Union Rd. Genesee St., Wehrle Drive	\$6.6	Have a negative declara- tion by NYS DOT approved. Need PS&E by 7/76 for contract letting.
5	Southern Tier Expressway Sherman-Stowe I	\$28.5	Will need an approved FEIS about 20 months after consultant agreement approved. (As of this date FHWA has not approved agreement for FEIS.)
5	Southern Tier Expressway Sherman-Stowe II	\$9.7	Will need an approved FEIS about 20 months after consultant agreement approved. (As of this date FHWA has not approved agreement for FEIS.)

Fiscal Year 76-77 (Cont.)

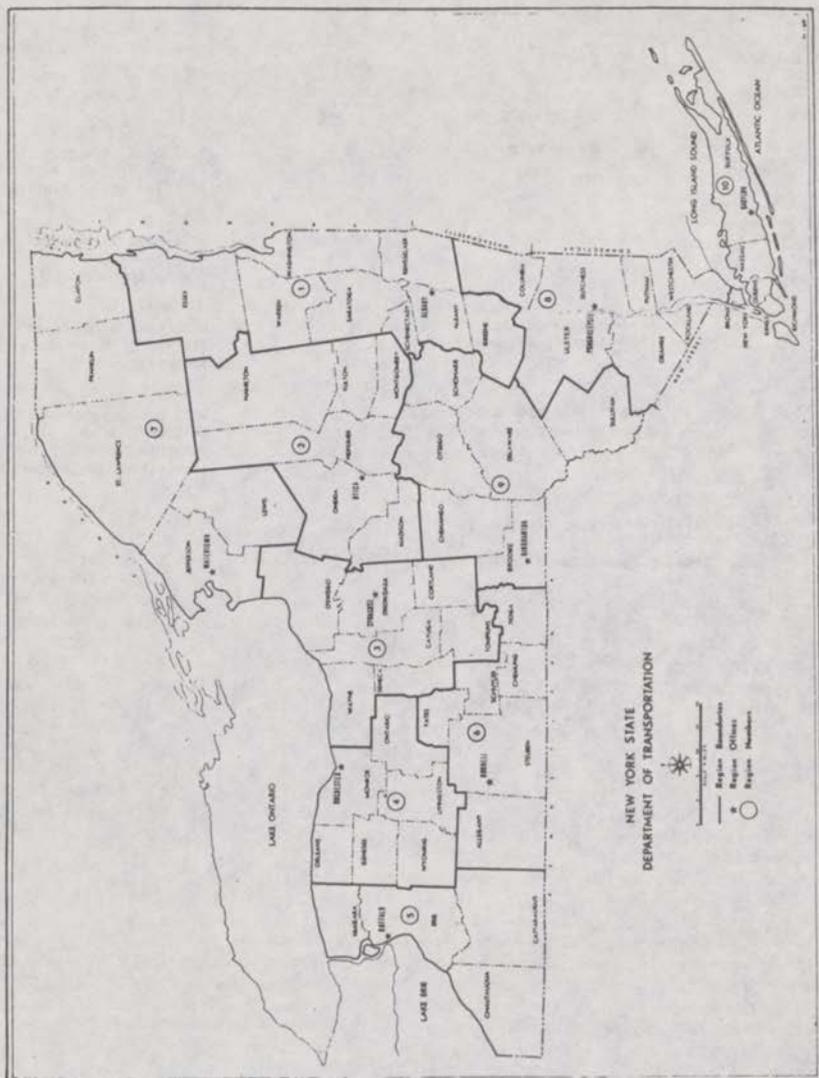
<u>NYS Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
5	Southern Tier Expressway Stowe-Bemus Point II (Bridge Superstructure)	\$26.6	Will need an approved FEIS about 20 months after consultant agreement approved. (As of this date FHWA has not approved agreement for FEIS.)
5	Southern Tier Expressway Pa. State Line-Sherman II	\$8.7	Will need an approved FEIS about 20 months after consultant agreement approved. (As of this date FHWA has not approved agreement for FEIS.)
5	Southern Tier Expressway Bemus Point Int.	\$1.0	Will need an approved FEIS about 20 months after consultant agreement approved. (As of this date FHWA has not approved agreement for FEIS.)
6	Rts. 21 & 36, Hornell Arterial	\$10.2	Have FEIS by NYSDOT approved. Need PS&E by 10/76 for contract letting.
6	Rt. 14 & 328, Elmira, Washington Ave. Overpass	\$1.6	Have FEIS by NYSDOT approved. Need design approval 10/75.
6	Elmira N-S Arterial, Penn. Ave. Washington Ave. (Center Section)	\$6.0	Have FEIS by NYSDOT approved. Need design approval as soon as possible.
7	Rt. 11 Eotsdam Relief Route	\$7.9	Will need an approved FEIS by 7/75 for design approval.
7	Ogdensburg Arterial	\$4.7	Have FEIS by NYSDOT approved. Need design approval by 11/75.

Fiscal Year 76-77 (Cont.)

<u>NYS Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
8	Foughkeepsie E-W Arterial Market & Hamilton Streets Burnett Blvd.	\$24.6	Will need an approved FEIS as soon as possible for right of way acquisition. PS&E approval by 3/77 for contract letting. FEIS is submitted.
8	Kingston N-S Arterial Broadway, Port Ewen Rt. 32	\$19.8	Will need an approved FEIS by 4/75 for design approval.
8	Rt. 9, Fishkill Village, Rt. I-84 - N. Village Line	\$8.8	Have FEIS by NYSDOT approved. Need PS&E approval by 1/76 for contract letting.
8	I-84, Newburgh-Beacon Br.	\$98.3	Will need an approved FEIS by 8/75 for design approval.
8	Rt. 59, Spring Valley Bypass	\$26.7	Will need an approved FEIS by 8/76, for design approval.
8	Yonkers Nepperhan Ave.	\$11.8	Will need approved FEIS by 3/76 for design approval.
8	White Plains, Arterial Feeder	\$13.3	Will need an approved FEIS for contract letting. The letting date is pending resolution of schedule.
9	I-88, Shad Point- Central Bridge	\$16.9	Have FEIS by NYSDOT approved. Need design approval 8/75.
9	I-88, Central Bridge- Schenectady Co. Line	\$5.6	Have FEIS by NYSDOT approved. Need design approval 8/75.

Fiscal Year 76-77 (Cont.)

<u>NYS DOT Region</u>	<u>Description</u>	<u>Cost</u>	<u>Status</u>
9	CR 7, Roscoe-Downsville	\$1.4	Will need an approved FEIS by 5/76 for PS&E approval to let contract.
10	West Side Highway	\$200.0	Will need an approved FEIS by fall '75 for design approval.
10	I-678, Van Wyck Expwy. 150th Street, Entrance to JFK Airport	\$8.2	Will need an approved FEIS by 8/76 for design approval.
10	Route 27, Sunrise Highway Ext. Brentwood Road-Wheeler St.	\$25.2	Will need an approved FEIS as soon as possible for ROW acquisition authorization.
Total Projects Fiscal Year 76-77		<u>\$938.7</u>	
Total Projects Two Fiscal Years		<u>\$1275.2</u>	



Senator STAFFORD. The Chair will invite the commissioner from the State of Vermont, John Gray, to come to the stand.

The Chair will comment that in the early history of this Nation if the jurisdiction of the Colony of New York had been imposed on the settlers east of Lake Champlain, that Commissioner Schuler would have spoken for the area which is now Vermont. But since that didn't happen, Vermont became a State and it has its own commissioner.

Mr. Gray, we welcome you here.

STATEMENT OF HON. JOHN GRAY, COMMISSIONER, VERMONT HIGHWAY DEPARTMENT

Mr. GRAY. Thank you very much, Senator. I appreciate this opportunity to appear before this joint meeting of the Senate Public Works Committee and the Senate Interior Committee.

As you know, if it hadn't been for the State of Vermont the other 13 States wouldn't have somebody to join in 1791, I would like to add to your comment.

I have prepared a statement which I will ask be introduced into the record together with its amendments.

Senator STAFFORD. Without objection, it will be included in the record.

[The statement appears on p. 104.]

Mr. GRAY. I would also like to somewhat informally cover particular aspects that I was asked to cover or suggested that I might want to discuss at my appearance here today.

Senator STAFFORD. The Chair invites you to proceed in whatever way you wish.

Mr. GRAY. The proposed legislation of H.R. 3130 and H.R. 3787 in its narrower view do not in our judgment in Vermont weaken the intent or the construction of the National Environmental Policy Act of 1969. I know as you are aware, Senator Stafford, that Governor Salmon would not support any legislation that would have a weakening effect on this very important policy and national concern.

As you know and as I believe most of the Nation knows, Vermont has been right up among the leaders with regard to the environmental legislation, particularly with act 250 in its development planning efforts.

We intend to continue this particular process because it is in our interest. It is in the interest of everyone and it should be done in the democratic manner.

We believe, however, that this legislation does rightfully clarify a section of law, of NEPA, that has been interpreted by various courts in different manners and by various interests to meet their own interests.

The proposed legislation would most likely insure that the people most knowledgeable in the matters that affect a State and the area would be the ones who would draw up the area environmental impact statement and it would also have an appropriate level of input as well as consideration by the responsible Federal officials.

I would call to the committee's attention that Judge Oaks in his "Opinion" regarding the *State of Vermont, Highway Department*

and the Secretary of Transportation v. The Conservation Society of Southern Vermont, that he indicated some alternative methods of overcoming the strict interpretation that he was placing on the act should be taken.

He stated on page 9 of his "Opinion" when speaking of his interpretation that FHWA must prepare the EIS:

This is, however, an argument to take to the Congress seeking either more funds for the Federal agency operations, a change in NEPA to permit such delegation or the simple authority to use its existing funds in the preliminary experimentation of the environmental impacts at the early stages of the Federal-State highway planning.

So right in the "Opinion" by Judge Oaks himself is the suggestion that this action and this consideration before you today and under consideration is a proper step to take.

I don't know whether that has been brought out before or not, but I would like to make it a matter of the individual record.

In the lateness of my arrival here because of the airlines which I must be accommodated by, I have heard the word "bias" used to a considerable extent.

I would challenge most anybody that any consideration where judgment is concerned, even of the most objective type, that some bias does not creep in. One man's bias is another man's profound judgment.

I think it depends on which side of the fence you look at and when you weigh all of the factors, that this is the real meaning, that you get 51 percent or more on the side of one thing, then in our democratic process it is the one to follow.

The committee asked that I speak to the question of whether legislation or administrative decision is the most appropriate course to follow.

I think as the first point my quote from Judge Oaks would seem to indicate that legislation would be the most appropriate course of action. It was also suggested that I discuss the relative merits between H.R. 3787 and H.R. 3130. While both are similar in intent and solely serve the purposes of clarifying NEPA, the H.R. 3787 is a narrow provision which amends the Federal Highway Act while H.R. 3130 is broader and much more extensive in that it clarifies, I believe, beyond reasonable doubt of reasonable men, the intent of the Congress in the passage of the National Environmental Policy Act of 1969.

