NOTE

Conservation Society of Southern Vermont: The Retreat on Delegation and Scope of Environmental Impact Statements

Federally-funded highway construction has been a singularly fertile breeding ground for litigation under the National Environmental Policy Act (NEPA).[1] Much of the source of this conflict can be traced to the differences between the policies implemented by NEPA[2] and the Federal-Aid Highways Act,[3] and to the often conflicting goals of environmentalists, who desire long-range planning and full consideration of alternatives,[4] and the Federal Highway Administration (FHWA) of the Department of Transportation (DOT), which is dedicated by congressional mandate to a policy of highway construction.[5] The administrative procedures followed by the FHWA to implement the highway construction program were initially promulgated before Congress enacted NEPA.[6] Although an attempt to accomodate FHWA procedures to the requirements of

1. 42 U.S.C. §§ 4321-47 (1970).

2. "The Congress . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . ." 42 U.S.C. § 4331(a) (1970).

3. 23 U.S.C. §§ 101-55 (Supp. IV, 1974). Congress passed this Act to encourage the "prompt and early completion of the National System of Interstate and Defense Highways." *Id.* § 101(b) (Supp. IV, 1974).

4. Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973); Conservation Society of Southern Vermont v. Secretary of Transportation, 362 F. Supp. 627 (D. Vt. 1973), *aff'd* 508 F.2d 927 (2d Cir. 1974), *vacated sub nom.* Coleman v. Conservation Society of Southern Vermont, 96 S. Ct. 19 (1975), *rev'd on remand*, Civil Nos. 73-2629 and 73-2715 (2d Cir., Feb. 18, 1976); Movement Against Destruction v. Volpe, 361 F. Supp. 1360 (D. Md. 1973).

5. *See* note 3 *supra*.

6. Peterson & Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ELR 50001 (1972).

NEPA was made by the DOT in issuing Policy and Procedure Memorandum 90-1 (PPM 90-1),[7] the fundamental differences in goals have led to recurrent bouts of litigation.

These crossed purposes are often contested doctrinally on issues related to the preparation of an environmental impact statement (EIS) mandated by NEPA for federally-funded highway proposals. Two challenges which environmentalists have raised repeatedly are whether EIS preparation can be delegated to a state highway department, and whether the scope of an EIS can be limited to the particular road segment for which a proposal for funding has been submitted. PPM 90-1 authorized the FHWA to delegate preparation of an EIS to the state highway department[8] responsible for planning and building the stretch of highway analyzed in the impact statement. Environmentalists have argued that this transfer of federal responsibility to state officials places the evaluation of environmental effects in the hands of a state agency which is biased in favor of the construction of the highway in question,[9] and which usually has made a significant investment in the particular proposal. It is claimed that this delegation results in an EIS based on "self-serving assumptions"[10] which avoid adequate assessment of adverse environmental effects.

PPM 90-1 also directed the FHWA to limit the scope[11] of an EIS to highway segments connecting logical termini,[12] generally major cities or highway interchanges. Environmentalists have argued that this limitation on EIS scope prevents implementation of the NEPA policy of long-range planning—a policy which, environmentalists claim, requires, in addition to the "project" EIS, an overall "program" EIS for the entire corridor of which the proposed highway is a segment.[13] It is claimed that as a result of this

7. 37 Fed. Reg. 21809 (1972), 23 C.F.R. § 1 App. A (1974), *removed* 39 Fed. Reg. 41821 (1974). *See* 23 C.F.R. §§ 771.1-.21 and §§ 795.1-.17 (1975).

8. PPM 90-1, ¶ 6b, 37 Fed. Reg. 21811 (1972), *as amended*, 23 C.F.R. § 771.3(g), 771.12(a) (1975).

9. *See, e.g.*, Conservation Society of Southern Vermont v. Secretary of Transportation, 362 F. Supp. 627, 630-31 (D. Vt. 1973).

10. Greene County Planning Bd. v. FPC, 455 F.2d 412, 420 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

11. PPM 90-1, ¶ 6, 37 Fed. Reg. 21811 (1972), *as amended*, 23 C.F.R. § 771.5(a) (1975).

12. *Id.* ¶ 3(a) at 21810, *as amended*, 23 C.F.R. § 771.3(g) (1975).

13. *See* Conservation Society of Southern Vermont v. Secretary of Transportation, 362 F. Supp. 627, 637 (D. Vt. 1973).

limitation, non-highway transportation alternatives realistically cannot be considered.[14]

An examination of NEPA case law shows that environmentalists usually have not been successful in pressing these arguments.[15] In *Conservation Society of Southern Vermont v. Secretary of Transportation (Conservation Society I)*,[16] challenges to an EIS on grounds of both delegation and scope were sustained, but the victory was short-lived. The Supreme Court vacated the judgment[17] and remanded the case to the Second Circuit Court of Appeals for reconsideration in light of a recent amendment to NEPA, Public Law 94-83,[18] and the Supreme Court's recent decision in *Aberdeen & Rockfish R.R. v. SCRAP (SCRAP II)*.[19]

The response from the Second Circuit was the brief per curiam opinion of *Conservation Society of Southern Vermont v. Secretary of Transportation (Conservation Society II)*[20] in which the delegation and scope holdings of *Conservation Society I* were completely reversed. The implications of the new holdings are that henceforth the scope of an EIS will be limited to the federally-funded highway segment that is actually proposed, with little regard given to the broader impacts of and alternatives to the particular program in question. Furthermore, a federal agency may limit its participation in EIS preparation to a minimal level of guidance and evaluation, leaving only a questionable ability to check local self-interest.

This Note analyzes the Second Circuit's decision in *Conservation Society II*, and critically examines the court's interpretation of *SCRAP II* and construction of Public Law 94-83.

14. "Of course, an overall EIS for all of Route 7 would have one major consideration in mind, whether a superhighway is environmentally and otherwise the most viable alternative." *Id.*

15. The delegation cases are discussed at notes 62-83 and accompanying text *infra*; the scope cases are discussed at notes 106-15 and accompanying text *infra*.

16. 508 F.2d 927 (2d Cir. 1974), *vacated sub nom.* Coleman v. Conservation Society of Southern Vermont, 96 S. Ct. 19 (1975), *rev'd on remand*, Civil Nos. 73-2629 and 73-2715 (2d Cir., Feb. 18, 1976).

17. Coleman v. Conservation Society of Southern Vermont, 96 S. Ct. 19 (1975).

18. Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424 (1975), *codified in* 42 U.S.C.A. § 4332(2)(D) (Supp. 1976).

19. 422 U.S. 289 (1975).

20. Conservation Society of Southern Vermont v. Secretary of Transportation, Civil Nos. 73-2629 and 73-2715 (2d Cir., Feb. 18, 1976) (per curiam, one judge dissenting).

I. LITIGATION BACKGROUND

Route 7 is a principal north-south highway connecting the westernmost portions of Connecticut, Massachusetts and Vermont. It is not only a potential route for automobile traffic between New York City and Montreal, but also a gateway to the recreational areas of Vermont.[21] Because Route 7 is an old road and obsolete in design for much of its length, rebuilding projects have recently been proposed, and several suits have been brought challenging the environmental impact statements prepared under NEPA's mandate. *Conservation Society II* is the most recently decided of these cases. To fully appreciate the impact the decision can be expected to have on future environmental assessments of highway improvements in the Route 7 corridor, as well as its more far-ranging national implications, it is useful to consider the decision in the context of the preceding litigation. After *Conservation Society II* the surviving principles which will guide future cases appear to be those offering the least environmental protection.

