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Marilyn Ursu Bauriedel

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FEDERAL HISTORIC PRESERVATION LAW: UNEVEN STANDARDS FOR OUR NATION'S HERITAGE

INTRODUCTION

Growing awareness of the value of historic properties has been evidenced in recent years by a marked upsurge in litigation in the field of historic preservation. In most of the reported cases, preservationists have sought a precise determination and enforcement of the requirements imposed by three statutes protecting historic resources: the National Environmental Policy Act (NEPA);\(^1\) the National Historic Preservation Act of 1966 (NHPA),\(^2\) coupled with its implementing Executive Order No. 11593\(^3\) and the regulations issued by the Advisory Council on Historic Preservation;\(^4\) and the transportation legislation found in both section 4(f) of the Department of Transportation Act of 1966\(^5\) and section 18(a) of the Federal-Aid Highway Act of 1968.\(^6\)

In attempting to delay or stop the wrecker's ball, plaintiffs have often asked the courts to require that federal agency officials complete the duties imposed by all three statutes before going ahead with a proposed project. In many cases the courts have found only one, and sometimes two, of the laws applicable even though all were passed to require federal agencies to weigh the adverse effects of federal actions on historic properties. As

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1. 42 U.S.C. §§ 4321-4374 (1976). This analysis concerns § 4331(b)(4) and § 4332 (2)(C).
4. In February 1973 the Advisory Council promulgated regulations setting forth a procedure for complying with section 106 of NHPA. 38 Fed. Reg. 5388 (1973). In January 1974, these procedures were revised to include guidelines to assist federal agencies in complying with their section 1(3) responsibility under Exec. Order No. 11593, 36 C.F.R. §§ 800.1-10 (1977). The Advisory Council regulations were revised again and called "regulations" instead of "procedures." The new version took effect March 1, 1979. 44 Fed. Reg. 6068 (1979). Where this comment refers to the language of the old procedures, it is noted, and the text of the new regulations is given.

NHPA created the Advisory Council, 16 U.S.C. § 470(v) (1976), to "advise the President and the Congress on matters relating to historic preservation; recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation . . . ." Id. § 470.

6. 23 U.S.C. § 1308 (1976). Since the wording of this section is identical to section 4(f) of the Department of Transportation Act, this comment usually refers to section 4(f). In most reported cases the statute being construed is section 4(f).
a result, courts have applied varying standards of protection to threatened historic properties, depending upon which statute, in the court's opinion, governs the project.

This comment reviews the statutes' varying standards and the somewhat piecemeal and inconsistent way they have been applied by different courts, with two purposes in mind: 1) to clarify, insofar as it is possible, the requirements of each statute and how agencies may coordinate compliance where more than one statute applies to a project and 2) to question, for those concerned with future legislative action, the rationality of the disparate and unequal treatment historic properties receive depending upon which court interprets the law, which statute is found applicable, what kind of federal project is proposed and what each statute means by "historic" property.

To accomplish the first objective, the comment analyzes the language of each act, beginning with NEPA. It also considers the implementing regulations as well as the principal judicial decisions of the past decade. To reach the issue of the unequal treatment of historic properties, the comment examines both the uneven application of a particular law by different courts and the quite different duties each statute imposes upon a federal agency undertaking a project affecting an historic property.

FEDERAL STANDARDS FOR HISTORIC PRESERVATION

The National Environmental Policy Act (NEPA) is the basic federal environmental charter promulgated to insure that federal agency planning and decisions reflect environmental values. It requires a federal agency to balance environmental costs with economic and technical benefits when the agency proposes legislation or undertakes some other "major federal action significantly affecting the quality of the human environment." The balancing is accomplished through the preparation and use of an environmental impact statement (EIS) in the decision-making process.

Since compliance with the requirements of NEPA can be viewed as a federal agency's basic duty wherever a major federal project impacts an historic site, and the requirements of

the National Historic Preservation Act (NHPA) and section 4(f) of the Department of Transportation Act can be viewed as adding duties to those already required, it will facilitate a comparison of the three statutes to begin with an explanation of how NEPA operates to protect historic properties. The requirements of the other two statutes will then be compared with those of NEPA and with each other.

Protection of historic properties is a stated objective of NEPA. Section 101(b)(4) states:

[I]t is the continuing responsibility of the Federal Government to use all practicable means ... to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may ... preserve important historic, cultural and natural aspects of our national heritage, and maintain, wherever possible an environment which supports diversity and variety of individual choice ... .

The link between this objective and the duties imposed by NEPA is that the effect of a federal project on an historic property is one consideration that must be taken into account when the agency prepares its threshold evaluation of environmental effects and its environmental impact statement (EIS) as directed by section 102(2)(C) of the Act.10

The "responsible Federal official" is required "prior to making any detailed statement . . . to 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" and to prepare an initial evaluation to determine whether the action is one "significantly affecting the quality of the human environment." If the agency finds that the environmental impact will not be "significant," the agency

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11. Id.
12. Id. In Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), the court discussed the content and purpose of this initial assessment of environmental significance of the proposed action. The court said that an agency, in making a threshold determination as to the "significance" of an action, is called upon to review in a general fashion the same factors that would be studied in depth for preparation of a detailed environmental impact statement . . . .

Id. at 835. The "environmental assessment" is also described in the Council on Environmental Quality Guidelines at 43 Fed. Reg. 25244 (1978), (to be codified in 40 C.F.R. § 1508.9).
official may issue a finding of no significant impact and proceed with the project. If, on the other hand, the agency concludes that the effect on the historic property will be significant, it must prepare a detailed EIS, which includes a thorough analysis of costs and benefits of alternatives to the proposed action.

The major federal action requirement. The criteria for finding that a federal project is a “major federal action” requiring application of NEPA’s protective provisions have been clearly defined by judicial decisions. However, since NHPA and section 4(f) use different terms (NHPA speaks of “federal undertaking,” and section 4(f) speaks of a “project”) it is useful for later comparison to state briefly how much involvement is required to constitute a “major federal action” under NEPA.

The federal courts have construed “major federal actions” to include federal funding of state and local projects, such as urban renewal under the Department of Housing and Urban Development’s loan and capital grant contracts and the building of dams, highways, and commuter rail systems with money from federal agencies. Direct federal execution of a project, such as the General Services Administration’s construction of a federal bank building, is also viewed as a “major federal action.”

