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Environmental Requirements of Highway and Historic Preservation Legislation

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In the last four years the federal-aid highway program\(^1\) has been forced...
to accommodate a variety of non-transportation social values, which can broadly be considered "environmental." Since roads are planned for future requirements, typically twenty years in advance, and since the behavior of vast bureaucracies in fifty-three jurisdictions can be expected to exhibit substantial lags in response, the

by a state, without any federal participation. Federal environmental protection requirements may not apply to these activities. However, the legal situation is not entirely clear when a state-financed project is part of a broader federally-financed program (e.g., a short state-financed project through a park, connecting with a federally-assisted project outside the park). Also untested is the extent to which the Secretary may withhold or revoke his approval of a state’s primary or secondary system because of state-financed projects included in the system which are incompatible with federal environmental standards. The effect of such non-approval is to render such a state’s system ineligible for any federal-aid financing. 23 U.S.C. § 103(e) (1964). If the Secretary has such authority, a further unresolved question arises as to whether he may be compelled to use it.

2. The objectives are both to minimize harm to and to maintain or enhance socially favored assets. That the FHWA’s view of itself encompasses the latter aspects as well as the former is indicated in the following excerpt from the 1970 Turner Statement:

The highway official attaches as much importance to noise, pollution, compatibility of land uses, amenities, ecological factors, and many other environmental considerations as he does to drainage, topography, cuts and fills, traffic accommodation, and other engineering elements of location and design. We estimate that about 12 percent of all Federal-aid highway program costs are directly associated with social and environmental factors, and at least as much again is indirectly concerned with the environment.

To illustrate how highway improvements can enhance the environment, the occasion of improving a segment of highway has often resulted in the provision of park and recreation accommodations of many kinds; the improvement and upgrading of housing and the provision of decent, safe, and sanitary homes for many Americans who never before have enjoyed such facilities; the preservation of historic sites; the unearthing of artifacts of civilizations of the past; the eradication of rodents that do millions of dollars worth of damage each year; control of erosion of all sorts; the prevention of siltation of our streams and lakes and other bodies of water; and many related environmentally-desirable improvements.

In addition, the highway program has provided thousands of roadside rest areas and scenic overlooks for the enjoyment of highway users. . . .


3. Transportation also contributes to the quality of one’s life and the amenity of one’s situation, and is included in the conglomerate catalog of "social, economic and environmental effects" enumerated in the Bureau of Public Roads Policy and Procedure Memorandum 20-8, 23 C.F.R. App. A (1970) [hereinafter cited PPM 20-8].

4. According to Title 23, "The geometric and construction standards . . . for the Interstate system . . . shall be adequate . . . to accommodate the types and volumes of traffic anticipated for such project for the twenty-year period commencing on the date of approval by the Secretary . . . of the plans, specifications, and estimates for actual construction of such project." 23 U.S.C. § 109(b) (Supp. V, 1970). For highways other than freeways the "design year" is usually "about 20 years from date of completion of construction, but may be anywhere within a range of 15 to 25 years." AMERICAN ASSOCIATION OF STATE HIGHWAY OFFICIALS, GEOMETRIC DESIGN STANDARDS FOR HIGHWAYS OTHER THAN FREeways 5 (1969).

5. The program is actually carried out by the separate highway departments of the states, the District of Columbia, and Puerto Rico in conjunction with the federal
effect of these requirements on the conduct of the highway program is only beginning to become detectable.

Recently, however, there have been several key developments: new laws and regulations, changes in public opinion considered in Washington to be politically important, and a marked trend on the part of the courts to permit judicial review of administrative actions at the initiative of citizens who oppose such actions. It may be helpful to outline some of the factors which have begun to affect the operations of the Department of Transportation (DOT), state highway departments, and related federal and state agencies, and the participation of non-government design and conservation professionals and members of the public in the highway planning process.