Litigation over the relocation and reconstruction of the Vermont portion of the Route 7 corridor began with *Conservation Society of Southern Vermont v. Volpe*,[22] an action to enjoin the FHWA and the Vermont Department of Highways from proceeding with the improvement of Route 7 from Bennington north to Manchester until an EIS was filed. The court granted the injunction for the twenty-mile stretch of road north of Bennington, but permitted the Arterial 7 bypass around Bennington to be completed without an EIS. The court, in excepting the project from the injunction, relied on the facts that the bypass was in advanced stages of construction, had independent utility, and would produce few adverse environmental effects.[23] Even though the court was specifically

21. In its introduction to the EIS for the Bennington-Manchester highway segment, the Vermont Department of Highways referred to the 22,000,000 people living in the belt from Boston to central New Jersey and noted "that mass of humanity is going to be forced further and further afield in ever increasing numbers in recreational pursuits . . . ." The Department then asked: "[a]re we to refuse tens and tens of thousands of visitors and residents alike the amenity of decent automotive transport?"; and answered: "[e]ither we plan and build our transportation system now to accomodate this increase or we shall face greater congestion in the future. Vermont may well, like it or not, become the one major four season recreational and rural living center for the entire northeast." Conservation Society of Southern Vermont v. Secretary of Transportation, 362 F. Supp. at 641.

22. 343 F. Supp. 761 (D. Vt. 1972).

23. *Id.* at 767.

concerned with the lack of an EIS for the particular segment of Route 7 in question, and while the injunction issued was specific as to the segment of highway where construction was to be enjoined, the court was unclear as to the required scope of the EIS.[24]

Preparation of the Bennington-Manchester highway EIS took approximately one year to complete. In the spring of 1973 the FHWA and Vermont Highway Department presented the court with the finished EIS and filed a motion to dissolve the injunction. The EIS was challenged in *Conservation Society of Southern Vermont v. Secretary of Transportation*[25] as being prepared contrary to the non-delegation policy of the Second Circuit, announced in *Greene County Planning Board v. FPC*,[26] and as too limited in scope for a proper analysis of alternatives to Route 7 relocation and reconstruction. Both claims were upheld.[27] The delegation claim was analyzed in light of what the Court of Appeals had described in *Greene County* as the danger of "self-serving assumptions" where the EIS is prepared by a state agency responsible for the construction of the proposed project.[28] Since the Vermont Highway Department had been mandated by the Vermont Legislature to reconstruct Route 7, the dangers were found to be especially worrisome.

24. *Id.* at 763. Because the court in *Conservation Society II* read *SCRAP II* literally with respect to the requirement of a federal proposal as a prerequisite to an EIS, it is useful to place the court's finding of "substantial acceptance" into the scheme of federal highwayese to determine just what kind of proposal had been made. Essentially, there are four approval steps to a federally-funded highway: program; location or corridor; design; and plans, specifications and estimates (PS&E). Hill v. Coleman, 399 F. Supp. 194, 199 (D. Del. 1975). Program approval is limited to broadly aligned corridors. Location approval is granted for a more specific route within a corridor. Before location approval is granted by the FHWA, the state highway department must hold a public hearing, and prepare a draft EIS and a section 4(f) statement acceptable to the FHWA. *Id.* at 200. Thus, it appears that "substantial acceptance" is simply program approval which requires no EIS because it does not federalize the project. *See* Lathan v. Volpe, 455 F.2d 1111, 1120 (9th Cir. 1971).

25. 362 F. Supp. 627 (D. Vt. 1973).

26. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

27. The court also considered a direct challenge to the adequacy of the EIS prepared for the twenty-mile segment, 362 F. Supp. at 633, and a claim that section 4(f) procedures had not been complied with in relation to the use of United States Forest Lands. *Id.* at 638. With respect to the EIS substantive challenge, the court found that there had been a good faith attempt to consider the areas of environmental sensitivity along the proposed route and to consider alternatives, but found the EIS deficient in its specific weighing of costs and benefits. *Id.* at 634. With respect to the section 4(f) claim, the court noted that since it was remanding for preparation of an overall EIS there would be time to pursue all section 4(f) procedures. *Id.* at 639. Neither of these rulings was appealed in *Conservation Society I*.

28. 362 F. Supp. at 631.

With respect to the scope issue, the district court found that even though there was no overall federal plan for improving the Route 7 corridor, the states had been individually looking to this goal over a long period of time, the state legislatures had authorized reconstruction, the FHWA knew of the overall planning by the states and worked in "partnership" with them, and the isolated sections of new highway would induce excess traffic requiring further construction beyond the termini of the planned sections.[29] As a result of these findings, the court ordered the FHWA to prepare an EIS for the entire Route 7 corridor from its southern terminus in Norwalk, Connecticut to its unimproved northern terminus in Burlington, Vermont.[30] In short, this order required an environmental analysis of the effects of and the alternatives to rebuilding the road through the entire Route 7 corridor, including segments which had been challenged in southern Connecticut.[31]

In *Conservation Society I* the Court of Appeals sustained the district court's ruling. Although no present federal plan to build a superhighway through the Route 7 corridor had been found by the district court, the Court of Appeals found that the lower court had

29. *Id.* at 636.

30. *Id.* at 638.

31. Challenge to construction of the Route 7 corridor was not limited to Vermont. Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972), was an action brought in Connecticut to enjoin construction of Route 7 from Norwalk north to New Milford until an EIS was prepared. Although the specific federal involvement challenged consisted of approving only two small road segments having a total length of 3.1 miles, the court found substantial evidence of a proposal to rebuild Route 7 as an expressway from Norwalk to New Milford: the "State had authorized bonds for the expressway and undertaken extensive planning for it." *Id.* at 734. The court also found that one of the objectives which the planners appeared to have in mind was to connect Danbury (which is between Norwalk and New Milford) to Norwalk. As a result, the court issued an injunction pending preparation of an EIS for the entire segment from Norwalk to Danbury "to the extent this is the proposal." *Id.* at 740.

Two observations on the court's choice of an appropriate highway segment for the proper scope of a NEPA-mandated EIS in *Committee to Stop Route 7* are relevant to later litigation developments in the Route 7 corridor. First, in choosing the segment the court did not rely on a mechanical test. Instead, it attempted to balance the state's interest in insuring that Danbury would be located on rebuilt Route 7 (which it might not be if an overall EIS found a less environmentally adverse route connecting Norwalk to New Milford but bypassing Danbury) against the need for considering alternatives, which required choosing a segment which would be long enough for a meaningful consideration of alternatives. Second, the court did not feel bound to limit the scope of the EIS to the particular proposal actually before it; instead the court looked to the facts to determine the scope of the proposal on its own.

not abused its discretion by requiring an overall program EIS because "an ultimate Route 7 superhighway is the expectation of state agencies with the knowledge and cooperation of the federal government."[32] Thus, the court seemingly extended the "irretrievable and irreversible commitment" rationale of *Scientist's Institute for Public Information v. AEC (SIPI)*,[33] in which an overall program had been *announced*, to the situation in which an overall program could be *inferred*. Only by so doing did the court feel that the long-range planning policy fostered by NEPA could be satisfied. In particular, the court was troubled by the fact that the FHWA, unlike the AEC in *SIPI*, did not intend to prepare an overall EIS at some future point in time to assess the environmental impact of the rebuilding of Route 7 through its entire corridor.

The Solicitor General petitioned for and was granted a writ of certiorari, and on October 6, 1975, the Supreme Court vacated the judgment in *Conservation Society I* and remanded for further consideration in light of the recently enacted amendment to NEPA, Public Law 94-83, and *SCRAP II*.

Conservation Society II was the Second Circuit's response on this remand. In this opinion the court made a complete about-face, and in a terse opinion the court summarily, and inadequately, dealt with the two key issues. Delegation of authority to prepare the EIS was to be allowed within very broad limits. The scope of an EIS was henceforth to be confined to the proposal advanced by the agency.