Mere receipt of federal funds, however, does not turn a local project into a “major federal action.” In order to require agency compliance with NEPA, the funds must be designated for a specific use. For example, the Council on Environmental

Quality regulations, issued under authority of NEPA, state that NEPA is not applicable when state or local governments undertake projects with general revenue sharing funds.22

Where federal participation has been less direct, the courts have generally refused to characterize agency involvement with a local project as a “major federal action” and have thus refused to invoke NEPA’s protection for historic buildings. In Edwards v. First Bank of Dundee,23 the court found that the action of the Controller of the Currency in approving a bank’s change of location, which resulted in the demolition of a historic bank building, did not necessitate compliance with NEPA because it was not a “major federal action.”24

Another example of federal involvement that was held too indirect to require an EIS under NEPA occurred in Miltenberger v. Chesapeake and Ohio Ry. Co.25 The Fourth Circuit refused to grant a preliminary injunction against the National Railroad Passenger Corporation (AMTRAK), a quasi-federal agency, to halt a private railroad company’s demolition of a recognized historic railroad station and hotel. The court found NEPA inapplicable because AMTRAK, under the terms of its enabling statute, is not an agency or establishment of the federal government.26

Another question that arises under NEPA with regard to “major federal actions” is whether a state can turn a federal action into a mere state action and thus avoid having to comply with NEPA. Several states have tried to achieve this result by bookkeeping maneuvers. The federal courts have consistently refused to allow the state agencies to do this in order to avoid preparation of an EIS.27

22. 43 Fed. Reg. 25245 (1978) (to be codified in 40 C.F.R. § 1506.17(a)).
23. 534 F.2d 1242 (7th Cir. 1976).
24. Id. at 1245. The Controller’s action was taken to carry out the terms of the Federal Deposit Insurance Corporation Act. But see Billings v. Camp, 4 ENVIR. REP. (BNA) 1744 (D.D.C. 1972) (not officially reported) (approval by Controller of the Currency of a bank’s opening a branch affecting historic and architecturally significant locale deemed a “major federal action”), vacated as moot, 3 ENVIR L. REP. 20701 (D.C. Cir. 1973).
25. 450 F.2d 971 (4th Cir. 1971).
26. Id. at 975. The court said categories established by Congress must be honored despite the fact that AMTRAK is governed by a board of 15, 8 of whom are appointed by the President. Id. at 975 n.7.
27. In Named Individual Members of San Antonio Conservation Soc’y v. Texas Highway Dept’, 446 F.2d 1013 (5th Cir. 1971), the court held that attempted avoidance of the environmental legislation by converting a segment of the federal project into a local one would not be permitted. See Ely v. Velde II, 497 F.2d 282 (4th Cir. 1974).
Cut-off for NEPA’s requirements. A more significant and persistent issue in historic preservation cases has been the question of whether ongoing projects may be required to comply with NEPA when compliance was avoided at the outset. This has been referred to as the cut-off issue. Most courts have held that NEPA applies throughout the federal involvement as well as at the time of the initial proposal. In a number of cases where an agency neglected its duty under NEPA, the reviewing court compelled the agency to comply even though the project had been underway for years. The court in Hart v. Denver Urban Renewal Authority found authority in section 102(2)(C) of NEPA to impose this continuing responsibility. Section 102 states that Congress requires “to the fullest extent possible” that the policies and laws of the United States should be carried out in accordance with the policies of NEPA. The Hart court interpreted this section to mean that where an agency remains meaningfully involved in a project over time, it continues to have an environmental role and can be required to submit an EIS until late in the project.

The fact that the cut-off time for applying NEPA is interpreted as occurring late in a project has played an important role in historic preservation cases. The section of this comment on NHPA analyzes cases in which courts have held it was too late to require the agency to follow NHPA procedures but not too late to require compliance with NEPA—that is, the preparation of an EIS and a search for ways to mitigate harm to the historic site.

The meaning of “historic.” Another significant issue in historic preservation cases is whether the threatened historic
property is one that the statute protects. The language of NEPA does not limit its protection to sites that have been given official recognition. Instead, NEPA states that its purpose is to preserve "important historic, cultural and natural aspects of our national heritage." NEPA itself does not define "important," but one case indicates the statute extends to properties which have not yet been officially designated "historic." In *Libby Rod & Gun Club v. Poteat*, upon plaintiffs' showing that University of Idaho researchers had made archaeological discoveries in the area of a proposed Army Corps of Engineers project, the court required the Corps to review in its EIS the impact of the project on the archaeological sites. Since plaintiffs did not present enough evidence to show that the sites met the criteria of the National Register of Historic Places, however, the court refused to order the Corps to meet the additional requirements of NHPA. NEPA's broad standard of what is historic also aided preservationists in a number of other cases in which a site had not been declared eligible for the National Register when federal action began. Like the court in *Libby Rod & Gun Club*, the courts in these other cases required under NEPA, at least limited consideration of the project's environmental impact and alternative courses of action even though they refused to require an agency to undertake the procedures required by NHPA and its associated regulations.

Substantive protection of historic values. Another issue to consider regarding NEPA's protection of historic sites is the likelihood that historic values will be given weight in the final decision concerning the federal project. In other words, is NEPA's protection substantive or merely procedural? Another way to look at this issue is to consider how likely it is that NEPA's substantive goals of preserving historic structures and objects on the landscape will be attained if all the required statutory procedures are followed.

The Fourth, Seventh and Eighth Circuits have recognized that section 101 of NEPA creates not only procedural but also

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36. 457 F. Supp. at 1190. NHPA established a National Register of Historic Places which applies only to properties listed on or eligible for the National Register. 16 U.S.C. § 470(a) (1976). For the criteria of eligibility see note 55 infra.
substantive rights and duties. In section 101, Congress declared that

it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal . . . programs . . . to . . . preserve important historic . . . aspects of our national heritage.

In Environmental Defense Fund v. Corps of Engineers the Eighth Circuit interpreted this passage to mean

that the Act is more than an environmental full-disclosure law . . . . NEPA was intended to effect substantive changes in decisionmaking . . . . The procedures included in §102 of NEPA are not ends in themselves. They are intended to be "action forcing." The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill government archives.

Nowhere in NEPA does it say, however, that the agency shall give historic values greater weight in decision making than it gives to other factors. What NEPA actually requires is that the agency, in good faith, balance environmental costs with technical and economic costs in arriving at a decision. Moreover, when a court is asked to enforce the substantive duties of NEPA, its review of the agency's compliance is very limited. The Fourth, Seventh and Eighth Circuits have measured compliance by the standard announced in Citizens to Preserve Overton Park v. Volpe. Under Overton Park, the reviewing court will not substitute its judgment about the project for the agency's decision. The court will only determine "whether the agency acted within the scope of its authority"

38. Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Conservation Council v. Froehlke, 473 F.2d 664 (4th Cir. 1973); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).
40. 470 F.2d 289 (8th Cir. 1972).
42. 470 F.2d at 298, 300.
43. Id. at 300.
45. Id. at 416.
and "whether the decision reached was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." In determining whether the decision was "in accordance with law," the court "must decide if the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment." Rarely have the courts in a NEPA case overturned an agency decision where an EIS was reasonably well documented.

To compare the legal requirements of NHPA with those of NEPA, it is necessary to turn first to the Congressional Declaration of Policy in NHPA and to sections 101(a)(1) and 106 of that Act. In the preamble to the Act, Congress declared that the "historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."