H.R. 3787 applies only to the highway projects while H.R. 3130 would cover many other areas which either should or do have environmental impact statements required to be submitted before Federal funds and public investment is made in those particular projects.

H.R. 3130 would have the merit of consistency where H.R. 3787 might not.

I believe in the Housing and Urban Development Act of 1974, in one section thereof the delegation is made completely to the applicant agency for the content and the completion of the environmental impact statement. This is inconsistent with the current practices that are being followed.

So on balance it would appear that H.R. 3130 would be the better solution and that H.R. 3787 while if it were put on the books, it might provide an avenue of unwarranted and unneeded and unnecessary litigation and attempts at litigation by interested parties.

There is a suggestion in the testimony before the House Committee on Public Works that the problem faced by Vermont, Connecticut, and New York could be resolved administratively and that the decision of the second circuit court of appeals can be reconciled with those in five other circuits whose decisions upheld the procedure of preparation of draft environmental impact statements by the individual States.

I would like to believe that this could be done, but my common-sense tells me differently.

Administrative resolution would require that different individuals with different concerns, varying interests and divergent purposes interpret the same law, rule or regulation exactly alike; chances of this accomplishment are remote, indeed, unless you hold to the proposition that why don't you fellows be reasonable and see things my way?

More seriously, a rule can be challenged through the process of litigation and all to the detriment of the taxpayer who has already been beleaguered almost beyond all belief.

If the administrative solution called for by the Federal Highway Administration to redo environmental impact statements already completed or nearly completed, we would have the extraordinary delay of time, the unnecessary expenditure of money to say nothing of probably staffing up the Federal organization beyond the question of reasonableness when other adequate facilities and resources could do the job and are already present on the site.

In this respect I concur most heartily with the comments of Commissioner Schuler of the State of New York.

The courts have long held that—I am quoting from Judge Oaks' decision in the second circuit court—"to the extent regulations of any Federal agency do not implement congressional policy, compliance with the agency's regulations will not satisfy NEPA."

That quote is from, as I have indicated, the *Conservation Society of Southern Vermont v. Secretary of Transportation* on page 934 of 508 F. 2927.

It indicates that unless congressional intent is clear the courts will make their own interpretation. Thus, no administrative action can positively cure the differing views of the second circuit court with the five other circuit courts which have held just to the opposite.

I have considerably more in my prepared statement, Mr. Chairman. I would point out that I believe that there is one phrase in H.R. 3130 which says participates in section preparation, speaking to the FHWA.

That in itself is somewhat ambiguous. I am convinced that the essential benefit would accrue to the language and to the meaning of this phrase if it was given unqualified clarity incapable of misunderstanding, either through any report that might be issued with regard to this legislation or any dialog that might be held in the committees and the joint committee deliberations.

I would suggest that wording might be something along the line that that phrase could not be interpreted so narrowly that a conclusion would be reached that the word "participate" would result in the requirement that the Federal Highway Administration or the Federal agency in the case of H.R. 3130 should prepare the entire statement.

I wish to thank the chairman and the distinguished senior Senator from Vermont, my friend, Bob Stafford, for allowing me to appear here today. I would now attempt to answer any questions that you might have.

Senator STAFFORD. Both the subcommittees that are jointly holding these hearings appreciate your coming down here, Commissioner. The Chair can say that he takes judicial notice of the traveling conditions since he came down last night through the same kind of weather you came down through this morning.

Our air transport, our favorite airline, was quite late in getting into Washington last night.

Mr. GRAY. We hope with our new agency of transportation in the State of Vermont that perhaps we can make some improvements.

Senator STAFFORD. Commissioner, attached to your statement, which is now a part of the record of these hearings, are some letters. One is from the Governor to Hon. James Jeffords, who is a U.S. Representative from Vermont.

Can you say, as a member of the Governors administration, what his position is with respect to H.R. 3130, 3787?

Mr. GRAY. I believe the Governor's position is that the preferable route would be H.R. 3130 because it does speak to the National Environmental Policy Act in which he has great concern. As you know, Senator, he is chairman of the National Governors Conference's Committee on Natural Resources. As such, this is a matter of primary concern to him.

Senator STAFFORD. In his letter of February 22 to Congressman Jeffords, he says, "Clarifying language—referring here to H.R. 3130—does not in my judgment impinge upon the proper and balanced consideration which should and must be given to legitimate environmental concerns. In fact, I believe that the clarifying language as presented in H.R. 3130 will strengthen the concern and abilities of responsible Federal officials." Does he continue to hold that view?

Mr. GRAY. He does, sir.

Senator STAFFORD. Do you share it?

Mr. GRAY. I share it wholeheartedly.

Senator STAFFORD. An earlier witness has testified that several projects given high priority by the State of Vermont cannot proceed because of injunctions issued for reasons other than impermissible delegation of impact statement preparation.

Are there other projects which could proceed but for the court decision in the second circuit?

Mr. GRAY. The court decision with regard to the second circuit upheld the injunction on certain projects between Bennington and Manchester. There are other projects which have been held up by administrative decision and the Federal highway decision pending outcome of the decision in the Second Circuit Court of Appeals.

Senator STAFFORD. Could you estimate the number of projects in Vermont which you could have underway, say, in the next 6 months but for the decision in *Conservation Society v. Secretary of Transportation*?

Mr. GRAY. We will have had several projects completed by this time, if it hadn't been for that decision. We would be able to have some of

our other ones, such as the very serious condition we have in Milton and Colchester with regard to the bridge and the route that connects our Grand Isle County with the rest of the State.

Undoubtedly this 2-year delay has put a serious crimp in the ability of the appointed officials of the State to carry out the mandate of the people. So, altogether too long, people have been complaining that the appointed officials are making decisions that can't serve the needs of the electorate. We would like the opportunity to do so if some of these procedural barriers were removed.

Senator STAFFORD. Whether or not either of the bills before us is enacted, will there not still be certain requirements that your department must comply with in order for the court to dissolve the injunction on the Route 7 project between Bennington and Manchester?

Mr. GRAY. We stand in the situation here, Mr. Chairman, of having an adequate EIS prepared for those particular projects from Bennington to Manchester, up through Sunderland. Judge Oaks, in his opinion, opined that they were adequate. But they were not prepared by the Federal Highway people. Therefore, they were substantively adequate but procedurally wrong.

Senator STAFFORD. He made that specific finding?

Mr. GRAY. There is a specific finding in his decision.

Senator STAFFORD. So the statements were adequate, but not prepared by the right agency in the judgment of the court.

Mr. GRAY. That is correct, sir. This has just about the same type of a situation as if you were trying to have a Hemingway "Farewell to Arms" written by a John Steinbeck. You might get a little different wording but the cast of characters would remain the same.

Senator STAFFORD. We were told by the Federal Highway Administration last week that by the end of fiscal year—June 30, 1975—Vermont will have obligated more Federal aid to highway funds than it was originally scheduled to operate, based on administrative limitations imposed last July. Is this correct?

Mr. GRAY. We have used up all of our apportionment, Senator. We are looking for more any place we can get it. But this injunction is holding up sorely needed construction in the southwestern part of the State which, as you know, in your days as attorney general, Governor, and your illustrious congressional career, that those are sorely needed.

Senator STAFFORD. How much more would you be able to obligate as a result of the second circuit's decision if resolved?

Mr. GRAY. We will be able to use our primary funds. We first would have to get a lifting of the injunction.

Senator STAFFORD. Commissioner, personally, and for both of the subcommittees, I want to express our appreciation to you for coming and helping us in our deliberations this morning.

Thank you very much.

Mr. GRAY. Thank you very much, Senator.

[Mr. Gray's written statement follows:]

PREPARED STATEMENT OF COMMISSIONER JOHN T. GRAY

I am John T. Gray, Commissioner of Highways for the State of Vermont. My purpose here before this Committee today is to speak for Vermont in support of the intent and principles behind H.R. 3787 introduced in the U.S. House of Representatives on February 27, 1975 by the Honorable James J. Howard. My appearance here today has the support and backing also of the Honorable Thomas P. Salmon, Governor of our State. Accordingly, my remarks reflect his opinions and concerns over the matter which the introduced legislation is designed to either alleviate or eliminate. This concern of Governor Salmon's must be weighted with the fact that he is Chairman of the National Governors' Conference Committee on Natural Resources.

It is my understanding that the purposes and intent of H.R. 3787 are essentially consistent with other legislative proposals which have been submitted on the general subject. I refer to H.R. 3128 introduced by the Honorable Jack Kemp on February 13, 1975; H.R. 3129 also introduced by Representative Kemp on February 13, 1975, and H.R. 3130 introduced in the House of Representatives February 13, 1975 by the Honorable John J. LaFalce.

The earliest possible relief from the legal and procedural entanglements which snarl and hurt the capability of the States to make sorely needed highway improvements is of vital importance. In Vermont, planned improvements to Route U.S. 7 in particular and throughout the State in general are being delayed with the resultant continuance of hazardous conditions and the otherwise avoidable construction cost increases. Immediate relief is of such major importance that Governor Salmon stated his strong support for the provisions of H.R. 3130 in a communication dated February 27, 1975 to the Honorable James M. Jeffords, U.S. Representative from Vermont. I have attached for your information and balanced consideration a copy of this communication to Representative Jeffords.

The purpose of the legislation appears to be the expression, in clear and specific terms, of the intent of the Congress as to the public agency responsible for the preparation of an environmental impact statement required by the National Environmental Policy Act of 1969. It would also clarify the congressional intent regarding the appropriate federal level of approval as well as the scope of an environmental impact statement in terms of area of coverage. Clarification of these issues is paramount to the orderly progress of highway capital investment in Vermont and I surmise the same to be true in many other, if not all, States in our Union. It is hard to conceive that the U.S. Congress in its wisdom and will expressed in the language of the National Environmental Policy Act ever envisioned the use of the content of that Act as a means and tool to delay sorely needed public and private capital improvements by procedural means. It would certainly appear more proper that the intent of Congress must have been to insure that adequate, proper and sufficient consideration would be given to legitimate environmental concerns in concert with balanced deliberations on the economic benefits which would accrue from planned improvements.

We believe the legislation would not weaken NEPA but merely clarify a section of the law that has been interpreted by various courts in different manners. We believe the proposed legislation would not only clarify but insure that the people most knowledgeable of an area would be the ones to draw up the environmental impact statement. Of course, the EIS would be drawn up under the guidance of the law and the rules laid down by CEQ and FHWA.

We would like to point out that in the southern Vermont case which is the case which has triggered this controversy, there is no question of adequacy of the environmental review. Judge Oakes on page 13 of his Opinion ruled that the EIS prepared by the Vermont State Highway Department in cooperation with FHWA "... evidences good faith consideration of the environmental values involved insofar as they relate to the particular segment of road contemplated." His concern was the strict interpretation of the law that the impact statement must be prepared by the Federal Agency who holds the purse strings. He not only ruled that environmental matters had been considered but went further and on page 24 expressed an opinion as to the need for the construction in saying "... in respect to the Bennington-Manchester segment and the construction of two lanes thereof (hereby expressly found to be needed for local purposes)..."