II. Delegation

A. *Draft and Final EIS*

Section 102(2)(C) of NEPA requires that all agencies of the federal government shall "include in every recommendation or report on proposals for . . . major Federal actions . . . a detailed statement *by* the responsible official."[34] In *Greene County Planning Board v. FPC*, the Second Circuit construed the word "by" to require a strict rule of non-delegation[35] in order to prevent the prep-

32. 508 F.2d at 934.
33. 481 F.2d 1079 (D.C. Cir. 1973).
34. 42 U.S.C. § 4332(2)(C) (1970) (emphasis supplied).
35. 455 F.2d at 423.

aration of a biased EIS "based upon self-serving assumptions."[36] The court held in *Greene County* that the EIS prepared by the Power Authority of the State of New York, a state agency interested in power development, in support of its request to build transmission lines could not be reviewed by the Federal Power Commission as a substitute for its own final EIS.[37]

The *Greene County* holding was reaffirmed in *Conservation Society I* when the court ruled that the FHWA's delegation of the preparation of the final EIS to the Vermont Department of Highways violated NEPA.[38] However, the language in *Conservation Society I* appears to go beyond *Greene County* to require the non-delegation of the *draft* impact statement's preparation as well.[39] This extension of the non-delegation doctrine was accepted by the FHWA as the proper interpretation of the decision.[40] As a result, the FHWA halted almost all federal funds to highway construction projects in the three states of the Second Circuit, thus threatening to exacerbate a growing unemployment problem in the construction industry.[41] Even though the Council on Environmental Quality (CEQ) contested the FHWA interpretation of *Conservation Society I*, and the FHWA itself found upon reconsideration that many projects could still proceed,[42] the FHWA persisted in its rigid reading of the opinion in an apparent effort to force a political solution to the delegation problem. The result was the passage by Congress of Public Law 94-83,[43] which amends NEPA to permit delegation of the preparation of the final EIS under certain safeguards.

The Amendment provides for the delegation of EIS preparation where the responsible federal official furnishes guidance, participates in the preparation, and independently evaluates the EIS before approving and adopting it. Delegation is limited to state agencies or officials having statewide jurisdiction, and delegation to any

36. *Id.* at 420.

37. *Id.* at 422.

38. 508 F.2d at 929.

39. *Id.* at 932-33. The opinion quotes section 7(c) of the CEQ guidelines, which requires agency responsibility for the scope and content of draft and final environmental impact statements. 40 C.F.R. § 1500.7(c) (1975).

40. S. REP. NO. 152, 94th Cong., 1st Sess. 2 (1975).

41. *Id.*

42. *Id.*

43. Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424 (1975), *codified in* 42 U.S.C.A. § 4332(2)(D) (Supp. 1976).

state official with lesser jurisdiction is explicitly prohibited. The Amendment applies to the "detailed statement" required by section 102(2)(C) of NEPA which, according to *SCRAP II*, refers to the final EIS only.[44]

This Amendment opens a Pandora's box of litigation over the extent of federal participation required. It replaces the rule of "genuine" federal preparation with a test requiring a determination of the extent of federal "guidance," "participation" and "independence of evaluation" of the state-prepared EIS. In construing these criteria, the majority and dissenting opinions in *Conservation Society II* differed sharply over the influence the *Greene County* doctrine should play. Both agreed that "[t]o the extent *Greene County* and *Conservation Society I* place an absolute prohibition upon delegation to the state agency of responsibilities to prepare the EIS, they have now been overruled by Congress."[45]

Differences in the perception of the legislative purpose in enacting the Amendment to NEPA led the majority to ignore *Greene County*, which it believed to be totally repudiated,[46] while Judge Adams in his dissent found continued vitality in the case to the extent that "delegation must be sufficiently limited to maintain federal accountability for decisions that affect the environment."[47] In support of his position, Judge Adams presented an extensive analysis of the Amendment's legislative history, emphasizing those statements which indicate a congressional intention to retain substantial federal responsibility. But he missed an important element which reinforces his finding of continued life in *Greene County*. The House Report[48] clearly states that H.R. 3130—the precursor to the Act as finally passed—was a response to the interpretation given to *Conservation Society I* by the FHWA.[49] This interpretation imposed a stricter delegation standard than did *Greene County*, an interpretation which had not been followed by any court when the Bill was being considered by the House. By the time the Bill

44. 422 U.S. at 320.

45. Civil Nos. 73-2629 and 73-2715 (2d Cir., Feb. 18, 1976) at 2024-25 [hereinafter cited as Slip Opinion]. It should also be noted that in *SCRAP II* the Supreme Court overruled *Greene County* with respect to the timing question only and did not discuss the case's delegation rationale. 422 U.S. at 321 n.20.

46. Slip Opinion at 2021 n.2.

47. *Id.* at 2026.

48. H.R. REP. NO. 144, 94th Cong., 1st Sess. (1975).

49. *Id.* at 2.

was before the Senate, opinions in two other circuits[50] had adopted the FHWA's rigid interpretation[51] of *Conservation Society I*, and the Senate stated that it was concerned with the growing official adoption of the FHWA view[52] which created confusion in the circuits.

Thus, it appears that Congress was concerned about the trend toward more restrictive limits on delegation than those to be found in *Greene County*. Once that trend is recognized as the danger perceived by Congress, the statement in the Report that the Bill adhered to the "basic logic" of *Greene County*[53] is understandable and indicates that the majority in *Conservation Society II* failed to interpret the congressional intent correctly.

Furthermore, the House Conference Report[54] states that the purpose of H.R. 3130 was to restate the administrative and case law with respect to delegation which had existed before the *Conservation Society I* and *Swain v. Brinegar*[55] decisions. This statement appears to indicate that Public Law 94-83 was aimed at the growing trend toward preventing the delegation of *draft* EIS preparation; it limited legislative changes in the case of delegation of *final* EIS preparation to a relaxation of the rigid non-delegation rule only, while leaving the need for substantial federal supervision essentially intact.

B. *Guidance, Participation and Evaluation*

In deciding whether the FHWA had complied with Public Law 94-83, the majority in *Conservation Society II* recognized that:

> Under the law as amended the state agency may prepare the EIS provided the federal agency "furnishes guidance and partici-

50. Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105 (D. N.H. 1975); Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975).

51. *See* S. REP. NO. 152, 94th Cong., 1st Sess. 2 (1975).

> This pressure [for legislative action] has increased as the result of rulings of a district court in another circuit [citation omitted] and another Court of Appeals [citation omitted] in the last four weeks. These rulings appear to favor the interpretation placed on the 2d Circuit decision [by the FHWA] that NEPA requires full and independent preparation of all EIS's by the Federal agency.

52. "[T]he rapidity with which these decisions followed *Conservation Society* seemed only to increase the concerns of those who feared massive interruptions in highway construction." *Id.* at 6.

53. *See* Conservation Society of Southern Vermont v. Secretary of Transportation, Slip Opinion at 2026 (dissenting opinion).

54. H. CON. REP. NO. 388, 94th Cong., 1st Sess. (1975).

55. 517 F.2d 766 (7th Cir. 1975).

> pates in such preparation" and provided "the responsible Federal official independently evaluates such statement prior to its approval and adoption."[56]

However, the court sets out neither the minimum guidance and participation necessary for statutory compliance nor the objective criteria it will examine in finding independent evaluation. Instead, because it started from the premise that the Amendment was specifically designed to overturn its decision in *Conservation Society I*,[57] the court simply listed the evidence of federal agency activity found below in the district court and concluded that it was sufficient to comply with the statute. By so doing, the court has set an unnecessarily low standard for the required guidance and participation and has not carried out the congressional intent explicitly enunciated in the Committee Reports.