Pursuant to the above policy, section 101(a)(1) established the National Register of Historic Places, defined as a "register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture." Section 106 requires that where a "federal or federally assisted undertaking" or "federal licensing of any undertaking" is contemplated, the responsible agency official

   shall prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register.

Furthermore, the head of the agency "shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."

Executive Order No. 11593 and the Advisory Council Regulations. Federal agency responsibilities under section 106 are further defined in the regulations of the Advisory Council. These regulations set forth procedures to be followed by the

46. Id. at 415-16.
47. Id. at 416.
49. Id. § 470(a).
50. Id. § 470(f).
51. Id.
agency to "take into account the effect" on the property. They also define what is meant by the Advisory Council's "reasonable opportunity to comment" on a proposed undertaking. In addition, other regulations list the criteria a site must meet to be eligible for the National Register.55

The Advisory Council regulations were promulgated in response to Presidential Executive Order No. 11593 of May 13, 1971." The Executive Order was issued in furtherance of the policies of NEPA and NHPA57 and instructed federal agencies, in consultation with

the Advisory Council . . . [to] institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archeological significance.58

The regulations promulgated in 1974, were intended to serve as guidelines for the agencies until they adopted their own procedures.59

Federal agency compliance with Executive Order No. 11593, was not uniform. Prominent among agencies slow to respond was the Department of Housing and Urban Develop-

54. Id.
55. 36 C.F.R. § 60.6 (1978):
The criteria were issued by the Secretary of the Interior and are set forth as follows: "The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects of State and local importance that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

(1) That are associated with events that have made a significant contribution to the broad patterns of our history; or
(2) That are associated with the lives of persons significant in our past; or
(3) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
(4) That have yielded, or may be likely to yield, information important in prehistory or history."
57. Id.
58. Id.
59. 36 C.F.R. § 800.1(b)(2) (1978). The new regulations delete this reference since the courts have interpreted the regulations as binding on federal agencies. See 44 Fed. Reg. 9073 (1979).
ment (HUD). Noting HUD's failure to issue its own regulations, one court concluded that HUD by its delinquency, had "chose[n] to incorporate the Advisory Council regulations as part of its own internal procedures" and, the court held, HUD was consequently bound to follow these procedures. Other courts have, under different facts, similarly interpreted the regulations as mandatory procedures for any federal undertaking with a potential impact on historic properties.

The Advisory Council regulations impose three duties on federal agencies engaged in projects that may affect an historic property. The first is to identify properties within the area of the project's potential impact "that are included in or eligible for inclusion in the National Register." This task must begin "at the earliest stage of planning or consideration of a proposed undertaking" or as "early as possible and in all cases prior to agency decision concerning an undertaking." Compliance requires that the agency official consult with the State Historic Preservation Officer (SHPO) and apply the National Register criteria "to all properties possessing historical, architectural, archeological, or cultural value." If the agency official determines that a property appears to meet the National Register criteria, or if it is questionable whether the criteria are met, the official must formally request an opinion from the Secretary of the Interior as to the property's eligibility for the National Register.

61. Id.
63. 36 C.F.R. § 800.4(a) (1978). The new regulations, effective March 1, 1979, state, It is the responsibility of each Federal agency to identify or cause to be identified any National Register or eligible property that is located within the area of the undertaking's potential environmental impact and that may be affected by the undertaking.
64. 36 C.F.R. § 800.4(a) (1978). The new regulations state, As early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any action that would foreclose alternatives or the Council's ability to comment, the Agency Official shall take the following steps . . .
65. 36 C.F.R. § 800.4(a) (1978). The role of the State Historic Preservation Officer is further defined in the new regulations. 36 C.F.R. § 800.5 (1979).
Register. The Secretary's opinion respecting eligibility is conclusive.

The second responsibility of the agency official is to determine if the project will have an effect on eligible properties. And third, the official must determine whether or not the effect will be "adverse". If an adverse effect is found, or if the Executive Director of the Advisory Council does not accept the agency's determination of no adverse effect, the agency official must proceed with what is termed the Advisory Council's "consultation process". During the consultation process, any of the consulting parties (the Executive Director, the State Historic Preservation Officer or the agency official) may request an on-site inspection of the property and a public meeting to give interested persons an opportunity to express their views and suggest alternative courses of action.

The three-party consultation always includes a consideration of feasible and prudent alternatives in order to avoid the adverse effect. If no agreement on an alternative project or plan is reached, the three must attempt to reach an agreement on ways to minimize the impact on the historic property while allowing the project to proceed. If any agreement is reached, a thirty-day review period follows. During this time the Advisory Council may review the agreement or take no action. If no action is taken, the agreement becomes final and the project

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67. Id.
69. 36 C.F.R. § 800.4(b)(2)(1979). The criteria of adverse effect appear at section 800.3(b), as follows:
   generally, adverse effects occur under conditions which include but are not limited to:
   (1) Destruction or alteration of all or part of a property;
   (2) Isolation from or alteration of the property's surrounding environment;
   (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
   (4) Neglect of a property resulting in its deterioration or destruction;
   (5) Transfer or sale of a property without adequate conditions or restrictions regarding preservation, maintenance, or use.
36 C.F.R. § 800.3(b) (1979).
70. 36 C.F.R. § 800.4(d) (1979).
71. 36 C.F.R. § 800.6(b)(2) (1979).
72. 36 C.F.R. § 800.6(b)(3) (1979).
73. 36 C.F.R. § 800.6(b) (1979).
74. Id.
75. 36 C.F.R. § 800.6(c)(2) (1979).
proceeds. If no agreement has been reached by the consulting parties to avoid or mitigate the effect on the historic property, the Advisory Council has a thirty-day period in which to consider the case and make recommendations or to take no action and let the project proceed.

The Advisory Council includes the highest officials of twelve federal agencies as well as the Secretary of the Smithsonian Institution, the Architect of the Capitol, the Chairman of the Federal Council on the Arts and Humanities, the Chairman of the National Trust for Historic Preservation, the President of the National Conference of State Historic Preservation Officers and twelve members appointed by the President from outside the federal government. The outside members are citizens with experience and expertise in the field of historic preservation. Because of its high-level composition, the influence of the Council may have an important bearing on whether federal agencies treat NHPA as merely a procedural formality or a serious search for an alternative that does the least damage to historic and cultural values. The prestige and credibility of the Council can be important factors in securing agency adoption of the Council's recommendations. Agencies, however, are not legally required to implement the recommendations.  