So we have here a road that has been expressly found to be needed and the environmental matters considered in good faith and yet we are unable to build

it. Furthermore, a straw vote recently taken on Town Meeting Day showed overwhelmingly that the people in the towns involved are in favor of the road as proposed. The bill that is being considered would make it possible to proceed. It may be pointed out that Judge Oakes in his Opinion indicated some alternate methods of overcoming the strict interpretation he felt he must place upon the Act. He stated on page 9 of his Opinion when speaking to his interpretation that FHWA must prepare the EIS. "This is, however, an argument to take to Congress, seeking either more funds for the conduct of the Federal Agency operations, a change in NEPA to permit such delegation, or the simple authority to use its existing funds in the preliminary exploration of environmental impacts at the early stages of Federal-State highway planning." Since the States are charged with the planning, design, construction and maintenance of highways within their boundaries any solution other than the delegation proposed in the Bill under consideration would be a duplication of effort and waste of resources.

An additional point should be made with regard to Judge Oakes' Findings. This is represented by language on pages 24 through 27 relative to a "4(f) statement" of the Department of Transportation Act of 1966. The Court found that § 4(f) had not been complied with by the Department of Highways. However, the Court did not enjoin the project on this basis but rather stated, "Since a new EIS is ordered in any event, there should be ample time and opportunity to pursue all § 4(f) procedures." (Page 27). Initially it was felt that the area in question was not of significance. This determination was based on letters from the Forest Supervisor (copies attached). Since Judge Oakes' decision, attempts to comply with § 4(f) have been carried on. This has been complicated by the transfer and replacement of the Forest Supervisor and delays in reaching agreement as to procedures between the Department of Agriculture and the Department of Transportation. The attached letter dated March 28, 1975 shows the present status of this matter. There will be no delay in advancing the enjoined projects to construction because of the 4(f) requirement.

Vermont is in full and enthusiastic support of the legislation under consideration here today for three additional basic reasons. The *first* and most predominant and important reason is that removal of the procedural bars to sorely needed highway construction in Vermont and the Nation is a definite anti-recession measure. Vermont builds and refurbishes a great majority of its highway construction through contract construction. Such activity is at a low ebb in Vermont today because of the vagaries over the future and general depressed economic condition of our country. Vermont has at the current moment an unemployment rate of 10.3%. In Bennington County where the planned highway improvement to Route U.S. 7 are primarily located, the unemployment rate is 13%. The hardest hit segment of Vermont unemployment rests in the contract construction industry. In January 1973, contract construction employed 8,250 people in Vermont. This employment level shrunk in January 1974 to 7,600 and this past January, it declined further to 6,050. The peak months for highway construction in Vermont are usually July and August. Employment levels in this particular industrial facet of labor during those peak months declined from a level approximating 12,500 in 1973 to 10,500 in 1974.

Unemployment in the construction trades is approaching 50% in Vermont. There are 25 Vermont contractors looking for work and could hire an estimated 5,000 out of a 10,000-12,000 work force. There is every reason to believe that only relief through the expeditious passage of H.R. 3787 would be of major assistance in reducing this grim unemployment picture in the construction industry. It should also be pointed out that in the usual situation one job in construction either generates or increases two other related jobs in services and supplies areas of the private sector of the economy.

Specifically early passage of H.R. 3787 would result in the expeditious movement towards construction of \$46.4 million of sorely needed and long awaited highway improvements in Vermont, a majority of which are located in the Bennington County area.

The *second* additional point is the matter of individual State's rights in the question of who should prepare an environmental impact statement and the scope of that statement in terms of coverage. Ever since the advent of federal aid for highways in 1916, the role of the federal government has been one of financial aid. The decision of where that aid would be applied on the Federal Aid System in any State rested with the State officials. The federal agency could effectively decide the highway and transportation projects to be accomplished with federal aid in any State if they were to be the determinant of whether an environmental

impact statement is necessary and also if that statement reached a "build" or "no-build" decision. The transfer of such a decision process from the State level to the federal government would go a very long way toward the destruction of the current high level of excellent Federal-State relationship as it pertains to federal aid for highways and transportation.

Complaints are heard in Vermont today that highway officials are not elected and thus decisions relating to highways are being made by individuals not responsive to the will of the people. In effect, the second circuit court decision that the environmental impact statement must be made at the Federal level is centralization of that function at a level in government almost totally unfamiliar with local conditions, economies, desires and problems.

As stated in my Statement before the House Public Works Subcommittee on March 5, 1975 in support of this proposed legislation, the *third* point is the matter of consistency. The Housing and Community Development Act of 1974 (Public Law 93-383) provides in Section 104(h) that the Secretary of Housing and Urban Development may, subject to certain certifications, delegate his responsibility for environmental impact statement procedures and processes to fund applicants. This proposed law would not proceed, in my judgment, as far as the determination authority already provided by the Congress to the Department of Housing and Urban Development. It provides that the Secretary of Transportation may use the expertise found in the States to develop and prepare adequate environmental impact statements. I believe this to be a sound and entirely proper course of action following the principle of the economic use of knowledgeable resources to accomplish a desired and necessary administrative procedure.

In summary, enactment of this Resolution into law will not affect the ecological or environmental impact of enjoined construction projects on the surrounding area in any deleterious manner or way. It is believed rather that the construction of these projects expeditiously will enhance the ability of everyone using this transportation corridor to enjoy more fully its natural attributes.

Passage of this Resolution would not adversely affect any of the purposes and policies of the National Environmental Policy Act but clarifies the Congressional intent and permits orderly and needed progress.

Passage of this Resolution will have a sound element for checks and balances which should be in place to insure that a vocal minority with a blind devotion to an unproved cause can't do irreparable damage to a transportation system which is the life blood of all of the nation, our State and the economy.

Early passage of the Resolution will assure that those most knowledgeable on environmental matters associated with economic improvement and enhancement will be permitted to participate in the vital process.

Early passage of this Resolution should result in less cost since delay is resulting in price increases of labor, material and lost time, as well as existing safety hazards to the traveling public.

Early passage of this Resolution will enable the State of Vermont to fulfill its promises to the people of southwestern Vermont who have waited patiently for many years and impatiently for the past two years for this urgently required facility as one means of improving their way of life.

Finally, early passage of this Resolution is considered to be a very positive anti-recession measure which is sorely needed in Vermont.

The reputation of the State of Vermont in its actions taken and underway to enhance its environment is well known. Please assist us in this matter through favorable consideration and report on House Resolution 3787.

Thank you very much and I would be pleased to reply to any questions which you might have.

U.S. DEPARTMENT OF AGRICULTURE,
GREEN MOUNTAIN NATIONAL FOREST,
Rutland, Vt., December 23, 1970.

COMMISSIONER OF HIGHWAYS,
State of Vermont,
Montpelier, Vt.

The present plans for lands within the Forest proclamation boundary and adjacent to the proposed routing of the relocated U.S. 7, between Bennington and Shaftsbury, should they be acquired for National Forest purposes, are for timber production, watershed protection and related activities. There are no recreation facilities contemplated.

As has been previously discussed with your Planning and Right-of-Way Divisions, we are desirous that consideration be given toward providing suitable access either to or across the new highway for future access to the lands east of the new route so that they may be properly managed in accordance with their intended uses.

If we can be of further assistance in this matter, please advise.

FLOYD J. MARITA, *Forest Supervisor.*

U.S. DEPARTMENT OF AGRICULTURE,
GREEN MOUNTAIN NATIONAL FOREST,
Rutland, Vt., May 19, 1970.

MR. JOHN T. GRAY,
Commissioner, Department of Highways, State of Vermont, Montpelier, Vt.

Thank you for your letter of May 14, 1970.

We are in agreement with the location of the proposed new routing of U.S. 7 as has been presented at the various hearings held by your department.

As has been stated previously, our concern is that we continue to be advised of final design governing access points that affect future access to National Forest lands. Your offer toward coordination of right-of-way widths when they become available, is appreciated.

JOHN E. ALCOCK, *Forest Supervisor.*

U.S. DEPARTMENT OF AGRICULTURE,
GREEN MOUNTAIN NATIONAL FOREST,
Rutland, Vt., May 15, 1972.

COMMISSIONER OF HIGHWAYS
State of Vermont, Montpelier, Vt.

The present plans for lands within the Forest Proclamation Boundary should these lands be acquired for National Forest purposes, and the existing National Forest lands, adjacent to the planned routing of the relocation of U.S. Route 7 between Bennington and Manchester, are for timber production, watershed protection and related activities.

FLOYD J. MARITA, *Forest Supervisor.*

U.S. DEPARTMENT OF AGRICULTURE,
GREEN MOUNTAIN NATIONAL FOREST,
Rutland, Vt., February 11, 1971.

COMMISSIONER OF HIGHWAYS,
State of Vermont, Montpelier, Vt.

The present plans for lands within the Forest Proclamation Boundary and adjacent to the planned routing of the relocation of U.S. Route 7 between Bennington and Manchester, should they be acquired for National Forest purposes, are for timber production, watershed protection and related activities.

FLOYD J. MARITA, *Forest Supervisor.*

STATE OF VERMONT, EXECUTIVE CHAMBER,
Montpelier, Vt., February 27, 1975.

HON. JAMES M. JEFFORDS,
U.S. Representative, 501 Cannon Building, Washington, D.C.

DEAR JIM: I note that Representative John J. LaFalce has introduced H.R. 3130 in the House of Representatives on February 13, 1975. Its stated purpose is to amend the National Environmental Policy Act of 1969 to provide clarification of procedures established relative to the preparation of environmental impact statements.

The earliest possible relief from the Court Orders barring the delivery of sorely needed improvements to Route 7 in southwestern Vermont is paramount to the health, welfare, safety, social betterment and economy of that area of our State. The clarifying language does not, in my judgment, impinge upon the proper and balanced consideration which should and must be given to legiti-

mate environmental concerns. In fact, I believe that the clarifying language as presented in H.R. 3130 will strengthen the concern and abilities of responsible Federal officials.

I will sincerely appreciate your early and continued support for the expeditious enactment into law of this important legislation. I am taking the liberty of advising Senators Stafford and Leahy of my position by copies of this letter to them.

Sincerely,

THOMAS P. SALMON.

UNITED STATES DEPARTMENT OF AGRICULTURE,
GREEN MOUNTAIN NATIONAL FOREST,
Rutland, Vt., March 28, 1975.

STATE OF VERMONT,
Department of Highways
Montpelier, Vt.

(Attention of Mr. Arthur J. Goss.)

DEAR MR. GOSS: We are in the process of reviewing the documents needed to make the 4(f) determination for this project. Advice has been received from our Washington Office relating to the wording of the statement and also the procedure to arrive at the proper statement.