Public Law 94-83 retains virtually verbatim the language of the original House Bill.[58] In the House Report accompanying this Bill, the House Committee on Merchant Marine and Fisheries explained its favorable report on H.R. 3130 by noting:

> H.R. 3130, as amended, follows and supports the holdings of other United States Circuit Courts on this issue. The Committee believes those cases to have been correct on the laws and supports their reasoning. To the extent that the *Conservation Society* case departs from those decisions, the bill rejects that reasoning, and would have the effect of mooting that decision.[59]

This should be a clear indication to any reviewing court that it must tailor its construction of Public Law 94-83 to be in accord with pre-*Conservation Society I* case law. The Committee Report also states that:

> To the extent that the bill conflicts with that part of the holding of the Second Circuit Court, which invalidates statements solely by reason of State preparation, the bill rejects that holding.[60]

Thus the Amendment was not intended to produce a whole new body of law, but was limited to rejecting one specific holding. More specifically, the Senate Report notes that the phrases "fur-

56. Slip Opinion at 2020.
57. *Id.*
58. *See* H. CON. REP. NO. 388, 94th Cong., 1st Sess. 3 (1975).
59. H.R. REP. NO. 144, 94th Cong., 1st Sess. 2 (1975).
60. *Id.*

nishes guidance" and "participates," when used to describe the actions required by a federal official, are to be determined by reference to existing language in judicial opinions, the CEQ guidelines and federal agency regulations.[61] Thus, when applying the test laid out in Public Law 94-83, a court would appear to have an affirmative duty to first determine the extent of the key phrases as understood by Congress when it enacted the Amendment. In *Conservation Society II* the court clearly failed to do this. Whether this omission has led to a misapplication of Public Law 94-83 can only be determined by looking to case law to discover the content of the key phrases and by testing the facts relied upon by the court against these criteria.

Several courts have considered the delegation problem in both highway and non-highway contexts. In *Life of the Land v. Brinegar*,[62] delegation of the EIS preparation to a private consulting firm with a "financial interest in an affirmative decision on the proposed project" was found to be acceptable under NEPA.[63] As for the extent of federal involvement, the court found that "Federal Aviation Agency officials actively participated in all phases of the EIS preparation process";[64] they assisted in the preparation from its earliest stages and held regular meetings with state and other federal officials, as well as with representatives of the consulting firm, such that the EIS was a "joint effort."[65] The federal agency participated in the writing of the draft EIS and worked as a team with state officials and the private agency to prepare the final EIS after considering solicited comments.[66] In short, the Federal Aviation Agency was found not to have abdicated its responsibility to another organization because of its significant participation.[67]

In *Sierra Club v. Lynn*,[68] the Department of Housing and Urban Development (HUD) did not become active in the impact statement process until after it had received the draft statements along with the proposals from the private contractors.[69] It then formed

61. S. REP. NO. 152, 94th Cong., 1st Sess. 8 (1975).
62. 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974).
63. *Id.* at 468.
64. *Id.* at 467.
65. *Id.*
66. *Id.* at 468.
67. *Id.* at 466.
68. 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).
69. 364 F. Supp. 834, 841 (W.D. Tex. 1973).

an interdisciplinary team of staff members who prepared and compiled three environmental impact statements after they had independently reviewed data, information and comments provided by the developer's experts and interested public agencies. HUD obtained further verification of the environmental analysis by retaining a geologist who supervised and analyzed supplementary studies and reviewed every aspect of the project.[70] These objective indicia of federal agency participation were sufficient to demonstrate to the court that HUD had not "simply rubber stamped a statement prepared by others" because the participation in both the preparation and drafting of the final EIS was found to be active and significant.[71]

In these two cases, federal agency personnel actually participated in writing the impact statements. This may be more active participation than is presently required by a federal agency under Public Law 94-83, and might be taken to define the courts' use of the modifier "significant." Therefore, to determine the degree of federal involvement in the highway context, short of actually preparing the EIS, which Congress contemplated when it used the words "furnishes guidance" and "participates," it is useful to turn to the delegation cases specifically involving the FHWA. In these cases the EIS was usually prepared by the state highway department in accordance with PPM 90-1,[72] which requires the state highway department to consult with the FHWA when preparing the final EIS and then requires the FHWA to review and adopt the EIS.

In *Finish Allatoona's Interstate Right v. Volpe*,[73] after the state highway department submitted a preliminary EIS, the Department of Transportation made an extensive study of the alternatives, added a written report of its own, and introduced specific design measures.[74] As a result, the court found that the final EIS contained a "concentrated analysis" by an FHWA study team.[75] It also

70. 502 F.2d at 59.

71. *Id.*

72. 37 Fed. Reg. 21809 (1972). The PPM 90-1 procedure can be summarized as follows: the state highway department prepares and circulates the preliminary EIS, in cooperation with the FHWA; the state prepares the final EIS and section 4(f) statement in consultation with the FHWA; the FHWA reviews and adopts the EIS.

73. 355 F. Supp. 933 (N.D. Ga.), *aff'd sub nom.* Finish Allatoona's Interstate Right v. Brinegar, 484 F.2d 638 (5th Cir. 1973).

74. *Id.* at 937.

75. *Id.* at 938.

was found that the final EIS was prepared by the state in consultation with the federal agency, although the extent of the consultation was not described.

Less specific in terms of federal participation is *Movement Against Destruction v. Volpe*,[76] where delegation was held proper on the basis of the FHWA's constant monitoring of the development of plans and its participation in the EIS preparation through frequent contacts and objective review.[77] However, neither activity was quantified by the court. In *Iowa Citizens for Environmental Quality v. Volpe*,[78] the court found that FHWA review, modification and adoption were sufficient to meet the requirements of NEPA.[79] In particular, the FHWA recommended changes in the draft EIS and supplemented the final EIS with additional information.[80] The preparation of a preliminary EIS by the state highway department was seen as legitimate information gathering necessary to supplement the resources of the FHWA, and a process known to Congress and approved by the CEQ.[81] In *Citizens Environmental Council v. Volpe*,[82] the state highway department prepared the EIS in consultation with other state and federal agencies, as well as a private consultant. The court found it sufficient that the FHWA had reviewed the EIS and adopted it as its own.[83]

In attempting to distill from these cases the degree of participation Congress envisioned as satisfying the language of Public Law 94-83, the paucity of references to specific activity becomes immediately obvious. This deficiency in the opinions may be caused by the courts' limiting their inquiries to the requirements of PPM 90-1. But had Congress wanted to do no more than adopt these requirements, it almost certainly would have done so by specifically referring to PPM 90-1. Furthermore, the Committee Report clearly indicates that something more was desired,[84] as does the

76. 361 F. Supp. 1360 (D. Md. 1973), *aff'd per curiam*, 500 F.2d 29 (4th Cir. 1974).

77. *Id.* at 1393.

78. 487 F.2d 849 (8th Cir. 1973).

79. *Id.* at 854.

80. *Id.*

81. *Id.*

82. 484 F.2d 870 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

83. *Id.* at 873.

84. Clearly, the Federal official can test the adequacy of the EIS only if he "independently evaluates" it. However, a thorough and detailed independent valuation of an EIS—particularly of its completeness and accuracy—requires a

use of language different from that found in PPM 90-1 to describe the federal official's responsibility. From this meager evidence it might be concluded that it is the objectively verifiable indicia of activity such as those pointed out above in the review of the cases, which Congress meant to require. If so, the reliance by the *Conservation Society II* court on a field trip taken by the FHWA engineer, and three suggestions made by the interdisciplinary task force and incorporated into the final EIS, may have been well taken. Less reliable, but no less quantitative than in any other analysis, are the frequent contacts and weekly verbal communications referred to in the record.