Overlapping statutory duties. An important issue in com-

76.  Id.
77. 36 C.F.R. §§ 800.6(b)(7), (d)(1)-(2) (1979).
79. The Advisory Council annual report for 1973-74 contained the optimistic conclusion that "[i]n most cases, this staff level negotiation process results in a mutually acceptable solution to both preservationists and Federal project planners." ADVISORY COUNCIL ON HISTORIC PRESERVATION, A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 1973-74 (1975). In Fiscal Year 1974 the Council reported that of 331 cases in which action was completed, 145 ended in Memoranda of Agreement among the consulting parties, and "186 were closed by a determination of no Federal involvement, a finding of no adverse effect to the property, or withdrawal of the project." Id. at 14.

In Fiscal Year 1975 there were sixty Memoranda of Agreement. In five of those cases it was necessary to agree to the destruction of buildings listed on or eligible for the National Register, and in eight cases it was necessary to agree to relocating an historic building that otherwise would have been demolished. In all the other cases closed, projects were modified to avoid adverse effect on the historic properties or to permit only slight impairment. The Council added, "On rare occasions, the public interest of preservation was found to outweigh the project's benefits, and the project was cancelled." Id. at 15.
paring the protections afforded by NEPA and NHPA is the extent to which their statutory duties overlap. The Advisory Council regulations direct that where both NEPA and NHPA apply, the agency undertaking the project shall coordinate all the steps taken to fulfill NHPA obligations with preparation of the EIS required by NEPA.\(^8\) The Advisory Council anticipates preparation of one document to meet the requirements of both statutes.\(^8\)

**Federal undertaking.** In comparing the statutory language of NHPA section 106 with the language of NEPA section 102(2)(C), another issue that arises is whether a "federal undertaking" or "federal license" under NHPA\(^2\) is the same as a "major federal action" under NEPA. In general, the courts have held that the kind of federal involvement which requires an EIS is the same as that which requires the agency to complete the additional procedures of NHPA.\(^3\) Under NHPA, just as under NEPA, where federal agency involvement is indirect,

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\(^8\) 36 C.F.R. § 800.9 (1979).

\(^8\) Id. Despite the directives to coordinate compliance with NEPA obligations, however, the Advisory Council regulations speak of the "separate responsibilities" of NHPA and the Executive Order as compared with NEPA. Id. The regulations state that "agency obligations pursuant to the National Historic Preservation Act and Executive Order 11593 are independent from NEPA requirements and must be complied with even when an environmental impact statement is not required." Id.

It seems inconsistent that a threshold finding of no significant environmental effect under NEPA would result in any duties under NHPA. However, Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741 (N.D. Ga. 1978), is a case in which the federal agency issued a finding that no EIS was required under NEPA—but was required by the court to complete the separate duties of NHPA. In this case the Federal Highway Administration made no independent effort to assess the potential environmental effects under NEPA. Instead the agency relied on a report prepared by the Georgia Department of Transportation. The court was disturbed by this "blind reliance . . . upon the state's determination and findings." Id. at 751. The court did not bother, however, to require the agency to submit its own EIS, but focused on the Federal Highway Administration's failure to make an effort under the Advisory Council regulations to identify properties within the area of the project's potential impact that were included in or eligible for the National Register. The injunction was granted predicated upon noncompliance with NHPA. The court held that the statute requires that "the determination of effect, adverse effect, or no effect by the appropriate federal agency official be an independent one, and not simply a 'rubber stamp' of the state's work." Id. at 752. But see Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412, 420 (2d Cir. 1972), clearly indicating that NEPA also requires that EIS preparation be a nondelegable responsibility.


\(^3\) Federal agency action in the cases cited in notes 17-19 supra met the criteria of "federal undertaking" or "federal license" under section 106 of NHPA as well as of "major federal action" under section 102(2)(C) of NEPA.
courts have not required the agency to follow statutory procedures.\textsuperscript{84}

On the related issue of whether a state may avoid the duties imposed by the federal historic preservation statutes by shifting the federal funds to other projects and using state funds, one court has handled the problem the same way it has been decided under NEPA. In \textit{Ely v. Velde II},\textsuperscript{85} the state of Virginia planned to use funds from the federal Law Enforcement Assistance Administration (LEAA) to construct a prisoners' facility. The construction would have impacted the Green Springs Historic Area, which had been listed on the National Register. In order to avoid the requirements of NHPA, the state diverted the LEAA funds to other projects within the state penal system and planned to construct the center with state funds. The court held that if the state failed to consider the effect on the historic district as required by NHPA, the state could not use the federal money for this or any other project but must return the funds to the federal government.\textsuperscript{86}

The "cut-off" issue. The next consideration under NHPA is the critical issue of whether a court may require an agency to stop in the middle of a project to comply with NHPA when the agency failed to do so at the outset. The court's treatment of the cut-off issue has been, for the last decade, one of the most significant differences between NEPA and NHPA. In several cases, when courts have at least found authority to compel agency compliance with section 102(2)(C) of NEPA, they have

\textsuperscript{84} Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976); Miltenberger v. Chesapeake & Ohio Ry. Co., 450 F.2d 971 (4th Cir. 1971). Weintraub v. Rural Electrification Administration, 457 F. Supp. 78 (M.D. Pa. 1978), illustrates a type of indirect federal funding which was not enough to come within the terms of "federal undertaking" under NHPA. In \textit{Weintraub} an electric cooperative borrowed funds from the Rural Electrification Administration (REA) to construct its new building. The fact that the new building would house a restaurant and other commercial tenants as well as the offices of the cooperative created a need for a parking lot next door. To make room for the parking lot, the co-op proposed demolishing a historic building listed on the National Register. In denying any agency responsibility under NHPA to solicit Advisory Council comments on the effects of this project on the building, the court reasoned that no federal funds were to be used directly for the demolition; no federal agency authorized the money for demolition; the federal action was too indirect; and Congress did not intend the NHPA to reach every effect of federal spending. Moreover, in a statement similar to the court's reasoning in \textit{Edwards}, the \textit{Weintraub} court said that the REA's requirement that all borrowers receive the agency's approval for plans to construct their headquarters and garages does not constitute a "license" within NHPA. 457 F. Supp. at 92.

\textsuperscript{85} 497 F.2d 252 (4th Cir. 1974).

\textsuperscript{86} Id. at 254.
held that it was too late to impose the additional duties of NHPA.

The cases that have been the most difficult legally have involved urban renewal projects funded by HUD with plans calling for demolition of historic buildings. In most cases, massive planning and funding were approved in the 1960's before NEPA and NHPA became law and before citizens realized the potential impact of the projects on historic buildings in the project area. In each case, when the impact became known, the citizens had the buildings placed on the National Register and sued to stop the project until the agency complied with NHPA and NEPA.