I expect that the determination statement will be prepared by May 1, 1975 for transmittal to the Regional Federal Highway Administration.

L. KENT MAYS, Jr., *Forest Supervisor.*

Senator STAFFORD. At this point, the joint meeting is dissolved and the Subcommittee on Transportation will stand adjourned, pending call of the Chair.

[Whereupon, at 12:20 p.m., the subcommittee recessed, to reconvene subject to the call of the Chair.]

[The opinion in the case of *Conservation Society v. Secretary of Transportation* and statements from the Sierra Club and the AFL-CIO follow:]

CONSERVATION SOCIETY v. SECRETARY

OPINION

U.S. COURT OF APPEALS SECOND CIRCUIT

The Conservation Society of Southern Vermont, Inc.; Bernard G. Winslow, Leon R. Eldred, Anstiss H. Eldred and Wallace E. Van Keuren, individually and as members of The Conservation Society of Southern Vermont; Lawrence Wasco and Ruth Wasco; and The Vermont Association of Railway Passengers v. Secretary of Transportation; H. James Wallace, Frank A. Balch, Henry O. Angell, Robert S. Bigelow, and H. Gordon Smith, in their capacities as members of the Vermont State Highway Board; John T. Gray, Commissioner of Highways, State of Vermont, and David B. Kelley, Division Engineer, Federal Highway Administration; The Vermont Natural Resources Council, Inc., Catherine Beattie, individually and as a member of the Vermont Natural Resources Council, Inc., Citizens Asking for Reconsideration of Route 2, and Leslie A. Parker, individually and as a member of Citizens Asking for Reconsideration of Route 2 v. Claude S. Brinegar, Secretary of Transportation, David B. Kelley, Division Engineer, Federal Highway Administration, H. James Wallace, Frank S. Balch, Henry O. Angell, Robert S. Bigelow, and William Costa, in their capacities as members of The Vermont State Highway Board, and John T. Gray, Commissioner of High-

ways, State of Vermont; Town of St. Johnsbury, intervenor-Appellee, Nos. 73-2629, 74-2168, and 73-2715, December 11, 1974.

Land

1. Federal, state, and local regulation—Transportation—Highways (§ 8.353)

Federal, state, and local regulation—Administrative agencies—Procedure before agencies (§ 8.621)

Federal-aid highway's environmental impact statement that was prepared by Vermont Highway Department and merely reviewed by Federal Highway Administration does not satisfy National Environmental Policy Act, since NEPA requires direct preparation, rather than perfunctory review, by concerned federal agency.

2. Federal, state, and local regulation—Transportation—Highways (§ 8.353)

Federal, state, and local regulation—Administrative agencies—Procedure before agencies (§ 8.621)

Federal district court did not abuse its discretion in requiring Federal Highway Administration (FHWA) to prepare separate National Environmental Policy Act environmental impact statement on entire 280-mile federal-aid highway corridor, even though most of corridor is only in planning stage and even though FHWA already is preparing impact statement on individual 20-mile project segment.

3. Federal state, and local regulation—Transportation—Highways (§ 8.353)

Liability by industry—Construction (§ 11.20)

Court jurisdiction and procedure—Injunctions (§ 15.71)

Federal district court did not abuse its discretion in refusing to enjoin construction of federal-aid highway interchange that is nearly completed and that is needed to divert heavy traffic from adjoining town, even though Federal Highway Administration's environmental impact statement violated National Environmental Policy Act by failing to consider alternative of not building interchange.

Statutes

Federal—National Environmental Policy Act (§ 95.011)

Federal—Federal-Aid Highway Act (§ 95.051)

Construed.

Consolidated review of two judgments from the U.S. District Court for the District of Vermont, one judgment requiring Federal Highway Administration preparation of an environmental impact statement (5 ERC 1683) and the other judgment denying an injunction halting construction of a federal-aid highway project.

Judgments affirmed.

Harvey D. Carter, Jr., and R. Paul Wickes, of Williams, Witten, Carter & Wickes, Bennington, Vt.; Haynes N. Johnson, of Bryan, Parmelee, Johnson & Bollinger, Stamford, Conn.; and Frederick Pope, Jr., Brattleboro, Vt., for appellees in No. 73-2699 and appellant in No. 74-2168.

Robert C. Schwartz, assistant attorney general, Montpelier, Vt.; George W. F. Cook, U.S. attorney, and William B. Gray, assistant U.S. attorney, Rutland, Vt.; Wallace H. Johnson, assistant attorney general, Edmund B. Clark and Kenneth A. Rubin, Department of Justice, Washington, D.C., for appellants in No. 73-2699 and appellees in No. 74-2168.

J. G. Speth and Edward L. Strohbehn, Jr., Washington, and Sarah Chasis, Angus MacBeth, William F. Morrill, and John Souwine, New York, N.Y., for *amicus curiae* Natural Resources Defense Council.

Edward R. Zuccaro, of Witters, Zuccaro, Willis & Lium, St. Johnsbury, Vt., for intervenor-appellee.

Full Text of Opinion

Before Moore, Mulligan and Adams,* Circuit Judges.

Adams, Circuit Judge:

Two cases are consolidated for appeal here because they present an identical issue, namely, whether this Circuit adheres to the holding of *Greene County Planning Board v. Federal Power Commission*,¹ that an environmental impact statement (EIS) sufficient to satisfy the requirements of the National Environmental Policy Act² must be prepared by the responsible federal agency. We reaffirm that *Greene County* remains the law of this Circuit,³ and that the Federal Highway Administration (FHWA) must formulate and prepare its own impact statement to assess the environmental effects of proposed federally-funded highway projects.

I. Background.

Objections by environmental groups to proposed Vermont highway construction have generated both these cases, and the defendants in each include the state and federal highway officials.⁴

In *Conservation Society of Southern Vermont v. Secretary of Transportation*, improvement was planned for a twenty-mile segment of U.S. Route 7 between Bennington and Manchester, Vermont. The district court, Circuit Judge Oakes sitting by designation, granted a permanent injunction in 1972 against proceeding with construction pending compliance with the mandate of NEPA.⁵ In 1973, the federal defendants, asserting procedural and substantive compliance with NEPA, moved to dissolve the Route 7 injunction. That motion was denied. Federal participation in preparation of the EIS, Judge Oakes concluded, was scant, perfunctory and insufficient to satisfy the procedures of NEPA as that Act was interpreted in *Greene County*.⁶

Judge Oakes found that the ultimate conversion of the Route 7 corridor into a divided limited-access superhighway through Connecticut, Massachusetts and Vermont is not the subject of an existing federal plan. However, he found that it is nonetheless seen by the respective state highway departments as a goal "possible of accomplishment with legislative and federal approval over a long-range period of time, with federal approval taking place on an ad hoc basis at the division engineer level." 362 F.Supp. at 636. The district court determined that the FHWA has knowledge of each state's planning process and acts in a "partnership" with the officials of each state respectively. Conversion of isolated portions of Route 7 into a superhighway, the court stated, will produce greater traffic, thus creating synergistic pressure for further construction to connect the newly expanded sections.

The district court therefore held that before the contemplated construction was undertaken, a comprehensive exploration into the environmental impact of development alternatives through the 280 mile corridor was called for. Judge Oakes concluded that there was justification for his order both under NEPA and under the Intergovernmental Cooperation Act of 1968.⁷ This appeal by defendants followed.

*Of the Third Circuit Court of Appeals, sitting by designation.

¹455 F.2d 412 [3 ERC 1595] (2d Cir.), cert. denied 409 U.S. 849 (1972).

²42 U.S.C. § 4321 et seq. (1973) (NEPA).

³*Contra, Life of the Land v. Brinegar*, 485 F.2d 460 [5 ERC 1780] (9th Cir. 1973), cert. denied, 42 USLW 3595 [6 ERC 1612] (April 22, 1974); *Citizens Environmental Council v. Volpe*, 484 F.2d 870 [5 ERC 1989] (10th Cir. 1973), cert. denied, 42 USLW 3584 [6 ERC 1440] (April 15, 1974); *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849 [6 ERC 1088] (8th Cir. 1973); *Finish Allatoona's Interstate Right, Inc. v. Brinegar*, 484 F.2d 638 (5th Cir. 1973); *Movement Against Destruction v. Volpe*, — F.2d — (4th Cir., March 19, 1974).

⁴The Town of St. Johnsbury is the defendant-intervenor in *Vermont Natural Resources Council*. In both cases briefs by amici curiae have been filed and considered.

⁵343 F. Supp. 761 [4 ERC 1226] (D. Vt. 1972). The holding that there had been non-compliance with § 4(f), Department of Transportation Act of 1966, 47 U.S.C. § 1653(f), which served as a basis for the original injunction, is not questioned in this appeal.

⁶"There is no indication whatsoever that FHWA or any of its employees conceived, wrote or even edited any section of or passage in the EIS." 362 F. Supp. 627, 632 [5 ERC 1683] (D. Vt. 1973).

In contrast to the procedural shortcoming of the EIS, the district court found that substantively the EIS was adequate. There is no appeal from this aspect of the district court opinion.

⁷42 U.S.C. § 4321(b), (e) (1973).

In the companion case, *Vermont Natural Resources Council v. Brinegar*, an appeal is taken by environmentalist-plaintiffs from rulings of District Judge Coffrin on several issues relating to a proposed construction denominated the Sleepers River Interchange.⁸ The interchange, to be located in St. Johnsbury, Vermont, would provide a highway connection for motorists between U.S. Route 2 (an east-west road) and Interstate I-91 (a north-south road). Without the interchange, those who wished to transfer from one highway to the other would have to leave the highway and pass through the narrow streets of St. Johnsbury. The two principal roadways, Route 2 and I-91, are presently under construction; the sole project at issue before this Court is the proposed interchange.

As envisaged, building the St. Johnsbury interchange would require the channelization⁹ of approximately one mile of Sleepers River. The environmentalists sought to enjoin the project because of alleged failures by defendants to comply with federal law. They allege procedural and substantive violations of NEPA § 102(2)(c).¹⁰ They contended before the trial court, and here, that the draft and final EIS were prepared by the state agency rather than by the federal agency and observed that, contrary to statute, the EIS did not consider alternatives to the construction. While conceding certain shortcomings in the EIS, the district court found the construction essential and declined to issue an injunction. Noncompliance with the permit requirements of the Federal Water Pollution Control Act of 1972¹¹ is also pressed on this appeal as grounds for enjoining further work on the interchange. The district court found that plaintiffs could not maintain such cause of action because they had not satisfied a sixty-day notice requirement established by the Pollution Control Act as a precondition to suit.¹²

II. The "Responsible Official" to Prepare the EIS.

Consideration of environmental factors in planning major federal projects has been deemed a high national priority. The duty of a federal agency under NEPA is to produce, as part of a determination whether to proceed with a project, a detached and comprehensive analysis of the impact on the environment of such project.¹³

Sec. 102. The Congress authorizes and directs that to the fullest extent possible: . . .
(2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

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

⁸D. Vt., Civ. No. 74-149, order entered Aug. 16, 1974, opinion filed Aug. 21, 1974 (Coffrin, J.). The district court in effect bifurcated the proceedings to enable speedy disposition of the Sleepers River Interchange controversy, designated a matter of "considerable urgency."