It should be clear from this discussion that helpful criteria for determining compliance with Public Law 94-83 cannot readily be distilled from the case law, including the *Conservation Society II* decision. The court in *Conservation Society II*, faced with the task of construing a new statute, and presumably aware of the lack of guidance from prior judicial decisions, failed to deliver an opinion with prospective value by neglecting to begin the process of determining the appropriate criteria necessary to evaluate what activity by a federal agency will fulfill the requirements of Public Law 94-83.[85]

C. *Need for Remand*

Even if it can be assumed that the findings relied upon by the majority in *Conservation Society II* were sufficient for compliance with Public Law 94-83, the ambiguities in the record regarding the interpretation of these facts required that the case should have been remanded to the district court for clarification and supple-

high degree of familiarity with both the proposed Federal action and the EIS preparation process. Thus, H.R. 3130 requires the official to "furnish guidance" and "participate in" the EIS preparation. The involvement of the Federal official should come early and at every critical stage in the preparation of the EIS, and should be substantial and continuous.

S. REP. NO. 152, 94th Cong., 1st Sess. 10 (1975).

85. A recent case decided near the time of passage of Public Law No. 94-83, and therefore not a part of the body of case law referred to in the House and Senate Reports, is Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975), in which the draft and final impact statements were prepared cooperatively by state and federal officials. This was evidenced by federal review of work in progress, field inspections, erosion control recommendations, joint design and progress meetings, and joint consideration of details. This listing of activity appears to be more in line with congressional intent, but after *Conservation Society II*, it may be more federal participation than is now necessary.

mental findings in light of the new standard to be applied. As it now stands, the precedent set by *Conservation Society II* is open to a wide range of interpretations depending on the weight one chooses to give to the district court's findings of federal involvement and the later interpretation of these findings by the Court of Appeals. In fact, it is unnecessary to go beyond the majority and dissenting opinions in *Conservation Society II* itself to foresee the troubled future.

The district court found that during the time of EIS preparation Hoxie, engineering coordinator for the federal division engineer in Vermont, was in verbal communication with Gross, state planning engineer of the Vermont Department of Highways, two or three times weekly. On one occasion FHWA division engineer Kelley went on a field trip, during which the proposed route was examined and environmental considerations noted and discussed with representatives of the Vermont Highway Department. After a draft EIS was prepared by the state officials in consultation with, but not under the supervision of the FHWA, it was submitted to the public for comment and to the division and regional offices of the FHWA.[86] These district court findings form the basis of the majority's finding in *Conservation Society II* of compliance with the NEPA Amendment.[87]

On the other hand, Judge Adams in his dissent looked to the same record and noted that the court below found:

> There is no indication whatsoever that the FHWA or any of its employees conceived, wrote or even edited any section or passage in the EIS. At the most there were informal chats touching upon the subject, together with [one] field trip [to the site of the proposed project] and subsequent 'review.'[88]

On the basis of this interpretation of the findings, Adams found that Public Law 94-83 was not satisfied. It is obvious that the district court's findings were open to more than one interpretation when viewed under the new statutory test; clarification by the district court in light of Public Law 94-83 would have been desirable.

Regardless of its ambiguities, the record would still have been insufficient because the facts were found under an analytical framework different from the new standard created by Public Law

86. 362 F. Supp. at 629-30.
87. Slip Opinion at 2020.
88. Id. at 2031, *quoting* 362 F. Supp. at 632.

94-83. Even though facts are theoretically neutral, the purpose for which they are found subtly influences the manner in which they are stated.[89] And there can be no question that the context of fact-finding strongly influences which facts will be found as relevant and important, and which will be ignored as unnecessary. In the district court the plaintiffs viewed the delegation question in light of the rigid *Greene County* doctrine, which did not consider the nuances of federal agency participation important because it was an absolute rule: it focused on the dangers of "self-serving assumptions." The defendant FHWA relied on PPM 90-1 which provides a framework of what the FHWA considered to be an acceptable degree of delegation. The provisions for cooperation, consultation, review and adoption set out in PPM 90-1 had been examined and accepted in other circuits; the FHWA relied on this precedent in arguing the facts it wished to prove. Thus, if for no other reason than that Public Law 94-83 establishes a new set of criteria for acceptable delegation, which shifts the focus of factfinding, the case should have been remanded to the district court for supplemental findings of fact.

The propriety of a remand could be criticized on the ground that it would have limited utility. Memory of the details of contact between the FHWA and the Vermont Highway Department would have dimmed over the several year period since the EIS had been prepared. But reconstruction could have been attempted below, for example, by looking to any extant correspondence not included in the record by the FHWA in its reliance on the limited requirements of PPM 90-1. Furthermore, it is reasonable to assume that the state and federal personnel involved in preparing the EIS would have tried to recall every possible contact between them in an attempt to insure that the court would find compliance with Public Law 94-83. Thus, remand would not only have clarified the contradictory record relied on by the *Conservation Society II* court; it also might have produced a fuller record of federal-state contact. Had the reviewing court then found compliance on the basis of this

89. A good example is given by NRDC v. Callaway, 524 F.2d 79 (2d Cir. 1975), in which the Navy personnel first prepared a short, rough draft of the EIS and then sent it to a private consultant with instructions to expand it and to include additional information supplied by the Navy. Because the court found that there "was no problem of self-interest on the part of the author" under these conditions, it found no violation of the *Greene County* rule. *Id.* at 87. However, under the new law this delegation is open to question.

more complete record, any future litigation over the extent of contacts needed for compliance with Public Law 94-83 would be influenced by a holding based on extensive contacts. As the situation stands now, the *Conservation Society II* holding on compliance with Public Law 94-83 is based on minimal contacts.

Remand also would have caused further delay in construction of the Bennington-Manchester highway segment. However, in view of the substantial delay which had already taken place, the extra time needed for a remand would have only introduced a small percentage increase in the total delay. More importantly, the substantial influence this first construction of Public Law 94-83 can be expected to have on future challenges to delegation in all NEPA cases to which the amendment applies seems to outweigh significantly any local inconvenience which would have resulted from an extended delay in construction.

III. SCOPE

The contradictory determinations of the proper scope of an EIS made in *Conservation Society I* and *II* mark the farthest reaches of the pendulum—both are extreme points of view. In *Conservation Society I* the district court's exercise of discretion in ordering a broad-scoped, *program* EIS was upheld even though no broad federal program had been found proposed. This program EIS was to supplement the *project* EIS, which had been prepared to assess the impact of a particular federally-approved segment of the program. The holding of the court in *Conservation Society I* can be characterized as finding that the state and federal aspects of the program were so intertwined that an overall federal action could be inferred. In *Conservation Society II*, however, the court refused to look beyond the actual proposal to see if the facts warranted a broader-scoped, program EIS.

A. *Scrap II*

When the Supreme Court remanded *Conservation Society I* for reconsideration "in light of . . . *Aberdeen & Rockfish R.R. Co. v. SCRAP*,"[90] it did not indicate which part of the opinion it thought relevant. Presented with a complex opinion, the Court of Appeals chose to focus on the narrow holding that "a federal agency must

90. 96 S. Ct. 19 (1975).

prepare its EIS 'at the time at which it makes a recommendation or report on a *proposal* for federal action.' "[91] On the basis of this reading of *SCRAP II*, the court then concluded that there was no overall federal plan to improve the Route 7 corridor, the only federal action being the funding of the Bennington-Manchester segment.[92] Furthermore, since that stretch was "admittedly a project with local utility," there was no "irreversible or irretrievable commitment of federal funds for the entire corridor and under *SCRAP* [II] no obligation for a corridor EIS."