In these situations the language of NHPA section 106 was interpreted in one of two ways. One line of cases held that the agency had no duty under NHPA unless the historic property affected had been included in, or declared eligible for, the National Register at the time the approval of the expenditure of federal funds was being considered.\(^8\) The other interpretation has been that there was no duty if the property was not included or declared eligible at the time project plans or amendments to plans were "authorized and the resulting loan and capital grant was entered."\(^8\)

To maximize the utility of the latter interpretation, courts have struggled to find an amendment to the urban renewal plan (or a decision as to disposition of the property) that took place after the site was listed on the National Register. If an amendment could be found, the court could require an agency to delay demolition of a building while the agency officials weighed alternatives and consulted with the Advisory Council. But in all of the cases, the courts were unable to find any amendments that had been added after the buildings became eligible, and it was not possible under this rationale to require HUD to comply with section 106.\(^8\)

When courts finally took cognizance of the issuance of the 1974 Advisory Council regulations, however, a door was opened

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to extending obligations of NHPA to cases in which the historic property had been declared eligible after all the amendments to the federal agency plans had been approved and the project was well underway. In 1975, in *Save the Courthouse Committee v. Lynn*, a court for the first time read section 1(3) of Executive Order No. 11593 together with the regulations and concluded that even if the language of section 106 of NHPA did not apply, HUD was legally bound to follow the Advisory Council procedures since it had not set up its own. In reaching this conclusion, the district court considered section 800.3(c) of the Advisory Council regulations which defines “undertaking” to include not only new but also “continuing projects and program activities ... supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance.” Thus, even though the entire urban renewal program for White Plains, New York had been approved earlier, the court saw the proposed demolition of the Westchester County Courthouse as a further “undertaking” within the meaning of these regulations. The court reasoned: “Unlike Sec. 106 of NHPA the applicability of the regulations is not expressly linked to the timing of the approval of the Federal expenditures.” Instead, according to the court, the regulations apply as long as the agency has not made a final “decision” about the property. Looking at section 800.3(g) the court found “decision” defined as “the exercise of agency authority at any stage of an undertaking where alterations might be made in the undertaking to modify its impact upon historic and cultural properties.” From this definition the court reasoned that the regulations were meant to apply “at any time when it was still possible to effect changes in the undertaking in order to circumvent an adverse impact.”

91. Section renumbered in new regulations and found at 36 C.F.R. § 800.2(c) (1979).
92. 408 F. Supp. at 1339.
93. *Id.* (emphasis added). Section renumbered in new regulations and found at 36 C.F.R. § 800.2(h) (1979). The section now reads,

“Decision” means the exercise of or the opportunity to exercise discretionary authority by a Federal agency at any stage of an undertaking where alterations might be made in the undertaking to modify its impact upon National Register and eligible properties.

94. 408 F. Supp. at 1339. The new regulations contain a new section aimed at alerting an agency to its ongoing duty and at preventing resources discovered in the middle of a project from being adversely affected. As the Council describes the intended impact of the new regulation, the section “applies only to those resources
Applying the above standard in *Save the Courthouse*, the district court declared it was not too late because “the proposed demolition of the courthouse had not reached such a plateau of implementation that reassessment of the action by all concerned would be wholly impracticable.” Since no final decision had been made by the agency concerning disposition of the property, the court felt justified in issuing an injunction delaying the project while HUD gave the Advisory Council the opportunity to review and explore with the agency an alternative to demolition.

The foregoing application of the regulations may seem similar to the test applied to ongoing projects under NEPA. As noted earlier, a number of courts have held in cases involving similar HUD-funded urban renewal projects that NEPA applied to continuing federal agency involvement even several years after the project was underway. However, in a 1978 HUD case, *Wisconsin Heritages, Inc. v. Harris*, a federal district court decided that the project had reached the point where it was too late for NHPA but not too late for NEPA. In that case, a contract had been signed between the urban renewal agency and Marquette University much earlier in the project promising to demolish an historic mansion on the university campus and to deliver the land, cleared of the building, to Marquette at a specified date in the future. As was typical of the other HUD cases, citizens had the property placed on the National Register long after the HUD capital grant and loan had been approved for the whole urban renewal project. The court held that it was too late for reconsideration of the fate of the mansion under the Advisory Council regulations. The signing of the contract in *Wisconsin Heritages* was held to be an irrevocable “decision” about the property, leaving no room for reconsideration under NHPA or its regulations.

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discovered during construction that meet the National Register Criteria” and requires that “an agency make reasonable efforts to avoid foreclosing options while the Council’s comments are being sought.” 44 Fed. Reg. 6067, 6071 (1979). The section does not, however, require a mandatory halt to construction because commentators on the draft regulations objected to the delays this would cause. Id.

95. 408 F. Supp. at 1339. See also Committee to Save the South Green v. Hills, 7 ENVIR. L. REP. 20061 (D. Conn. 1976).
96. See notes 29-32 and accompanying text supra.
98. Id. at 1124. The *Wisconsin Heritages* court said,

The key to the applicability of [the regulations] in this case is whether a decision was made by HUD subsequent to . . . the date on which the
The court held, however, that it was not too late to require an EIS under NEPA to consider methods to mitigate the adverse effect and granted a two-month delay while HUD prepared an EIS seeking a plan for preserving the mansion at another location.\textsuperscript{99} Quoting from \textit{Jones v. Lynn},\textsuperscript{100} the court said,

While it may be fruitless to apply procedural protections afforded by NEPA to a project which has been so far terminated to preclude any change in plans, the only correct interpretation would seem to be that if the requirements of the Act can be feasibly applied—even if the project in question was begun prior to the enactment of NEPA—then they should in fact be applied.\textsuperscript{101}

The \textit{Wisconsin Heritages} court found that, even after the conditional closeout of bank accounts for the urban renewal project three years earlier, HUD’s control over the remaining funds for demolition of the mansion was sufficient “to impose further responsibilities under NEPA.”\textsuperscript{102} The court recognized, however, “that in applying NEPA to an ongoing urban renewal project, consideration must be given to vested rights.”\textsuperscript{103} It further stated that “Marquette’s contractual right to the mansion site cleared of improvements precluded HUD from considering as a NEPA alternative the retention of the mansion at its present site.”\textsuperscript{104} The agency could, however, give meaningful consideration to “relocation of all or part of the mansion.”\textsuperscript{105}

Had it not been for the vested contract right, the court in \textit{Wisconsin Heritages} may have invoked NHPA and ordered HUD to consult the Advisory Council. The fact that the court was impressed with the reasoning in \textit{Save the Courthouse v. Lynn} and carefully considered the “decision” point language of the regulations\textsuperscript{106} indicates that, but for the existing contract

\begin{footnotesize}
  \item[mansion became eligible for inclusion in the national register, thereby requiring that the regulations be followed.]
  \item[\textit{Id.}] 99. \textit{Id.} at 1127.
  \item[\textit{Id.}] 100. 477 F.2d 885 (1st Cir. 1973).
  \item[\textit{Id.}] 101. Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. at 1125 (quoting Jones v. Lynn, 477 F.2d at 889).
  \item[\textit{Id.}] 102. 460 F. Supp. at 1126.
  \item[\textit{Id.}] 103. \textit{Id.}
  \item[\textit{Id.}] 104. \textit{Id.}
  \item[\textit{Id.}] 105. \textit{Id.} at 1127. The agency was given two months to prepare an EIS. Advisory Council assistance might have been helpful in view of this short time period.
  \item[\textit{Id.}] 106. \textit{Id.} at 1124.
\end{footnotesize}
with Marquette, the court might have been willing to give a broader reading to NHPA. The most recent HUD urban renewal case addressing the cut-off issue, WATCH (Waterbury Action to Conserve Our Heritage, Inc.) v. Harris,\textsuperscript{107} is further evidence of a new trend. It heralds the end of the major difference between the protections of NEPA and NHPA on the cut-off issue.