**Statutory Developments**

Congress imposed environmental constraints on federal-aid roadbuilding, or at least legitimized the application of environmental principles, in four major enactments in the period 1966-68: Section 138 of Title 23 of the *United States Code*; Section 4(f) of the Department of Transportation Act; the National Historic Preservation Act of 1966; and Section 24 of the Federal-Aid Highway Act of 1968, known as the “urban impact amend-

authorities: the FHWA of the Department of Transportation (DOT), and FHWA’s near defunct subsidiary component, the Bureau of Public Roads (BPR). BPR is currently undergoing a major reorganization which will, in effect, terminate its existence. FHWA Notice, Federal Highway Administration Reorganization (Aug. 6, 1970).


7. The highway program has a legacy of preoccupation with the supposed illegitimacy of diverting highway funds to non-highway purposes. Well-financed lobbies, reputedly based on trucking and contracting interests, have even achieved the adoption of constitutional provisions in 28 states earmarking certain revenues for highway purposes, typically with stringent anti-diversion provisions. For a summary of such provisions, see Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENVER L.J. 167, 239 (1968). The technique of revenue earmarking obtains at the federal level as well, with the highway trust fund established under the Highway Revenue Act of 1956 (Title II of the Federal-Aid Highway Act of 1956, 70 Stat. 397). See *The Highway Trust Fund: Road to Anti-Pollution?* 20 CATHOLIC U. L. REV. 171 (1970). However, the statutes and regulations discussed herein make clear the propriety of spending federal highway funds to attain environmental policy objectives.


ment” to Section 128 of Title 23.

Section 138 of Title 23 and Section 4(f) of the
Department of Transportation Act

These provisions were amended in 1968\textsuperscript{10} so that the same language is now in each section. They developed along different paths.

Title 23 is the basic federal-aid highway legislation.\textsuperscript{11} In 1966 it was administered by the Bureau of Public Roads (BPR), which was then in the Department of Commerce. Amendments and new authorizations were (and still are) handled by the Public Works Committees of the House and Senate. Senator Ralph Yarborough of Texas was concerned about the damage which he feared would be caused by a proposed road through Brackenridge Park in San Antonio. He accordingly introduced an amendment to the proposed federal-aid highway bill of 1966 which, as passed by the Senate, would have declared it a national policy that in carrying out Title 23 “maximum effort should be made to preserve Federal, State, and local government parklands and historic sites\textsuperscript{12} and the beauty and historic value of such lands and sites.”\textsuperscript{13} Moreover, the Yarborough amendment would have prohibited the Secretary from approving “any program for a project . . . which requires the use of any land” from such parks or historic sites unless two conditions were met: “(1) there is no feasible alternative to the use of such land,” and “(2) such program includes all possible planning to minimize any harm to such park or site from such use.”\textsuperscript{14}

The House bill had no such provision. A watered-down version, worked out by the House and Senate Conferees and ultimately enacted, retained the “national policy” declaration calling for “maximum effort . . . to preserve . . . parklands and historic sites.”\textsuperscript{15} It changed the conditions required for Secretarial approval of the use of parkland or historic sites to:

unless such program includes all possible planning, including con-

\textsuperscript{10} The amendments were made by Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823-24.
\textsuperscript{11} Title 23 was “codified” in 1958, and the “laws relating to highways . . . revised . . . and reenacted as Title 23 . . .” by Pub. L. 85-767, 72 Stat. 885 (1958).
\textsuperscript{12} It is not evident from the text whether “Federal, State and local government” modified “historic sites” as well as “parklands” in 1966. The 1968 amendments made it clear, however, that historic sites need not be government-owned to qualify for Section 138 protection, and that extra costs be charged to the project right-of-way. See text accompanying notes 29, 30, infra.
\textsuperscript{13} 122 CONG. REC. 14074 (1966).
\textsuperscript{14} The Yarborough amendment as originally introduced also contained a third condition which was rejected by the Senate, i.e., that where possible and appropriate, substitute land be provided for any park or site used for a project.
\textsuperscript{15} Federal-Aid Highway Act of 1966, § 15, 80 Stat. 771.


sideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use.\textsuperscript{16}