By order dated Aug. 26, 1974, a stay pending appeal was issued by a panel of this Circuit pursuant to F.R. App. Proc. 8. The stay was dissolved by the present panel, in an order dated Oct. 23, 1974.

⁹Channelization of a stream, in the context employed here, involves the creation of an artificial stream bed and diversion of a stream from its natural course to the constructed waterway. From perspectives of engineering, ecology and aesthetics, clearly a broad spectrum is comprehended in the term "channelization."

¹⁰42 U.S.C. § 4332(2)(C) (1973).

¹¹42 U.S.C. § 1311, 1344 (Supp. 1974).

¹²A claim under the Federal Rivers and Harbors Act, 33 U.S.C. §§ 403, 407 (1970), rejected by the court below, was not pursued in this appeal.

¹³42 U.S.C. § 4332(2)(C), NEPA Section 102(2)(C), provides in full:

In *Greene County, supra*, the New York Power Authority, in accordance with the regulations of the Federal Power Commission, prepared and filed with the Commission an impact statement to accompany an application for a new power line. The Commission reviewed and circulated the statement that had been prepared by the Authority, a state agency, in alleged satisfaction of its duty under NEPA. Chief Judge Kaufman held that in so doing, the Federal Commission:

abdicated a significant part of its responsibility by substituting the statement of [the state agency] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.¹⁴

NEPA, Chief Judge Kaufman stated, "explicitly requires the [federal] agency's own detailed statement" of the expected environmental impact of a major federal action.¹⁵ The Act places "primary and nondelegable responsibility" for preparation of the EIS on the federal agency.¹⁶ Accordingly, *Greene County* held that, to the extent regulation of the Federal Power Commission did not implement Congressional policy, compliance with the Commission's regulations would not satisfy NEPA.

[I]n the highway cases presently before us, the FHWA is the initial decision maker under the Act. While it does not plan, design or construct highways, FHWA decides whether the commitment of millions of dollars of federal money should be allocated to specific highway projects. Accordingly, having carefully considered the Act, the regulations and precedent, we conclude that FHWA is in the best position to weigh the costs to the environment and the benefits hoped for from the project and then to reach, as it must, a decision based on "its own evaluation of the environmental issues."¹⁷

A state agency is established to pursue defined state goals. In attempting to secure federal approval of a project, "self-serving assumptions" may ineluctably color a state agency's presentation of the environmental data or influence its final recommendation. Transposing the federal duty to prepare the EIS to a state agency is thus unlikely to result in as dispassionate an appraisal of environmental considerations as the federal agency itself could produce. Judge Oakes declared that:

[T]he Vermont Highway Department has the duty . . . to follow legislative mandate in regard to proposed highway construction, and the construction here contemplated [Route 7] was legislatively mandated in 1968. Thus, it is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency.¹⁸

Requiring strict adherence to the *Greene County* rule would provide a clear and effective means to obtain an objective, comprehensive EIS. Furthermore, the beneficial effects of such an approach are substantial.

[A]ppropriate agency regulations on EIS authorship . . . would shift the initial burden of monitoring compliance with this aspect of NEPA to the agencies themselves, while facilitating ultimate judicial evaluation of such compliance. . . . [T]he case-by-case approach . . . tends to encourage even more NEPA litigation, while at the same time increasing the chance that a legally insufficient EIS might for lack of litigation become the basis for federal decisions made in ignorance of potentially disastrous environmental consequences.¹⁹

Lodging primary responsibility with the federal agencies would clarify definitively the respective roles of agency and court in effectuating the Congressional purposes. By assuring unambiguous rules, judicial intrusion into what are in essence agency determinations will be avoided wherever possible.²⁰

¹⁴ 455 F.2d at 420 (footnotes omitted).

¹⁵ *Id.* at 421 (emphasis original).

¹⁶ *Id.* at 420.

¹⁷ Council on Environmental Quality (CEQ) Guidelines, 38 Fed. Reg. 20553 (1973).

¹⁸ 362 F. Supp. at 631.

¹⁹ 1-291. *Whu? Ass'n v. Burns*, 372 F. Supp. 223, 246, n.72 [6 ERC 1275] (D. Conn. 1974), appeal filed No. 74-1545 (2d Cir. Feb. 7, 1974).

²⁰ See, *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 [3 ERC 1558] (D.C. Cir. 1972).

Further litigation before this Court should be rendered unnecessary, or at least kept to a minimum, regarding whether "significant federal participation" or "substantial interaction" between federal and state agencies satisfy NEPA requirements. Nothing short of "genuine"²¹ federal preparation of the EIS accords with *Greene County*.

The interpretation of the statute by the Council on Environmental Quality, CEQ, has been expressly accommodated to the *Greene County* result.²² The CEQ guidelines presently read:

§ 7(c). Where [a federal] agency relies on an applicant to submit initial environmental information, the agency should assist the applicant by outlining the types of information required. In all cases, the agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental statements.²³

It is objected that a stringent rule requiring FHWA preparation of the EIS is unmanageable from a practical viewpoint. Upon careful review, however, it would appear that the problems entailed in conforming to *Greene County* are tractable.²⁴

It is contended that the FHWA has not been involved in planning a particular project from the earliest stages, and thus does not have the advantage of information available to the state. This handicap is minimized however, for the CEQ guidelines explicitly preserve sufficient flexibility for the federal agency to solicit and integrate information from state agencies.²⁵ Surely there is no reason to lose the benefit of any work done by the state during initial exploration into project possibilities prior to federal involvement.

Turning now to the cases before the Court, in *Conservation Society of Southern Vermont*, we affirm the judgment of Judge Oakes that the requisite EIS be prepared by the FHWA, the responsible federal agency. The injunction prohibiting construction of Route 7 will continue until the requisite EIS is prepared in compliance with the district court order.

In *Vermont Natural Resources Council* a significantly different factual context is presented. To the extent that the district court questioned the need for FHWA compliance with *Greene County*, its opinion is not sustained. But the district court ascertained that, in any event, several factual considerations combined to justify withholding an injunction. Since we have resolved that the district court did not abuse its discretion in making its determination, we affirm the result reached below on this point.²⁶

²¹ 362 F. Supp. at 632.

²² 38 Fed. Reg. 10856, 10865 (1973) (statement accompanying proposed guidelines for the preparation of an EIS; comments to § 7(d)).

²³ Fed. Reg. 20550, 20553 (1973), codified as 40 CFR § 1500.7(c) (emphasis added). The guidelines do permit "the use [after review] of initial information furnished by an applicant in the form of an EIS." 38 Fed. Reg. 10865.

²⁴ The CEQ published FHWA Policy and Procedure Memorandum (PPM) 90-1 two years prior to issuance of its revised guidelines (102 Monitor, Vol. 1, No. 9, Oct. 1971). Such earlier publication does not provide evidence that CEQ presently approves the procedures outlined in PPM 90-1. The more likely inference is that the 1973 guidelines were intended by CEQ to stimulate agency revision of internal procedures inconsistent with judicial and CEQ interpretations of the Act.

²⁵ Shortages of both general and expert personnel are cited. However, we agree with the district court in *Southern Vermont* that this difficulty is best addressed to Congress. 362 F. Supp. at 361. Testimony on behalf of the Vermont Highway Department indicated that the FHWA already absorbs that share of the cost of EIS preparation commensurate with its underwriting of construction costs. It has been suggested that states might be asked to continue to pay their portion of costs when the FHWA prepares the EIS. No financial constraints operating on FHWA would thus hamper their ability to prepare the EIS. See Comment, The Independent Offices Appropriations Act of 1952: Who Should Pay for the Impact Statement, 3 E.L.R. 10059 (1973); Comment, More on the Independent Offices Appropriations Act of 1952, 3 E.L.R. 10086 (1973). The Supreme Court recently approved a fee assessment by a federal agency under the Appropriations Act. *National Cable Television Assoc., Inc. v. United States*, 42 U.S.L.W. 4306 (March 4, 1974).

²⁶ Notes 22, 23, *supra*.

²⁷ It would appear that the district court was moved in part at least by what it perceived as significant federal interaction in the preparation of the EIS. In contradistinction to *Conservation Society*, Judge Coffrin found that federal-state cooperation was "much more extensive." Slip Opinion 15. Federal review of the draft EIS was described as "searching." Slip Opinion at 12. In addition, federal agency contributions incorporated into the final EIS were found to be substantial.

While the level of involvement described does not reach the standard reaffirmed by this Court today, Judge Coffrin's findings in this regard help sustain his decision not to enjoin construction in the Sleepers River case until a properly prepared EIS is available.

In determining whether to issue an injunction against proceeding with the Sleepers River Interchange, Judge Coffrin found that the equities largely favored the defendants under the circumstances of this case. The court pointed to the late stage reached by the general construction program,²⁷ to the very strong considerations of public safety urged by St. Johnsbury into whose streets the I-91 highway traffic must otherwise empty, and to the urgency attending completion of this project.

Although the procedural requirements of NEPA must be followed scrupulously²⁸ and cost or delay will not alone justify non-compliance with the Act,²⁹ where the equities require, it remains within the sound discretion of a district court to decline an injunction, even where deviations from prescribed NEPA procedures have occurred.³⁰ We cannot conclude, based on its factual determinations and its weighing of the equities, that the district court abused its discretion in refusing to enjoin construction of the Sleepers River Interchange.

III. EIS for the Route 7 Corridor

The defendants appeal from the portion of the order in *Conservation Society of Southern Vermont* that, within six months from issuance by the FHWA of the project EIS, an EIS concerning development of transportation systems in the entire 280 mile Route 7 corridor must be prepared.³¹

Although no plant presently exists for constructing a Route 7 superhighway through Connecticut, Massachusetts and Vermont, the district court made particular findings indicating a long range goal of superhighway construction by the respective states and the federal government, acting in partnership.³² Development is apparently foreseen as the piecemeal connection of smaller segments, each considered on an ad hoc basis. It appeared that the FHWA would not consider a comprehensive corridor-long EIS necessary because the highway as an entity would never be characterized as a "major Federal action."³³ Judge Oakes emphasized the undesirable consequences if each isolated increment is approved in ignorance both of the cumulative environmental impact of fragmented growth and of major transportation alternatives that might be planned in lieu of highway construction.³⁴

The government advances the contention that the scope of the EIS required by the district court is excessive, first, in view of the nonexistence of any present plans to build the three-state highway, and second, in light of the relatively small portion of road reviewed here.³⁵

Under the facts as found, we would not disturb the district court's conclusion that an ultimate Route 7 superhighway is the expectation of state agencies with the knowledge and cooperation of the federal government. We thus must reach the second issue, whether it was beyond the sound exercise of discretion of the district court to order an EIS considerably greater in scope than the specific project before the agency at this time.