In WATCH v. Harris the city of Waterbury, Connecticut adopted an urban renewal plan to rehabilitate 20.6 acres of its downtown area. In 1973, the Waterbury Urban Renewal Agency (WURA) signed a loan and capital grant contract to receive from HUD about twenty-four million dollars over the life of the project. The plan called for eighty-three buildings to be demolished and replaced with high-rise offices and commercial buildings. Under the contract, as under other HUD urban renewal contracts, the work was to be done in phases, each of which required HUD's permission. The contract was executed before any affected properties were listed on the National Register—indeed, as in some previous cases, before the local citizenry was aware that some buildings might be eligible. When the public awakened HUD to the historic value of the area and the eligibility of at least one building for the National Register, HUD failed to comply with NHPA or NEPA.\textsuperscript{108} WATCH sued to enjoin further redevelopment until HUD prepared an EIS and consulted the Advisory Council. The district court agreed with WATCH that an EIS was needed, but as to NHPA, it relied on the older cases and interpreted the cut-off date to be the date the federal contract was signed. On appeal, however, the Second Circuit held that NHPA still applied and HUD must consult the Advisory Council.

The Second Circuit concluded that where a contract with a federal agency provides for subsequent federal approval of specific expenditures in stages or phases and the initial contract has only authorized the expenditures in a preliminary fashion, NHPA applies "until the agency has finally approved the expenditure of funds at each stage of the undertaking."\textsuperscript{109}

\textsuperscript{107} 603 F.2d 310 (2d Cir. 1979).
\textsuperscript{108} The buildings in the area are of a "classic turn-of-the-century main street type," representing an eclectic collection of architectural styles including, Renaissance revival, Richardsonian Romanesque, Greek revival, and Italianate." Id. at 314. The H.H. Peck carriage house was declared eligible for the National Register on February 7, 1978. Members of WATCH had asked for a determination with regard to all the commercial buildings in the project area. Id. at 315.
\textsuperscript{109} Id. at 319.
After a long and careful review of the language of the statute and its legislative history, the court reasoned that, although Congress did not consider the narrow cut-off issue, it did intend to provide a meaningful review of historic resources when a federal project was planned. The opinion states, "We believe that our interpretation provides a far more meaningful review than the strict cut-off interpretation."\(^{10}\)

As additional justification, the court of appeals noted that the Advisory Council, the agency charged with executing the act, had interpreted NHPA as applying on a stage-by-stage basis.\(^{11}\) The court was impressed with the fact that Congress did not change the 1974 Advisory Council procedures when it amended the act in 1976.\(^{12}\)

A further significant difference between the \textit{WATCH v. Harris} opinion and the other HUD cases is the court's sensitivity to the contemporary needs of the national preservation program. This is the first opinion to examine preservation policy and problems in depth and to fashion a decision sympathetic to current needs. The court was cognizant that an adequate inventory of properties is the key to preserving the significant ones and that it has been and continues to be very easy to overlook important resources and lose them to "'so-called' progress"\(^{13}\) because of a time lag in identifying and listing properties. The court identified the following causes for the lag.\(^{14}\) First, widespread interest in local historic preservation has only developed in recent years, partly because NHPA shifted the focus from recognizing and preserving nationally significant properties to identifying and saving properties of local merit. Second, state historic preservation offices are inadequately funded and understaffed to do the ambitious surveys of resources they are charged with completing. Third, they face a nearly impossible backlog of cases presented for identification and determination of Register eligibility. Finally, these agencies have had to use most of their monies for "'bricks and mortar' preservation of already inventoried properties in imminent danger of loss."\(^{15}\)

\(^{10}\) \textit{Id.} at 324.

\(^{11}\) \textit{Id.} at 324.

\(^{12}\) \textit{Id.} at 325. NHPA was amended to increase funding for preservation and to include within its protections buildings "eligible" for the National Register as well as those already "listed". 16 U.S.C. § 470(f) (1976).

\(^{13}\) 603 F.2d at 325.

\(^{14}\) \textit{Id.} at 314.

\(^{15}\) \textit{Id.} at 314 n.6. The expectation of the Advisory Council in 1975 was that a
The court recapitulated its reasoning as follows:

The sum and substance of all this is, we think, a congressional purpose, expanding over the years, to make certain that federal agencies give weight to the impact of their activities on historic preservation. Throughout Congress has recognized that it is necessary to identify the properties that are of state, community or local significance, and this was one of the major purposes of the 1966 act itself. The problems of identification were and remain considerable, as the 1976 legislative history recognizes. One would suppose that Congress, having these problems in mind, did not intend to adopt a strict cut-off date, at least as to grant and loan contracts such as this one where the federal agency gives its final approval to the expenditure of federal funds only in stages, and § 108(B) of the contract explains that one of the purposes of phased approval is to ensure that the local agency does not take any step which, in HUD's opinion, might violate federal law.116

In summary, courts have been more willing to impose legal responsibilities under NEPA than they have been under NHPA when the project is well underway. Recent interpretations of NHPA, however, are bringing it more in line with NEPA regarding an agency's continuing responsibility. The Second Circuit opinion in WATCH v. Harris, with its emphasis on the underlying purposes of NHPA, is likely to be an influential precedent in any forthcoming urban renewal cases and perhaps other historic preservation cases as well.