By separate legislation handled by different committees, Congress also passed the Department of Transportation Act of 1966,\textsuperscript{17} bringing together into a new cabinet-level agency the highway program, the Coast Guard, the St. Lawrence Seaway Development Corporation,\textsuperscript{18} and certain activities—generally operations other than franchising, rate making, and similar matters of economic regulation—\textsuperscript{19} involving civil aviation\textsuperscript{20} and railroading.\textsuperscript{21}

The Department of Transportation Act contained, in Section 2(b)(2),\textsuperscript{22} a declaration of “national policy that [a] special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.”\textsuperscript{23} In addition, largely through the efforts of Senator Henry Jackson of Washington, the Senate bill contained a provision which reflected the thrust of the Yarborough amendment as it had appeared in the Senate version of the 1966 federal-aid highway bill. The Jackson amendment to the Department of Transportation Act was enacted as Section 4(f) in the following form:

The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no

\begin{enumerate}
\item Id (emphasis added).
\item Economic regulation of civil aviation is carried out by the Civil Aeronautics Board, and of railroading and motor carriers by the Interstate Commerce Commission. The corresponding functions in the area of merchant shipping are divided between the Maritime Administration in the Department of Commerce (which would have been transferred to the Department of Transportation if symmetry had prevailed) and the Federal Maritime Commission.
\item A new Federal Railroad Administration was established in DOT to carry out, inter alia, various regulatory functions relating to railroad and liquid pipeline safety. Id. §§ 1652(e)(1), 1655(f)(3)(A).
\item Id. On the basis of this provision a federal district court has described "the conservation of the country's natural resources" as "one of the main purposes of the Department of Transportation Act." Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1090 (S.D.N.Y. 1969), aff'd, 425 F.2d 97 (2d Cir. 1970).
\end{enumerate}
feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.\textsuperscript{24}

Unlike Section 138 of Title 23, Section 4(f) applied to all activities within DOT, such as the Federal Aviation Administration's aid to airport construction,\textsuperscript{25} Coast Guard's approval of bridges and causeways over navigable waters,\textsuperscript{26} as well as to the road program under Title 23. Section 4(f) also went beyond Section 138 by covering recreation areas and wildlife and waterfowl refuges, in addition to the parks and historic sites specified in Section 138. (For convenience all categories of land mentioned in the last sentence of Section 4(f) will be hereinafter called protected lands.)

In addition the language of the section retained the original Yarborough prohibition against the approval of the use of protected lands unless "there is no feasible and prudent alternative . . . and such program includes all possible planning to minimize harm,"\textsuperscript{27} instead of the weaker Section 138 requirement for "all possible planning, including consideration of alternatives."\textsuperscript{28}

As a result, the federal-aid highway program was subject to two somewhat different provisions directed at similar objectives.

Two years later, in connection with the enactment of the Federal-Aid Highway Act of 1968,\textsuperscript{29} the House Public Works Committee tried to resolve these differences by amending Section 4(f) to make it more like Section 138, but the Senate Public Works Committee succeeded in obtaining a different resolution—both sections were amended to be identical with each other, with the resulting language more like the provisions of the original Section 4(f) than like Section 138:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands tra-

\textsuperscript{24} Department of Transportation Act § 4(f), 80 Stat. 934, 1966.
\textsuperscript{25} Id. §§ 1101-20.
\textsuperscript{27} 80 Stat. 934.
\textsuperscript{28} Federal-Aid Highway Act of 1966 § 15, 80 Stat. 771.
\textsuperscript{29} 82 Stat. 815 (codified in scattered sections of 23 U.S.C.).
versed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such programs include all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.\(^3\)

The first sentence is a verbatim repetition of Section 2(b)(2) of the Department of Transportation Act.\(^3\) The second sentence is the same as the first sentence of the original Section 4(f).\(^3\) The italicized portions of the third sentence (after the reference to the effective date of the 1968 act) indicate the significant changes from the 1966 language.