Support for the order below may be found in NEPA, which provides that the EIS consider the relation between short and long term uses of the environment, especially where "irreversible and irretrievable commitments of resources" will follow from approval of the proposed project.³⁶ NEPA also requires that federal

²⁷ Design approval for the I-91 construction was prior to Feb. 1, 1971. I-91 construction in Vermont was in its final phase. Even as to the interchange project at issue here, land acquisition has been completed, contracts have been awarded and construction has begun. *Slip Opinion* 5-6, 22, n.1.

²⁸ *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109 [2 ERC 1779] (D.C. Cir. 1971); *Greene County, supra*; *City of New York v. United States*, 344 F.Supp. 929 [4 ERC 1646] (E.D. N.Y. 1972) (3-judge court, Friendly, J.).

²⁹ *Calvert Cliffs, supra*; *Greene County, supra*; *Environmental Defense Fund, Inc. v. Froehke*, 477 F.2d 1033 [5 ERC 1313] (8th Cir. 1973).

³⁰ In *Greene County*, the court held that as to certain portions of the power line construction, "[T]here can be no question that the Commission failed to comply with NEPA. . . . Nevertheless we find no compelling basis for halting construction of the lines so far [80%] advanced. . . ." 455 F.2d at 424-25. See also *Environmental Defense Fund, Inc. v. Froehke*, 477 F.2d 1033 [5 ERC 1313] (8th Cir. 1973), and cases cited therein.

³¹ 362 F.Supp. at 638.

³² *Id.*, at 636.

³³ 42 U.S.C. § 4332(2)(c).

³⁴ The defendants would cast this determination by the district court as an intrusion into FHWA decisionmaking inconsistent with the limited scope of review afforded substantive matters. The failure of the FHWA to provide any impact statement regarding the entirety of what the district court found to be an ongoing, albeit piecemeal development is not so sheltered from judicial review. *Scientists' Institute for Public Information, Inc. v. A.E.C.*, 481 F.2d 1079 [5 ERC 1418] (D.C. Cir. 1973); *Natural Resources Defense Council Inc. v. Morton*, 458 F.2d 827 [3 ERC 1558] (D.C. Cir. 1972); *City of New York v. United States (II)*, 344 F.Supp. 929 [4 ERC 1646] (E.D. N.Y. 1972) (3-judge court).

³⁵ The Bennington-Manchester Route 7 project is approximately 20 miles in length.

³⁶ 42 U.S.C. § 4332(2)(C) (iv), (v).

agencies "recognize the world-wide and long-range character of environmental problems."³⁷ For consideration of environmental factors "to the fullest extent possible", CEQ requires review "beginning at the earliest possible point."³⁸ CEQ reminds agencies that, to be meaningful, impact statements "are to serve as the means for assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made."³⁹

The appropriateness of ordering impact statements for entire development programs when a proposal before an agency concerns only one portion of a more massive undertaking is not a novel issue in the courts.⁴⁰ In *Scientists' Institute for Public Information v. AEC*,⁴¹ the plaintiffs sought to force AEC to prepare an EIS regarding a liquid metal fast breeder reactor program to develop fuel for nuclear powered electric generators. The AEC conceded that at some future time prior to the construction of generator plants an EIS would be required, but the agency ascertained administratively that the program, still in the research and development stages, was not ripe for preparation of an EIS. The Court of Appeals for the District of Columbia disagreed. It reasoned that developments presently occurring required the "irreversible and irretrievable commitments of resources," and that these commitments themselves would curtail subsequent broad-scale assessment of alternatives.⁴²

Judge Oakes was equally concerned with the irretrievable commitment of federal funds to local highway projects without early attention to possible alternatives to highway development. Furthermore, in contrast to the situation in *Scientists' Institute* where it was clear that an EIS would be forthcoming at some time covering the reactor program, in the Route 7 case it appears that no overall impact statement is likely to emerge spontaneously from the FHWA.

The Bennington-Manchester Road is admittedly a project with local utility. Accordingly, the government asserts that by submitting an EIS for this segment compliance is established with the NEPA mandate to consider the environment from a broad perspective. The FHWA guidelines themselves would seem to answer this contention. Guidelines in the scope of an EIS provide:

The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. If possible, the highway section should be of substantial length that would normally be included in a multi-year highway improvement program.⁴³

[2] Upon careful consideration of the facts, and with a sensitive eye to the options often imperceptibly foreclosed by fragmented growth, we conclude that the legislation, the regulations and precedent appear to afford ample basis for Judge Oakes' determination.⁴⁴ The court thus did not abuse its discretion in con-

³⁷ 42 U.S.C. § 4332(2)(E). The Senate report accompanying NEPA states expressly that one function of the Act is to prevent decision-making that affects the environment to take place "in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

³⁸ Fed. Reg. 10856, 10865 (1973).

³⁹ Fed. Reg. 20550, 20552 (1973). 40 C.F.R. § 1500.2(a) mandates that "in all cases prior to agency decision" a detailed EIS is necessary. Courts also have required impact statements prior to decision-making by agencies. *Calvert Cliffs*, *supra*, described tardy consideration of environmental factors as a "hollow exercise." 449 F.2d at 1128.

⁴⁰ See also *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 [3 ERC 1995] (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); *Citizens Env'l Council v. Volpe*, 364 F.Supp. 286, 293-94 [4 ERC 1970] (D. Kan.), *aff'd*, 484 F.2d 870 [5 ERC 1989] (10th Cir. 1973), *cert. denied* 42 U.S.L.W. 3584 (April 15, 1974); *Citizens for Clean Air v. Corps of Engineers*, 349 F.Supp. 696, 708 [4 ERC 1456] (S.D. N.Y. 1972).

⁴¹ The related question of artificial division of a project into smaller segments for approval is considered in *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 [5 ERC 1749] (8th Cir. 1973), and *Named Individual Members v. Texas Highway Dept.*, 446 F.2d 1013 [2 ERC 1871] (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972). The test for whether an isolated highway segment is the proper subject of an EIS appears to be whether the segment has an independent utility, whether it has logical functional terminal, PPM 90-1 § 3(a).

⁴² 481 F.2d 1079 [5 ERC 1418] (D.C. Cir. 1973).

⁴³ *Id.* at 1092. See also *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 835 [3 ERC 1558] (D.C. Cir. 1972).

⁴⁴ PPM 90-1 ¶ 6.

⁴⁵ In a recent per curiam opinion, this Circuit affirmed a district court determination relating to a portion of the Route 7 corridor between Danbury and New Milford, Connecticut. *Citizens for Balanced Environment and Transportation, Inc. v. Volpe*, slip op. 5449 [6 ERC 2089] (2d Cir. Sept. 16, 1974). In that case the district court dealt solely with the question of whether or not there was federal action in the construction of the Danbury-New Milford portion of Route 7; it did not consider the issue of the necessity for an EIS covering the entire corridor. Thus, the affirmation by this Court of Judge Newman's specific finding does not preclude, and is unaffected by, the present affirmation of Judge Oakes' general findings.

cluding that the time was appropriate for early, comprehensive and meaningful consideration of the environmental impact of an alternative to continued highway expansion in the Route 7 corridor.⁴⁴

IV. Consideration of Alternatives at Sleepers River

An attack was leveled by plaintiffs in *Vermont Natural Resources* on the substantive adequacy of the EIS for the Sleepers River interchange because the EIS did not consider, as required by NEPA, other route locations or the alternative of abandoning the project.⁴⁵ NEPA's mandate is clear that agencies must accord thorough heed to the environmental impact of reasonably available options prior to a formal determination to pursue a course of action.⁴⁶ While consideration of every conceivable alternative is not necessary, "what is required is information sufficient to permit a reasoned choice of alternatives. . . ." ⁴⁷ Generally an EIS must consider the possibility of doing nothing as well as various ways to achieve a certain end.⁴⁸

The EIS here, in violation of NEPA, did not include a discussion of the environmental impact of not building the Sleepers River Interchange. Despite this failure, a constellation of facts contributed to the district court's conclusion that no injunctive relief was warranted in this case. Plaintiffs contend that a clear violation of NEPA justified injunctive relief against defendants pending compliance with the statute. Ordinarily, we would not take issue with a rule that, where other things are equal, a clear violation of a statute embodying a strong national policy merits injunctive relief. But in this case the district court found that the equities clearly and strongly favored the defendants.

Three grounds, each supported by the record, provided the basis for the district court's result. We need not decide today whether fewer than the sum of these would justify withholding injunctive relief, for here all were present.

First, the district court found that the general I-91 highway project and the Sleepers River Interchange were at an advanced stage of completion. I-91 when complete will provide highway transportation in Vermont from the Massachusetts border north to Canada. Most of the construction phase is ended and all but 24 miles of I-91 are in service in Vermont.⁴⁹ The I-91 portion to be serviced by the interchange was almost finished, and the interchange was found necessary to provide adequate access to I-91. The land acquisition program for the interchange right of way was accomplished. Contracts had been let and construction had begun except for actual diversion of the river bed.⁵⁰

Second, granting an injunction appeared unjustified where the outcome was virtually undisputed, where the affected resource was not "so environmentally unique [as to require] any special consideration,"⁵¹ and where extensive and thoughtful consideration had been given to mitigating the adverse environmental

⁴⁴ Since we affirm the district court's requirement of a corridor-long EIS based on NEPA, we do not reach the question whether such order might be bottomed on the additional basis asserted by the district court, namely, the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231 (1973).

⁴⁵ The EIS shall include a detailed statement of "any adverse environmental effects which cannot be avoided should the proposal be implemented," as well as "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C).

All federal agencies are required to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(D). See also S. Rep. No. 91-206, 91st Cong., 1st Sess. 21.

⁴⁶ *Citizens Environmental Council v. Volpe*, 484 F.2d 870 [5 ERC 1989] (10th Cir. 1973), cert. denied 42 USLW 3584 (April 15, 1974); *Monroe County Conservation Council Inc. v. Volpe*, 472 F.2d 693 [4 ERC 1886] (2d Cir. 1972); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 [3 ERC 1558] (D.C. Cir. 1972); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 [3 ERC 1126] (D.C. Cir. 1971).

⁴⁷ *Natural Resources Defense Council, Inc. v. Morton*, supra.

⁴⁸ *Monroe County Conservation Council, Inc.*, supra.

⁴⁹ It was stated at oral argument without contradiction that approximately 80%, or 3,900 feet of the 4,800 foot-long channelization of Sleepers River was attributable to the I-91 construction to which no objections are raised.

⁵⁰ The late stage at which this construction has been subjected to attack provides a vivid contrast to the situation in *Southern Vermont*, the companion case here, where the district court ordered early contemplation of alternatives, permitting a more meaningful appraisal. *Greene County*, supra; *Arlington Coalition on Transportation*, supra; *Calvert Cliffs*, supra.