Substantive v. procedural protection. The final issue to consider in comparing NHPA and NEPA is the extent to which NHPA and its regulations provide substantive as well as procedural protections for historic properties. The issue of whether the declared policy of NHPA to preserve historic resources imposes enforceable duties upon the agencies has not been raised by the cases as it has under NEPA. The decisions under NHPA have focused on whether the Advisory Council regulations apply and whether agencies have adequately followed them. It is difficult to ascertain from the judicial decisions how much

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116. 603 F.2d at 325.
the additional review procedures under NHPA add to the protections afforded by NEPA. What can be said about the outside review afforded by the Advisory Council, a key difference between NHPA and NEPA, is that this body of high ranking officials and preservation experts offers recommendations and approaches to preservation that the lead agency might overlook because of its lack of expertise and self-interest in seeing the project completed.\textsuperscript{117}

Protection of Historic Sites Under DOT Act Section 4(f)

Where historic properties lie in the path of a federally subsidized highway or other transportation project,\textsuperscript{118} the federal agency involved must meet a tougher standard of protection of historic properties. As a preliminary step, the agency will no doubt have to prepare an EIS and may have to undertake the duties required by NHPA if the site or structure is a National Register property or a likely candidate for the National Register. The Federal-Aid Highway Act of 1968, section 18(a)\textsuperscript{119} and the Department of Transportation Act of 1966, section 4(f)\textsuperscript{120} contain further duties, however. Both statutes mandate that a “special effort” be made to preserve historic properties located in the path of a federal transportation project. They also require, in identical provisions, that the Secretary of Transportation “shall not approve any program or project which requires the use of . . . any land from an historic site of national, State, or local significance” as determined by the federal, State or local officials who have jurisdiction over

\textsuperscript{117} HUD’s actions in \textit{WATCH} show how likely it is, even with public preservation awareness at a new high, that the self-interested agency doing its own environmental assessment will overlook historic resources. HUD had called upon the Secretary of the Interior to make a determination of whether any of the buildings in the project area met the National Register criteria. This was technical compliance with the regulations. When HUD did not receive a reply from the Secretary after several months of waiting, however, HUD officials permitted the project to proceed and allowed the local redevelopment agency to sign demolition contracts. \textit{Id.} at 315.

\textsuperscript{118} When the Department of Transportation (hereinafter cited as DOT) was established or within a short time thereafter, the following agencies became attached to DOT: Federal Highway Administration, 49 U.S.C. § 1652(e)(1) (1976); Federal Railroad Administration, 49 U.S.C. § 1652(e)(1) (1976); Federal Aviation Administration, 49 U.S.C. § 1652(e)(1) (1976); Federal Aviation Administration, 49 U.S.C. § 1652(e)(1) (1976); the Coast Guard, 49 U.S.C. § 1655(a) (1976); the Saint Lawrence Seaway Corporation, 33 U.S.C. § 981 (1976) and the Urban Mass Transportation Administration, 49 U.S.C. § 1608 (1976). Section 4(f) applies to the activities of all these agencies.


\textsuperscript{120} 49 U.S.C. § 1653(f) (1976).
these properties unless "(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm" to the property.\textsuperscript{121}

In 1976, the United States Supreme Court gave the following interpretation of section 4(f) in the landmark case, \textit{Citizens to Preserve Overton Park v. Volpe}.\textsuperscript{122} The Court upheld a citizen's right to review of the Secretary of Transportation's decision that no feasible and prudent alternative route exists.\textsuperscript{123} The Court declared that an alternative which avoided using the protected land would be considered "feasible," and therefore must be adopted, if it would be compatible with sound engineering practices. The nonharmful alternative would be considered "prudent," and therefore must be adopted, unless there were "truly unusual factors" present in a particular case or the "cost or community disruption resulting from taking a different route reached extraordinary magnitudes."\textsuperscript{124} The court added that the Secretary cannot approve destruction of protected lands "unless he finds that alternative routes present unique problems."\textsuperscript{125}

The standard of section 4(f) as interpreted in \textit{Overton Park}, is clearly higher than that of NEPA and NHPA. On its face, section 4(f) offers substantive protection to historic properties beyond that offered by the other two statutes. In balancing factors to arrive at a decision about a project, an agency is required by section 4(f) to give greater weight to historic and cultural values than to other factors.\textsuperscript{126} This is not the case

\textsuperscript{121} 23 U.S.C. § 138 (1976); 49 U.S.C. § 1653(f) (1976). Since section 4(f) pertains to all projects of the Department of Transportation, including the highway projects to which section 18(a) applies, and since the sections are identical, this comment refers to section 4(f) hereafter in speaking of the protection of historic properties under the transportation statutes. See \textit{Gray, Section 4(f) of the Department of Transportation Act}, 32 Md. L. Rev. 327 (1973), for a technical and detailed discussion of the legislative history and requirements of section 4(f).

\textsuperscript{122} 401 U.S. 402 (1971).

\textsuperscript{123} \textit{Id.} at 410, 420.

\textsuperscript{124} \textit{Id.} at 411, 413.

\textsuperscript{125} \textit{Id.} at 413.

\textsuperscript{126} Louisiana Environmental Soc'y Inc. v. Coleman, 537 F.2d 79 (5th Cir. 1976). In construing the statute in relationship to parkland (another type of property protected under section 4(f)) the \textit{Louisiana Environmental Soc'y} court said

Congress articulated in § 4(f) a disparate weighting against the use of parkland for highway projects . . . . This thumb-on-the-scale approach is required whenever the parkland is to be used. If courts were to interpret this section to permit an initial appraisal of whether the use was substantial, it would infuse consideration of elements . . .

\textit{Id.} at 84.
under NEPA or NHPA.

Just how far the federal agency must go in seeking an alternative and in meeting the requirement of "all possible planning to minimize harm" has been spelled out in different ways in the wake of Overton Park. In Louisiana Environmental Society v. Coleman, the Fifth Circuit concluded that a delay of ten years before an alternative route could be approved was not a cost of "extraordinary magnitude" or a "unique" problem within the meaning of Overton Park. The view in Louisiana Environmental Society sharply contrasts with the decision in Coalition for Responsible Regional Development v. Coleman where an alternative route was properly considered not feasible when such alternative lay outside the traffic corridor encompassed by the project and the alternative route "would not accomplish the objectives of the proposed project." Thus it appears that some courts take this higher duty more seriously than others.

Although the standard of section 4(f) differs from that of NEPA and NHPA, the mechanics of compliance are similar. The Department of Transportation has issued regulations indicating when the agency is required to prepare a 4(f) statement. The regulations also instruct the department official to coordinate compliance with section 4(f) and compliance with NEPA by submitting a combined EIS/4(f) statement. If NHPA also applies, the official may expand the EIS/4(f) document to meet the Advisory Council requirements.

Other issues. Further comparison of section 4(f) with NEPA and NHPA involves four additional issues. The first is the meaning of "use" in section 4(f). Section 4(f) applies when a Department of Transportation project "requires the 'use' of any land from . . . an historic site. . . ." The judicial opinions differ as to whether an historic property has to be physically used in the project for 4(f) to apply; e.g., the building be demolished or part of the site taken, or whether some constructive use is enough to impose a duty under the act. In Hall County Historical Society v. Georgia Department of

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127. Id. at 85.
128. 555 F.2d 398 (4th Cir. 1977).
129. Id. at 401.
131. Id. § 771.19(b), (f).
132. Id. §§ 771.18(a), .19(b).
Transportation, the court rejected the constructive-use test and instead required a showing of physical use. The fact that a historic district listed on the National Register would arguably be affected because a new road would run immediately adjacent to the homes in the district was not enough to require compliance with section 4(f).

On the other hand, in Stop H-3 Association v. Coleman, the Ninth Circuit applied the constructive-use test to an historic site and determined that a highway that would pass near a petroglyph rock would "use" the historic site within the meaning of 4(f). The court did not, however, provide a rationale for its determination.