This analysis is deficient in three respects: (1) the court misinterpreted the Supreme Court's reference to the timing of proposals; (2) the court failed to consider other aspects of *SCRAP II* which are arguably relevant to this case; (3) the court established an illogical connection between "independent or local utility" and an "irreversible commitment" of funds or the "bandwagon effect."

1. *Timing of Proposals.* While the Supreme Court determined in *SCRAP II* that an EIS was necessary at the *time* when a proposal for federal action was made, the Court of Appeals interpreted this holding as also limiting the *scope* of the final EIS to the actual project proposed. From the discussion following this holding in the *SCRAP II* opinion, it is clear that the Court of Appeals has misread the opinion.[93] Clearly, a determination of when an EIS is necessary is in no way a determination of the content or scope that is necessary. Furthermore, the Supreme Court in *SCRAP II* addressed the problem of scope directly.

2. *Aspects of* SCRAP II *Ignored.* Referring to the problem of EIS scope, the Supreme Court in *SCRAP II* began by noting that:

91. Slip Opinion at 2021 (emphasis in original).

92. This position had actually already been stated with respect to highway construction in Movement Against Destruction v. Volpe, 361 F. Supp. 1360, 1382-83 (D. Md. 1973), where the court found that the statutory scheme and administrative policies of the FHWA implied that the federal action is the project, and that the plain meaning of NEPA is that the unit of consideration is the federal action so that the project is the correct unit for an EIS.

93. The subsequent text in the *SCRAP II* opinion clearly shows that the word "proposal" was emphasized in the holding because of the nature of the rate review procedure used by the ICC. Agency action approving or denying rates is taken only *after* hearings held in response to initial proposals by the railroads. Thus, in this part of the *SCRAP II* opinion the court simply noted that no federal action had occurred until the ICC approved the rates; it thus rejected the plaintiff's contention that the hearing before the decision was an agency review of that decision. This reading is further reinforced by the court's overruling of the *Greene County* holding with respect to similar hearings held by the FPC in relation to power line approval, Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 289, 321 n.20 (1975).

> In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the "federal action" being taken.[94]

This determination is a function to be performed by the reviewing court. Even though the Court found the action taken by the Interstate Commerce Commission (ICC) to be the action proposed by the ICC, there was no hint of reliance by the Court on the ICC's statement of the proposed action in reaching this determination. Instead, the Court analyzed the nature of the action on its own. If a court cannot determine the extent of a program on its own from the facts, but is instead constrained by the limits set by the responsible agency, then NEPA would be reduced to an absurdity.[95] Thus, the reliance in *Conservation Society II* on the word "proposal" is too mechanical and narrow a reading of *SCRAP II*. Furthermore, it is contrary to the sound position taken in *Committee to Stop Route 7 v. Volpe*[96] where the Connecticut District Court looked beyond the stated proposal to find the program actually contemplated, which was broad enough to permit the type of considerations mandated by NEPA.[97]

3. *Bandwagon Effect.* To justify its limitation of the EIS scope, the court in *Conservation Society II* also relied on an illogical connection between independent utility, which permits a segment of a program to be analyzed in its own EIS if that project can be used without the completion of other projects, and irreversible commitment, which requires that an EIS analyze an entire program if that program follows irreversibly from the initial project proposed. Analysis of this reliance shows that it is misplaced for two reasons: independent utility is only one of several factors which courts have considered when deciding whether a project can be environmentally analyzed on its own; and a finding of independent utility does not automatically lead to the conclusion that federal funds are not irretrievably or irreversibly committed to the entire corridor.

a. *The Factor Analysis.* Independent utility is only one of several factors which must be considered in justifying project segmentation under NEPA. Courts generally have not relied on it alone when deciding whether a project can be analyzed on its own or

94. 422 U.S. at 322.
95. *See* 514 F.2d at 873.
96. 346 F. Supp. 731, 740 (D. Conn. 1972).
97. *Id.*

must be considered as part of a program requiring an overall EIS. A good example of an opinion which employs an extensive factor analysis is *Sierra Club v. Callaway*,[98] where the Fifth Circuit found the Wallisville Dam to be capable of EIS analysis separate from the Trinity River Project, an extensive plan for sixteen dams and twenty locks to control flooding, improve navigation and conserve water along the Trinity River. Besides looking to the independent utility of the project, the court also considered the practical necessity for a segmented analysis of such an extensive program, the relative cost of the project to the program, the separate congressional funding of the Wallisville Dam project, and the "in the ground equity" generated by the project's partial completion.[99] Although it is this last factor which really appears to have been determinative in the court's decision, a broad review of many factors was conducted so as to create a framework for an analysis—a framework totally ignored in *Conservation Society II*.

In the highway context, some of the same factors considered in *Sierra Club v. Callaway* were also considered in *Indian Lookout Alliance v. Volpe*.[100] In addition, other factors specifically relevant to roads (or modified to apply to them) were considered, including differences in environmental effects of the different segments,[101] singularity of purpose of the entire road,[102] meaningfulness of alternatives,[103] statutory avoidance,[104] and logical termini.[105]

98. 499 F.2d 982 (5th Cir. 1974). This analysis has been harshly criticized in Note, *Project-Program Relationships Used to Define Applicable Scope of Section 102(2)(C) of NEPA*, 23 KAN. L. REV. 342 (1975).

99. "In the ground equity" is the substantial influence exerted on an agency or court by a project which is already underway; any action which would prevent its completion would represent economic waste. 499 F.2d at 987-88.

100. 484 F.2d 11 (8th Cir. 1973).

101. *Id.* at 18. Reference is made to Citizens for Mass Transit Against Freeways v. Brinegar, 357 F. Supp. 1269 (D. Ariz. 1973), in which segmentation was permitted for a highway which was to run through desert, agricultural land and an urban area.

102. 484 F.2d at 18. This can be considered a nexus test for the interdependence of the segments, or a logical termini test for the entire road. In Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir.), *cert. denied*, 403 U.S. 923 (1971), the freeway was built primarily to carry airport traffic downtown.

103. 484 F.2d at 18. Two kinds of alternatives were recognized in Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972): whether or not to build, and where to place the road after deciding to build it.

104. 484 F.2d at 18. Segmentation had been undertaken to avoid NEPA in Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d at 1013 (5th Cir. 1971).

105. 484 F.2d at 19. The concept of logical termini was introduced into the lexi-

It may very well be that had the court performed the factor analysis in *Conservation Society II*, it still would have arrived at the same conclusion. However, by failing to perform such an analysis the court totally ignored the spirit of NEPA and opened the door to mechanical jurisprudence which can easily arrive at any desired result by suitably choosing as controlling the one factor which supports the desired conclusion.

b. *Irreversible Commitment*. The court found that the independent utility of the Bennington-Manchester segment logically implied no irreversible commitment to reconstruction of the highway in the rest of the corridor. The fallacy in this logic can be demonstrated with an illustration. If an old, winding highway connecting two cities along a highway corridor is replaced by a modern, straight highway which reduces accidents and travel time, then that project has independent utility. However, if that road also draws excess traffic from other parallel roads, then the building of the new highway also represents an irreversible commitment of funds to improving the entire corridor so that it can handle the traffic that it attracted. In *Conservation Society II* the court ignored the possibility of extra traffic. It is only in the absence of such consequences that segmentation can be justified on the basis of independent utility.