⁵¹ Dist. Court slip opinion at 24. The Court noted that although six alternative routes were suggested in the final EIS for the remaining 24 miles of I-91, all contained identical plans for the Sleepers River Interchange.

consequences of the project. Thus, the court found that the interchange was essential "for the benefit of the traveling public and the effective utilization of I-91"⁵² as well as for the safety and general welfare of the citizenry of St. Johnsbury. Elimination of the interchange, the court found, was "a very remote possibility"⁵³ and alternative proposals were "impossible to realistically implement because of adverse terrain."⁵⁴ Further, in preparing plans for the actual construction, exhaustive efforts had been expended to preserve the ecological value of the river, notwithstanding the channelization.⁵⁵

Third, Judge Coffrin found that the heavy damage to defendants to be expected from an injunction militated against its issue. Delay and concomitant cost increases would not alone justify noncompliance with the Act.⁵⁶ Here, however, the court found that until the interchange was complete the town bore an "impermissibly heavy traffic burden,"⁵⁷ compromising the quality of life in the town and the safety of its inhabitants. Also, construction would provide jobs in an area of high unemployment.⁵⁸ On the other hand, the delay occasioned by an injunction would be especially costly because of the curtailed construction season in northern Vermont, which would, in effect, postpone the job an entire year, although a far shorter period might be required to comply with NEPA.

[3] The district court gave the above reasons for withholding injunctive relief notwithstanding the violation of NEPA in regard to contemplation of alternatives in the EIS for the Sleepers River Interchange. When all the pertinent facts are considered, we cannot say the district court abused its discretion in so deciding.⁵⁹

V. The Federal Water Pollution Control Act Claim

The plaintiffs in *Vermont Natural Resources Council* also contend that the district court erred by concluding it lacked jurisdiction to entertain a claim that defendants' channelization of Sleepers River violated the Federal Water Pollution Control Act (FWPCA) Amendments of 1972.⁶⁰ The court concluded that only by waiting sixty days after giving notice to the administrator, the state, and the alleged violator as required by the statute⁶¹ could plaintiffs obtain review of the defendants' actions.

⁵² *Id.* at 23.

⁵³ *Id.* at 24.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.* at 21-24. In the course of review prior to issuance of the final EIS, there had been meetings with the U.S. Department of Interior Fish & Wildlife Service and the Vermont Fish & Game Department. Many aspects of construction were tailored to incorporate suggestions to alleviate the environmental impact of channelization, directed to flood control and the preservation of the fishing, recreational and aesthetic value of the stream. Some of the modifications involved placing a natural boulder fill in the channel, designating the steepness of the banks and the depth of the channel, and planting shade trees to keep down water temperature, to hold the soil and to promote the growth of other vegetation.

⁵⁶ *Greene County, supra; Calvert Cliffs, supra.*

⁵⁷ Slip opinion at 18.

⁵⁸ *Id.* at 35. This would appear to be of no consequence if the ultimate outcome were in substantial doubt, but such was not found to be the case.

⁵⁹ *Aberdeen & Rockfish RR. Co. v. Students Challenging Regulatory Agency Proceedings (SCRAP)*, 409 U.S. 1207, 1218 [4 ERC. 1369] (1972) (Burger, C.J., sitting as Circuit Justice).

⁶⁰ 33 U.S.C. § 1251 et seq. (Supp. 1974).

Section 1311(a) provides:

Except in compliance with this section and [section 1344] of this title, the discharge of any pollutant by any person shall be unlawful.

Section 1344(a) states:

(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

"Pollutant" is defined in 33 U.S.C. § 1362(6) to include dredged spoil, rock, and sand.

⁶¹ 33 U.S.C. § 1365(a) reads in pertinent part:

[A]ny citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter. . . .

33 U.S.C. § 1365(b) reads:

No action may be commenced:

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) of the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . .

After careful consideration we are not persuaded that Congress intended the sixty-day notice provision to erect an absolute barrier to earlier suit by private citizens under the FWPCA.⁶² However, we decline to remand the case for a determination of the merits of plaintiff's claims. Assuming arguendo that the district court had jurisdiction⁶³ over the FWPCA claims and, assuming further that a stream channelization project such as the one here would require a permit under the Act, we would not employ the equitable powers available to this Court to enjoin further construction of the Sleepers River Interchange until such a permit is obtained. As already pointed out, granting such an injunction would cause serious harm and inconvenience both to St. Johnsbury and to the general travelling public. The purposes which would be served by enjoining construction at this late date are simply not sufficiently weighty to balance the injury which further delays would cause.

Accordingly, the judgment of the district court in each of these cases will be affirmed.

NATIONAL ASSOCIATION OF COUNTIES,
Washington, D.C., May 8, 1975.

Hon. LLOYD M. BENTSEN,
Subcommittee on Transportation, Senate Committee on Public Works,
Washington, D.C.

DEAR SENATOR BENTSEN: Enclosed is a statement of the National Association of Counties for consideration by the Senate Public Works Subcommittee on Transportation (and the Senate Interior Subcommittee on Environment and Land Resources) in connection with H.R. 3130 and H.R. 3787, relating to state participation in the preparation of environmental impact statements.

We hope our comments will be helpful to the Subcommittees. Please let me know if we can provide additional information or assistance.

Sincerely,

RALPH L. TABOR,
Director, Federal Affairs.

⁶² See *Natural Resources Defense Council, Inc. v. Train*, Dkt. No. 74-1433 (D.C. Cir. Dec. 5, 1974). Ordinarily, the 60-day notice provisions must be adhered to prior to initiation of suit under the FWPCA. The purpose of the 60-day notice procedure of § 1365 is to provide the Administrator time to launch governmental enforcement of the FWPCA in lieu of enforcement through private citizens suits. See Sen. Rep. No. 92-414, 92nd Cong., 1st Sess., 79-80 (1971); 1972 U.S. Code Cong. & Ad. News 3668, 3745.

However, a crabbed construction of § 1365 which would elevate the 60-day rule to the position of an absolute barrier to earlier suit fails to account for § 1365(e), which preserves all private rights to sue for relief under any statute or common law. Moreover, a review of the legislative history of § 1365 and its prototype, § 304 of the Clean Air Act, supports the conclusion that the provisions for obtaining judicial review set forth in § 1365 were not intended to eliminate avenues previously available to citizens seeking enforcement of the Act but were rather intended to provide citizens with an additional remedy. Section 304 of the Clean Air Act, 42 U.S.C. §§ 1857h *et seq.*, was the model for the citizen suit provision of the FWPCA, and is substantially identical to § 505 of the FWPCA. See Sen. Comm. on Public Works (Library of Congress) A Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 93rd Cong., 1st Sess. (Jan. 1973) (2 vols.), at 820, 1497. See Sen. Comm. on Public Works, A Legislative History of the Clean Air Amendments of 1970, 93rd Cong., 2d Sess. (Jan. 1974) (2 vols.) at 436-39.

Although it appears that no court has expressly ruled on whether the § 505 procedure is the exclusive means of obtaining review of agency action under the FWPCA, district courts have in fact exercised jurisdiction over FWPCA claims based on other jurisdictional statutes. See e.g., *Scenic Hudson Preservation Conference v. Callaway*, ___ F.Supp. ___, 6 ERC 1241 (S.D. N.Y. 1973), *aff'd* 6 ERC 1767 (2d Cir. 1974) (establishing jurisdiction to grant permanent and injunctive relief for alleged violation of § 404 of FWPCA under 28 U.S.C. § 1331 and the APA, 5 U.S.C. §§ 701-06); *Natural Resources Defense Council, Inc. v. Quarles*, ___ F.Supp. ___, (Civil No. 1629-73, D. D.C., Feb. 1, 1974). See also *City of Highland Park v. Train*, ___ F.Supp. ___, 6 ERC 1464 (N.D. Ill. 1974), in which the court held that it had jurisdiction under 28 U.S.C. § 1331 to review the failure of the EPA Administrator to promulgate regulations in conformity with the Clean Air Act, 42 U.S.C. §§ 1857 *et seq.*

Abbott Laboratories v. Gardner announces the standard to be applied:

[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. 387 U.S. 136, 140 (1967). See also *PBW Stock Exchange, Inc. v. SEC*, 485 F.2d 718 (3d Cir. 1973).

Since a "persuasive reason" does not appear in this case, the notice requirements of § 505 would not operate as a total jurisdictional bar to entertaining plaintiffs' claim.

⁶³ Plaintiffs assert that the district court had jurisdiction to review under either the federal question statute, 28 U.S.C. § 1331, or the Administrative Procedure Act, 5 U.S.C. §§ 701-06.

STATEMENT OF THE NATIONAL ASSOCIATION OF COUNTIES

This statement is submitted by the National Association of Counties (NACo), the only organization representing county government at the national level. The purpose of our statement is to support passage of H.R. 3787 and H.R. 3130.

At a meeting on April 23-24, 1975, the NACo Transportation Steering Committee adopted a resolution supporting both bills. We believe H.R. 3130 is needed to clarify legislative intent regarding the administration of the National Environmental Policy Act of 1969 (NEPA) nationwide and across all federal grant-in-aid programs. In the event that consideration of the broad issues involved in amending NEPA might prevent speedy action on H.R. 3130, we support immediate passage of H.R. 3787 to provide relief for Connecticut, New York, Vermont, and other states where litigation is delaying highway construction as a result of the decision of the Second Circuit Court of Appeals in the case of *Conservation Society of Southern Vermont v. Secretary of Transportation*.

NACo strongly supports federal programs aimed at preserving and protecting this nation's environment and natural resources. We believe, however, that the administration of such programs should be undertaken by that level of government with the capacity to administer them, which is closest to the problem and the concerned citizens. Our platform, as it deals with the environment, states:

"We feel that the major role of the federal government in protecting the environment is in the fields of research, technical and financial assistance and setting of uniform minimum standards related to public health and the quality of the environment . . ."

NACo's Transportation Steering Committee adopted a resolution passed by the County Supervisor's Association of California. The resolution suggests even greater reliance on state and local involvement than is called for by the pending legislation. This resolution, which outlines general principles to be followed in any program of assistance to state or local government, recommends:

The federal and state governments should develop broad-brush procedural guidelines and general post-audit compliance procedures under which federal and state funds could be utilized with fewer administrative regulations;

There should be federal certification and acceptance of state, city and/or county standards and requirements for purposes of meeting all facets of federal requirements, including environmental reviews . . .

NACo believes that the process which the Federal Highway Administration (FHWA) has developed for preparing the Environmental Impact Statement (EIS) is a step in the right direction. The FHWA process involves federal district engineers directly in the development of the EIS by local and state officials. The participation of state and local agencies in this process should be encouraged and strengthened, toward the end contemplated in our Steering Committee resolution. To clarify the confusion created by the Court decision, legislative action is urgently needed.