Where the constructive-use test is accepted, it is unclear how difficult plaintiff's burden is to show such use. Furthermore, there is a question as to whether constructive use is qualitatively different from "adverse effect" under NHPA or "significant environmental effect" under NEPA. For example, the noise pollution or vibrations from a nearby airport would possibly be considered having a "significant environmental effect" on an historic site under NEPA and as having an "adverse effect" under the Advisory Council's criteria. It is unclear whether or not these "effects" would also constitute constructive "use" under section 4(f).

Protected properties. Another difference between section 4(f) and NEPA and NHPA is the type of properties to which they apply. The phrase in section 4(f) referring to "property of national, state or local significance" indicates that 4(f), like NEPA, provides environmental protection for more properties than does NHPA; i.e., the property need not be on the National Register to be covered by 4(f). Section 4(f) is, however, confined to protecting properties which already have been designated as local or state landmarks or have been found to meet the National Register criteria. The Libby Rod & Gun Club case, in which the court required an EIS to consider as yet

135. Id. at 750.
136. 533 F.2d 434, 445 (9th Cir. 1976). In assessing under section 4(f) a proposed bridge which plaintiffs alleged would have an effect on the Georgetown Historic District in Washington, D.C., the court in D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972) said that if a federally assisted highway project will encroach on historic sites, the Secretary "must determine before construction can begin that there is no feasible and prudent alternative to the use of such land." Id. at 1237.
undesignated archeological sites, is evidence that NEPA potentially reaches properties beyond those officially designated as landmarks. Thus it appears that NEPA's reach is broader than that of section 4(f).

The "cut-off" issue. The third point of contention is how far advanced a federal highway project may be before it is too late for a court to require the Secretary to find a feasible and prudent alternative. The Fifth Circuit has held that section 4(f) may apply to ongoing projects. In language similar to that applied to NEPA, the court in Arlington Coalition on Transportation v. Volpe138 said section 4(f) is applicable to an ongoing federal highway project until it has reached the stage "where the cost of altering or abandoning the proposed route would clearly outweigh whatever benefits might accrue."139 The court added that further "doubts about whether that stage has been reached must be resolved in favor of the applicability" of 4(f).140 Even if a project has been underway a long time, a court may still require strenuous efforts to mitigate harm to the historic site or structure.141 The foregoing interpretation is in keeping with most courts' view of NEPA on this issue and with the recent trend in construing NHPA.

Judicial review. Finally, the fact that section 4(f) provides greater protection to historic properties than either NEPA or NHPA deserves some qualifying remarks. In spite of the high standard it set for review of an agency decision, Overton Park emphasized that when a court reviews the Department of Transportation's compliance with 4(f), the Secretary's decision that there is no feasible alternative or that all possible measures to mitigate harm have been taken is entitled to a presumption of regularity.142 The burden of proof is on the party

139. Id.
140. Id.
141. In a mass transportation case, Philadelphia Council of Neighborhood Organizations v. Coleman, 437 F. Supp. 1341 (E.D. Pa. 1977), the efforts to mitigate harm to the Reading Terminal when a commuter rail tunnel was planned included a plan to underpin the terminal structure to prevent harm from vibrations. The Urban Mass Transportation Act, 49 U.S.C. § 1610 (1976), is worded very similarly to section 4(f), requiring a "special effort" to preserve historic assets in the construction of urban mass transportation projects. The section has a different standard however. Whereas section 4(f) requires "all possible" planning to minimize harm, the Urban Mass Transportation Act only requires all "reasonable" steps to minimize harm. This seems to be an anomaly since the Urban Mass Transportation Agency is a part of DOT.
142. 401 U.S. at 415.
charging noncompliance. The court added that this is not to shield the Secretary of Transportation's action from a "thorough, probing, in-depth review," but noted that the standard of review is narrow. The standard is the same as the one applied in NEPA cases. Review is limited to determining "whether the agency acted within the scope of its authority" and "whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under both NEPA and section 4(f) the courts have shown an extreme reluctance to reverse an agency decision or to substitute a court-made plan for the agency official's judgment.

CONCLUSION

The three major federal statutes that protect historic properties impose separate but interrelated duties on federal agencies undertaking projects. Preparing an Environmental Impact Statement as required by the National Environmental Policy Act is a first step in agency compliance with the National Historic Preservation Act and section 4(f) of the Department of Transportation Act. Moreover, the regulations governing the last two statutes require coordination with NEPA.

While the EIS serves as a vehicle for compliance, it does not end federal responsibility under section 106 of NHPA and section 4(f) of the Department of Transportation Act. Unlike the other laws, NHPA requires inclusion of the Advisory Council on Historic Preservation in the review process and in the search for an alternative to harming the historic resource or for mitigation measures. Section 4(f) also differs from the other historic preservation laws by requiring that an agency adopt any feasible and prudent alternative that can be identified. If no such alternative exists, then the act requires the agency to engage in all possible planning to mitigate the adverse effect on the historic property.

While all three statutes involve a balancing process in arriving at an agency decision about the project, section 4(f) requires that historic preservation always be accorded a higher value than economic, technical and other considerations. The other two statutes only require the agency to make a good faith

143. Id. at 415-16.
144. See notes 45 and 46 and accompanying text supra.
145. 401 U.S. at 414.
effort to consider historic preservation in weighing all the factors. Under NHPA and NEPA the agency apparently is free to give non-environmental factors a somewhat heavier weight in arriving at a decision than can be given under section 4(f).

Courts have interpreted all three statutes as applicable even after a project has been finally approved and have granted injunctions halting projects while the federal agency made the appropriate review, but until very recently they have been more willing to cause a delay under NEPA while an EIS is prepared than to require the agency to involve the Advisory Council under NHPA. NHPA compliance has been foreclosed when a final decision, in the form of a binding contract, has already been made regarding disposition of an historic property before it was declared eligible for the National Register. Section 4(f), like NEPA, has been interpreted as imposing duties until quite late in the project, but the specific cut-off time has not been spelled out.

In view of the varying standards imposed by these statutes, Congress should consider whether it is reasonable to place a higher value on historic and cultural resources than on economic and social factors in the transportation context and not to assure these same resources the same importance where other federal projects are proposed. If a "special effort"146 was believed necessary when section 4(f) was passed to protect historic places threatened by the national highway building program, the question remains whether a "special effort" should be deemed necessary in the face of other federal programs equally threatening to historic properties. Increasing public awareness of the disappearance of landmarks may result in citizen pressure on legislators to create greater uniformity of standards among these preservation statutes, with the aim of bringing NEPA and NHPA up to the higher standard of section 4(f),147 and in view of the considerable confusion that application of these laws has caused, a legislative attempt to coordinate and simplify them is needed.

Marilyn Ursu Bauriedel