B. *In Support of Segmentation*

To support its conclusion based on independent utility the court in *Conservation Society II* relied on two recent cases in the Ninth Circuit: *Friends of the Earth v. Coleman*[106] and *Trout Unlimited v. Morton*.[107] Analysis of these cases shows that they are inapposite to the problem faced in *Conservation Society*. Furthermore, in *Friends of the Earth* the court performed a factor analysis, and in *Trout Unlimited* there is an analysis of the facts to justify use of the independent utility test.

con of federal highway planning by ¶ 3(a) of PPM 90-1. In Indian Lookout Alliance v. Volpe, 484 F.2d 11, 18 (8th Cir. 1973), the court noted that the concept was consonant with the recommendations of the CEQ and used it to lengthen the segment of road which was to be analyzed in an EIS. In Daly v. Volpe, 514 F.2d 1106, 1109 (9th Cir. 1975), the concept was used to justify the limitation of an EIS to the stretch of road for which it had been prepared. Thus, it can be used to justify segmentation or promote long-range planning depending upon the viewer's perception of the logic of the termini.

106. 513 F.2d 295 (9th Cir. 1975).

107. 509 F.2d 1276 (9th Cir. 1974).

In *Friends of the Earth* an EIS had been prepared for a seventeen-mile segment of Interstate Highway 5.[108] The plaintiffs' attack was not directed at the analysis of the highway segment's impact, but at the analysis in the EIS of the "borrow site" which was to be excavated elsewhere to provide earthfill for the road construction.[109] In particular, plaintiffs challenged the failure of the EIS to discuss the environmental impact of subsequent use of the borrow site as part of a peripheral canal of the California Water Project.[110] Even though the borrow site was to be excavated with the correct dimensions for conversion into a peripheral canal, the court rejected this attempt to broaden the scope of the EIS to include the environmental effects of the canal as part of the overall project. In so doing it relied not only on the independent utility of the borrow site as a fish hatchery but also, unlike the court in *Conservation Society II*, the court looked to other segmentation factors including "in the ground equity," lack of irreversible commitment, difference in environmental considerations, and timing of the future projects.[111] Of these, the most significant factor was the lack of an irreversible commitment since the plaintiffs had not established a "sufficiently significant nexus" between the excavation of the borrow site and its later use as a canal.[112] Essentially, the court found that the hole in the desert would not foreclose a later, independent assessment of the proposal to build the peripheral canal because it would not influence an analysis of the very different environmental issues involved in deciding whether to undertake the water transfer at all.[113]

This chance for a later uncoerced evaluation of the second project on its own merits is to be contrasted with the finding in *Conservation Society I* that "[c]onversion of isolated portions of Route 7 into a superhighway . . . will produce greater traffic, thus creating synergistic pressure for further construction to connect newly expanded sections."[114] This difference in coercive effect is a factor which makes reliance on *Friends of the Earth* inapposite to *Conservation Society II*.

108. 513 F.2d at 300.
109. *Id.* at 297.
110. *Id.*
111. *Id.* at 300.
112. *Id.*
113. *Id.*
114. 508 F.2d at 929.

Trout Unlimited involved construction of the Teton Dam and reservoir. The EIS was challenged on the basis of its scope because it analyzed only the First Phase of the project and failed to include consideration of the Second Phase. The court rejected the challenge by finding that

> here the First Phase is substantially independent of the Second while in those [situations] in which the EIS must extend beyond the current project, that project was dependent on subsequent phases. The dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.[115]

There was no bandwagon effect coercing the undertaking of the Second Phase as a result of the changes introduced by completion of the First Phase. In *Trout Unlimited* the court went beyond the a priori independent utility of the First Phase to find further that its completion would not force completion of the Second Phase. In *Conservation Society II*, on the other hand, the court stopped at the a priori independent utility of the proposed road segment and thus did not look to see whether construction of the Bennington-Manchester segment would necessitate further construction within the Route 7 corridor. Reliance by the court in *Conservation Society II* on *Trout Unlimited* was unjustified because a full logical analysis was not completed.

In addition to distinguishing the facts in *Friends of the Earth* and *Trout Unlimited*, the cases can also be distinguished on the basis of the standards of review used in the Second and Ninth Circuits to test the adequacy of an EIS. The Second Circuit applies the "arbitrary or capricious" standard established by the Administrative Procedure Act; on the other hand, the Ninth Circuit applies the "without observance of procedure required by law" standard.[116]

In the eyes of the Ninth Circuit there are no clear procedural rules for testing the sufficiency of an EIS,[117] and its compliance with NEPA is tested as to "form, content and preparation" to see if it (1) "provide[s] decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences," and (2) "make[s] available to the public, information of

115. 509 F.2d at 1285.
116. Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974).
117. *Id.*

the proposed project's environmental impact and encourage[s] public participation in the development of that information."[118] Clearly the emphasis on information is such that an EIS will suffice in the Ninth Circuit if it contains a sufficiently detailed environmental disclosure. In *Trout Unlimited* sufficiency was satisfied by consideration given to "significant aspects of probable environmental consequences."[119] Specific treatment of secondary consequences is not a substantive requirement,[120] and future projects need be considered only if completion of the first is irrational by itself.[121] Thus, the review standard used in the Ninth Circuit has a built-in independent utility justification for limiting scope.

The ultimately mechanical nature of an observance of procedure test which looks to the sufficiency of the information presented is clearly illustrated by *Daly v. Volpe*,[122] another Ninth Circuit opinion in which the EIS for a seven-mile road segment was challenged as being impermissibly limited in scope. Although the court found that the highway length which plaintiffs wanted to be considered in an umbrella EIS was already planned, it justified the segmentation of the project and limitation of the scope of the EIS to the one segment actually proposed by reciting a list of segmentation criteria like a litany. As long as the segment has logical termini and independent utility,[123] is long enough to consider alternatives, fulfills important state and local needs, and is a multi-year project, then consideration of its environmental impact as distinct from that of the rest of the highway is not impermissible.[124]

In the Second Circuit, "an EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project."[125] Even though this verbal formula is not substantially different from the one used in the

118. *Id.*
119. *Id.*
120. *Id.* at 1283 n.9.
121. *Id.* at 1285.
122. 514 F.2d 1106 (9th Cir. 1975).
123. The absurdity of this type of analysis is clearly illustrated by the court's treatment of logical termini as a factor distinct from independent utility. *Id.* at 1110-11. Moreover, instead of testing the logical termini for compliance with NEPA's aims, the court analyzed the use of the word "major" in the PPM 90-1 definition of a logical terminus.
124. 514 F.2d at 1110.
125. Chelsea Neighborhood Ass'n v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975).

Ninth Circuit, the similarity disappears once the implementation of the Ninth Circuit's "sufficiency of detail" is compared with the Second Circuit's "reasonable necessity." For example, in *Trout Unlimited*, a conclusory discussion limited to presenting a range of alternatives reasonably related to the project was found by the Ninth Circuit to satisfy the rule of reason under which alternatives for NEPA purposes are tested. Furthermore, the court held, albeit cautiously, that supporting studies did not need to be included in the EIS, only conclusions derived from them.[126] By contrast, in *Chelsea Neighborhood Associations v. United States Postal Service*[127] the rule of reason was found by the Second Circuit to require the inclusion of enough data to enable the EIS reader to evaluate the analysis and conclusion with respect to the choice among alternatives. This difference in the testing by the court of the agency's presentation of alternatives shows that the observance of procedure standard is used simply to assure the agency did its job by including reasonable alternatives within its analysis; under the arbitrary and capricious standard the agency must show that it actually considered the relative merits of the alternatives.

Similar differences arise in the consideration of scope. It has already been noted that in the Ninth Circuit the independent utility test has been built into the review criteria. In the Second Circuit, however, the court found in *NRDC v. Callaway*[128] that the failure to discuss pending proposals for similar actions in the same geographical area which may have a cumulative effect made the EIS insufficient: the "EIS failed to furnish information essential to the environmental decision-making process,"[129] and this failure to consider other projects was an example of isolated decision-making which NEPA sought to eliminate.[130]

Comparison of the two tests does not show that one is more stringent than the other. Rather, comparison shows that the tests are fundamentally different in kind as applied. Under the "arbitrary and capricious" test the court reads the EIS more for its substance than its form; under the "observance of procedure" test the conclusions reached in the EIS are checked to see if they satisfy a laundry list of criteria, not if the criteria are appropriate to the particular

126. 509 F.2d at 1284.
127. 516 F.2d 378 (2d Cir. 1975).
128. 524 F.2d 79 (2d Cir. 1975).
129. *Id.* at 87.
130. *Id.* at 88-89.

case. For this reason, as well as the different fact situations before the courts, reliance on these Ninth Circuit cases by the Second Circuit in *Conservation Society II* is inapposite.