H.R. 3130 would greatly relieve the current and possible future confusion. We support extension of this clarification to programs beyond the immediate case involving a highway in Vermont. County government throughout the United States is generally involved, not only in the federal-aid highway program, but is frequently the recipient of grants from other federal agencies potentially affected by the court decision. Our member counties are grantees of the Law Enforcement Assistance Agency, (Department of Justice), Bureau of Outdoor Recreation (Department of the Interior), Department of Health, Education, and Welfare (particularly for hospitals and health-related programs), Environmental Protection Agency, Housing and Urban Development, Department of Agriculture, and others which involve participation and joint effort by federal and state agencies in carrying out of NEPA-imposed requirements.

Unless H.R. 3130 is passed in the near future, unnecessary and unreasonable delays in the construction of projects under these programs will result. This would mean undue delay in providing needed services to our citizens, along with exacerbation of unemployment in the construction industry, which is already so hard-hit by recession.

If the Vermont court decision is not overturned by legislative clarification of NEPA, the opinion may stand that Federal agencies must perform the entire

impact analysis, even when the same information is already put together by the relevant state agency, which is closer to the area and generally more knowledgeable about potential environmental concerns.

As testimony in hearings before the Committees has already suggested, the FHWA has conservatively estimated that 2,000 to 3,000 additional federal employees would be needed if FHWA were to undertake the complete preparation of the EIS. It is likely that projects long delayed while state agencies geared up to perform the EIS analysis would be delayed for two or more additional years if legislative clarification is not adopted. Further, the existing state review process, which has been undertaken at a direct cost of \$50 million to one state (California) for highway projects alone, would be unnecessarily duplicated. We believe such a situation would be intolerable to our members, as public officials, as well as to you as members of the Congress.

SIERRA CLUB,
Washington, D.C., May 7, 1975.

Hon. JENNINGS RANDOLPH,
Chairman, Senate Public Works Committee,
Washington, D.C.

DEAR SENATOR RANDOLPH: Please make this letter a part of the hearing record on H.R. 3130 and H.R. 3787, bills to clarify the responsibilities of Federal and state officials for the preparation of environmental impact statements on major Federal actions under the National Environmental Policy Act.

I would like to commend the two committees on holding these hearings; however, I strongly believe that insufficient time has been allotted. More hearings need to be held to investigate the broad implications of the legislation, especially H.R. 3130. The pressures for fast action on the bills has been artificially created by the Department of Transportation. I urge you to separate fact from fiction with respect to these pressures and to take the time necessary for a thorough review of the impact of this legislation upon the National Environmental Policy Act and upon Federal programs and agencies affected by the legislation.

As I stated in the House hearings, we believe that the legislation is unnecessary; the situation can be taken care of by Administrative remedy. We oppose H.R. 3787 because it tacitly sanctions "segmentation" of NEPA statements for multi-state projects and because it provides a special exemption for one Federal agency. We oppose H.R. 3130 because it would apply to any "state agency or official." Its application to all federal programs in which a state agency is an applicant for federal funds, licenses, or approvals has not been thoroughly considered and is far too broad.

More hearings in Washington are necessary to hear from other Federal agencies which could be affected by the bills. Field hearings would be highly desirable to receive information about the performance of local officials in preparing environmental impact statements. We hope you will delay any immediate action on these bills and schedule additional hearings as soon as possible.

Sincerely,

LINDA M. BILLINGS, *Washington Representative.*

TESTIMONY OF
ROBERT A. GEORGINE
PRESIDENT
BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO
ON
H.R. 3787 AND H.R. 3130
BEFORE JOINT HEARING OF THE
SENATE PUBLIC WORKS SUBCOMMITTEE ON TRANSPORTATION
AND
SENATE COMMITTEE ON INTERIOR

MAY 5, 1975

While America is in a recession, the construction industry is in a severe and protracted depression. The plight of the construction industry stems from a set of deliberate policies designed to fight inflation with recession.

The simple truth is that over the past eighteen months, the Federal Reserve Board, the Office of Management and Budget, and the Council of Economic Advisers have pursued policies designed to bring inflation under control by choking the construction industry through high interest-tight money policies, by freezing many housing construction programs, by cutting back on the other federal construction programs, and by defiantly impounding many billions of dollars of funds contrary to the intent of Congress.

Beyond doubt, the construction industry has borne an unfair and disproportionate burden in the Administration's discredited strategy of balancing the budget.

In short, the construction industry - the nation's largest industry - its bellwether of prosperity - has been the principal victim of governmental action.

The most recently available statistics give little reason to expect anything better in 1975. Unemployment for the month of April in the construction industry reached a staggering 19.3 percent, when seasonally adjusted. This translates into 832,000 unemployed construction workers.

The construction industry has been laboring under double-digit unemployment for ten consecutive months.

These^a figures, however, are only an average. In Connecticut for example, unemployment is 23%, it is 26% in Vermont and 30% in New York.

Even worse, unemployment is a lengthening problem. The number of workers idled for twenty weeks or more is over 225,000.

Underemployment is an equally grave problem.

According to Labor Department studies, the average fulltime (more than 700 hours) construction employee works an average of 1,200 hours at his trade each year-- at least 800 hours less than the average industrial worker. The past year has seen the average number of hours worked per week by a construction worker consistently decline. Due to the scarcity of work, many local unions are being forced to adopt shorter work weeks. Nevertheless, these workers are counted as employed.

The building industry is suffering. Skilled tradesmen, discouraged by the impossibility of finding work, are simply deserting the industry. By putting the building industry back on its feet, we can halt this attrition and make use of some of this country's most skilled and productive workers.

High construction unemployment is a tremendous cost to the entire economy.

It has been estimated that each additional percentage point in unemployment costs the Federal Treasury 14 billion dollars in lost revenue and 2 billion dollars in unemployment compensation payments. It is readily apparent that over 850,000 unemployed construction workers are costing the Federal Government alone billions upon billions of dollars.

Furthermore, when we add the multiplier effect of unemployment in related and other industries caused by the depression in construction, the total unemployment comes to nearly three million people. This is over one-third of the nation's total unemployment

and clearly demonstrates that the depressed construction industry is only fueling this country's overall unemployment problem.

The human cost of unemployment is incalculable and cries out for attention.

For the old, unemployment is a constant, demeaning, self-confidence destroying worry.

Economic predictions for 1975 anticipate further increases of joblessness to higher and higher levels. The only disagreement among responsible observers is the level of unemployment the nation will experience.

These are clearly times to forge new programs to aid the jobless and guarantee that existing programs are maintained and strengthened. However, a recent U. S. Court of Appeals ruling has effectively shut-down highway construction in three states, a decision which can only heighten construction unemployment in these areas.

On December 11, 1974, the U. S. Court of Appeals for the Second Circuit in the case of Conservation Society of Southern Vermont vs. Secretary of Transportation, et al, held that the Federal Highway Authority must formulate and prepare its own impact statement to assess the environmental effects of proposed federally funded highway projects.

This ruling has had the effect of stopping any new highway projects in the three States within the jurisdiction of the second circuit, namely, Vermont, Connecticut, and New York.

Due to the current national effort during this period of recession, with spiraling unemployment, to provide jobs within the construction industry, Congressman Howard of New Jersey

introduced H. R. 3787 to amend Section 109 of Title 23, United States Code which would remove the restraint imposed by the Vermont Case.

The second circuit decision has imposed a standard for the preparation of environmental impact statements more rigid than those required in a majority of States.

The bill, H.R. 3787, if passed would enable the Secretary of Transportation to adopt as his own any environmental impact statement prepared by the State. It leaves to the Secretary the final decision as to how extensive an environmental study has to be in order to conform with the intent and purpose of the National Environmental Policy Act.

No single group of Americans is more concerned with creating and preserving a harmonious environment for all Americans than union building tradesmen.

Building tradesmen deserve and desire a safe and healthy working environment as they build America.

Consequently, our record in supporting the environment is second to none. The Building and Construction Trades Department actively supported the original Federal Pollution Control Act of 1948, the 1956 amendments, the Clean Air Amendments of 1972, the National Environmental Policy Act of 1969, and sections of other federal statutes, such as the Housing Act, the Ocean Dredging Act, and the Flood Control law, which contain environmental requirements.

In short, the Department is prepared to support any necessary proposals which will provide an orderly system to protect the

environment, while taking into account the need to fulfill our national needs and maintain our economic well-being.

The Department is deeply troubled by the manner in which environmental statutes are being abused in practice. We are concerned:

That the interests of the tradesmen who build America are being totally shunted aside;

That construction programs vital to this nation's present and future well-being are being destroyed;

That litigation on technicalities rather than substance is rapidly becoming the order of the day;

That there are interminable delays;

That there is no finality, no orderly regulatory scheme, but a multiplicity of laws, regulations, administrative agencies, public bodies, forms, and actions where far too often, a premium is placed upon the ingenuity of counsel in raising yet another technical issue rather than the merits of the action itself.

The recent decision of the Second Circuit Court of Appeals affecting over 80 scheduled construction undertakings was based purely upon a technicality and illustrates our frustration. There, contrary to four other appellate courts, the second circuit held that the federal agency must prepare its own environmental impact statement, rather than rely upon a state statement, which was not challenged on its merits.

The Building and Construction Trades Department urges that

the Congress, before it enacts any further environmental legislation, thoroughly review the entire environmental program, to the end that an orderly federal system be developed to replace the present hodge-podge programs. Such a program should establish a single, orderly, decision-making process that would provide for environmental impact at the earliest possible planning stage, and final termination.

In the interval, the Department urges speedy passage of H.R. 3787.

There has to be a compromise between those who would not disturb a single leaf on a beautiful tree or build a power plant on a single river or lay a pipeline through a single valley and those who would build and construct without any regard for the change they might be wreaking.

In addition to H.R. 3787, Congressman Howard has also introduced H.R. 3130, which this committee is considering. This bill would permit an increase in the Federal matching share for Federal-aid highways and certain mass transit projects approved during the period February 12, 1975 to the end of this fiscal year. These increases could be up to 100 percent Federal share to be advanced to a State, upon request, from a State's existing Federal apportionment. In return, the State must agree to pay back such increases to the Federal Government by December 31, 1976. Failure on the part of any State to honor this commitment would result in the withholding of future Federal-aid project approvals in the State.

Mr. Chairman, this bill offers a solution to problems many States are presently experiencing in meeting the matching requirements for the construction of Federal-aid highways. As you know, the President on February 12 of this year suddenly released \$2 billion

in impounded highway funds to provide a stimulus to our declining economy. The States, of course, did not anticipate this release, and many States are simply unable to meet the additional requirements for State matching. In order to meet the goal of obligating the entire \$2 billion before the end of the fiscal year, I believe we must relax temporarily the matching requirement. Any increases advanced to a State for this purpose would be paid back to the Federal Government.

The Department sincerely urges both committees and the Senate to support both of these important measures to provide jobs and to stimulate our declining economy.