C. *The Scope of the Future*

Conservation Society II is important not only because it limits the need for a program EIS to explicitly proposed federal programs, but also because the decision interacts synergistically with other decisions relating to litigation over Route 7, giving the holdings of these decisions new importance. As a result, the need to find "federalization" has become a controlling factor which narrowly confines the definition of compliance with NEPA.

The reconstruction of Route 7 in Connecticut from Norwalk to New Milford was the object of several NEPA suits contemporaneous with the Vermont litigation. In *Committee to Stop Route 7 v. Volpe*,[131] an injunction was issued halting construction pending preparation of an EIS for the highway segment from Norwalk to Danbury (which is between Norwalk and New Milford). Subsequently, in *Citizens for Balanced Environment and Transportation v. Volpe (CBET)*,[132] there was an attempt to extend the scope of the injunction and the EIS to include two small sections of Route 7 between Danbury and Brookfield (which is between Danbury and New Milford). The attempt failed when the Connecticut District Court found that the Danbury-Brookfield project involved no federal action within the meaning of NEPA. Even though the FHWA had contributed $50,000 to the state highway department for planning the segments, the later decision by the state to fund the $20,000,000 construction project was found to make the federal contribution too insignificant to constitute the major federal action required by NEPA.

The *CBET* decision was rendered despite the court's knowledge of Judge Oakes' order in the Vermont District Court requiring an overall program EIS for the Route 7 corridor, an EIS which would include the Danbury-Brookfield segment. Neither the district court nor the affirming Court of Appeals found the exclusion of these projects inconsistent with the *Conservation Society* order for an overall program EIS. Apparently, the majority of the court determined that the specific finding of a lack of a sufficiently strong

131. 346 F. Supp. 731 (D. Conn. 1972). *See* note 31 *supra*.
132. 376 F. Supp. 806 (D. Conn.), *aff'd per curiam*, 503 F.2d 601 (2d Cir. 1974).

nexus between the federal and state projects by the district court in Connecticut would override the general finding of a de facto federalization of the entire corridor for NEPA purposes by the court in Vermont.[133]

This logical inconsistency between the holdings in *CBET* and the district court in *Conservation Society* was "resolved" in *Conservation Society I* when the Court of Appeals distinguished the cases.[134] The court limited *CBET* to the district court's narrow holding on the issue of federal action in planning or constructing the particular highway segments, a decision that did not consider the overall EIS issue. As a result, the Court of Appeals found that *CBET* did not preclude or affect the affirmance of Judge Oakes' general findings in Vermont.

The overruling of *Conservation Society I* infuses new importance into the *CBET* decision because the holding in *CBET* on the "federalization" prerequisite of NEPA is complementary to the holding in *Conservation Society II*. Thus, the FHWA is now provided with tandem lines of defense in future NEPA challenges.

First, the agency may look to *CBET* for justification in limiting preparation of individual, project impact statements to only those road segments which are federally-funded. It may then use *Conservation Society II* to oppose the need for an overall, program EIS by claiming the absence of an overall federal program. This argument can be buttressed by pointing to the inconsistency of requiring an overall EIS where the particular "state" highway segments are excluded from NEPA consideration. Thus, the details of the *CBET* decision are important, not only as they relate to determination of the "federal" nature of an individual project, but also as that decision affects the need for an overall program EIS.[135]

133. A vigorous dissent argued that had the state segment been between two federal stretches of highway, as in Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir.), *cert. denied*, 403 U.S. 932 (1971), there would be no question that segmentation was improper; the fact that only one terminus of the segment was linked to a federal highway while the future nature of the other terminus was still undecide was not sufficient to warrant a logical distinction.

134. 508 F.2d at 936 n.43a.

135. Several arguments were made by plaintiffs in *CBET* in an attempt to convince the court that the state segments were federal roads for NEPA purposes. First, they contended that the state was proceeding so as to keep the rest of the highway between Danbury and New Milford eligible for federal funding. The rationale of this argument is that the reconstruction of the remainder of the road, or a substantial portion of it, will be a federal action so that the two small state segments should be

IV. CONCLUSION

Delegation of EIS preparation is far more than a question of mere procedural compliance with NEPA. Segmentation of EIS scope is far more than a matter of mere substantive completeness of the impact statement. Both are fundamental policy considerations; and their boundaries ultimately determine the effectiveness of NEPA as a means for reaching the environmental goals established by Congress. *Conservation Society I* set these boundaries to achieve the environmental goals of long-range planning, meaningful consideration of alternatives, and broad, objective program evaluations at the federal level. The reversal of that decision places in doubt the court's continued commitment to these goals.

Even though the Second Circuit's reversal of its earlier decisions on non-delegation of EIS preparation and non-segmentation of EIS scope is an understandable response to the double-barreled rebuke by Congress and the Supreme Court, the extent of the court's reaction was unwarranted—unwarranted by congressional intent in Public Law 94-83, by a critical reading of *SCRAP II*, and by the very facts of the case. The court could have maintained much of its original concern for furthering the policy of NEPA by putting to advantage its position as the first court to interpret the new

federalized for NEPA purposes. The court rejected this contention even though it recognized that by so doing a state could manipulate the "federal action" requirement of NEPA to avoid its application to environmentally adverse road segments. Second, plaintiffs argued that the Connecticut General Assembly considered the Norwalk to New Milford highway to be one program; and since the Norwalk to Danbury part was admittedly federal, the entire road should be considered as federal for NEPA purposes. The court recognized that:

> Though not a "Federal action" in and of itself, the Danbury-New Milford portion of new Route 7 would be subject to NEPA requirements if it were an integral part of a "Federal action" to build a highway from Norwalk to New Milford.

376 F. Supp. at 813. In determining whether there was an overall federal action, the court found that the state's perception of the program as a single entity was immaterial. The court justified the segmentation by finding that the Danbury-New Milford segment had independent utility because it was needed to carry the traffic between the two terminal cities and, thus, was not dependent on the building of the Norwalk-Danbury segment. This reliance on independent utility and lack of a federal program was to appear again in *Conservation Society II*. Finally, plaintiffs argued that the building of the state segment from Danbury to New Milford would encourage the building of the federally-funded segment from Norwalk to Danbury. The court found the "bandwagon effect"—the irreversible commitment to a later project generated by the completion of an earlier one—relevant, but not decisive. By so doing, it rejected the long-range planning policy of NEPA and began a depreciation of the force of the irreversible commitment argument.

Amendment to NEPA, Public Law 94-83, and by breathing meaning and clarity into an apparently narrow and complex Supreme Court decision, *SCRAP II*.

Even though Public Law 94-83 and its legislative history can support a construction requiring significant federal participation in state EIS preparation, the court's less stringent standard could also be accepted as a conscious policy decision supported by well-reasoned argument. But the court's decision cannot be accepted on the basis of its impression of congressional intent. A still more serious shortcoming was the court's failure to clearly set out delegation criteria in an effort to resolve the ambiguities in existing case law. By baldly relying on the record as it did, the court has only succeeded in creating uncertainties over the factual boundaries of its holding; and has failed in its duty to write an opinion with prospective value which will avoid future litigation on the same issues.

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