Despite the victory of the Senate conferees on the language of Section 4(f) there developed from the conference a confusing record as to the legislative history of the amendment. A "Statement of the Managers on the Part of the House" which was added to the Conference Report, but which is not part of the agreement by the Senate conferees, contains the following assertion:

This amendment of both relevant sections of law is intended to make it unmistakably clear that neither section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority.\(^3\)

This statement was promptly repudiated by the Senate conferees during the debate on the conference report:

Mr. COOPER. I invite the attention of the Senator from West Virginia to the interpretation given in the report of the managers on the part of the House. I believe it is wrong, and is contrary to our discussions in the conference. But most important—and I believe this is an interpretation that will hold—it is contrary to the language of the section. There is nothing concerning discretion of the Secretary in the section itself . . . .

31. See text accompanying notes 22 and 23, supra.
32. See text accompanying note 24, supra.
I recall no discussion in the conference of any such intent. Furthermore, the language of the section gives no discretion. If a local official, a State official, or a Federal official having jurisdiction finds one of these areas or sites to be of significance, there is no discretion given to the Secretary of Transportation to permit its use for a highway. Will the Senator agree with me on that?

Mr. RANDOLPH. I agree with what the distinguished Senator from Kentucky has said in referring to the language of the House managers on page 32 of the conference report. That, I say with due deference to the House, is the interpretation of the House. It is not our interpretation. I agree with the Senator from Kentucky. This is not as we believe it.

Mr. COOPER. The legislative language, if it is clear on its face, of course, must be interpreted that way. The language prohibits any intrusion upon or invasion of these lands or areas if one of these bodies finds it is of National, State, or local significance, and the highway cannot be built, unless there is no feasible and prudent alternative to doing so.

Mr. RANDOLPH. I agree with the Senator.\(^3\)

As Senators Cooper and Randolph\(^3\) agreed, the House managers’ statement that “clearly expressed local preferences” should not be overruled cannot be squared with the statutory requirement that the Secretary disapprove the use of prohibited lands in the absence of certain conditions.\(^8\) And even if legal effect could be given to legislative history so flatly inconsistent with the text of a statute, it is clear that the repudiation by the Senate conferees deprives the statement of much if not all of the weight it might otherwise have had.\(^3\)

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34. 114 CONG. REC. 24033 (1968).

35. Senator John Sherman Cooper of Kentucky was (and is) the ranking Republican member of the Senate Public Works Committee, and Senator Jennings Randolph of West Virginia the chairman. This committee, like the House Public Works Committee, has traditionally had jurisdiction over the federal-aid highway program. The leadership of the Senate committee has, to a greater extent than that of the House Committee, developed a reputation for concern for environmental values. One reason may be that the Senate Public Works Committee has jurisdiction over air and water pollution (exercised through a subcommittee chaired by Senator Edmund Muskie of Maine), whereas these matters generally are handled in the House by committees other than Public Works (although that committee has a jurisdictional interest in navigable waters). The House Committee’s tone may change in the 92d Congress with new leadership.

36. A deference to local preferences may be appropriate, however, in considering whether an alternative is “prudent,” in view of the likelihood that the wisdom of the alternative will turn on a comparison between competing values whose relative significance for the community can best be judged by those most familiar with local conditions and needs.

37. The same “Statement of the Managers on the Part of the House” was discussed in D.C. Fed’n of Civic Ass’n’s v. Volpe, Civ. No. 23,870 (D.C. Cir., Apr. 6, 1970), in connection with another disputed provision of the Federal-Aid Highway Act of 1968: whether Section 23 of that Act, which required the construction of certain interstate projects in the District of Columbia, including the Three Sisters Bridge, “as soon as pos-
Perhaps, however, because of the physical characteristics of federal documents and the dynamics of their distribution (by virtue of which copies of conference reports are more handily circulated than copies of the Congressional Record), the House managers' statement was widely known among Federal Highway Administration (FHWA) engineering personnel, and accepted by them as authoritative, while the Senate repudiation of the Section 4(f) part of the statement was generally unknown. Not only engineers were misled. The compilers of the United States Code published an apparently erroneous note on the amendment.\(^{38}\) In addition at least one United States district court seems to have accepted the House managers' statement as the legislative history of Section 4(f)\(^{39}\) without reference to the considerations, based on the text of the section and on the Senate debate, which suggest that the statement should instead be ignored.\(^{40}\)

\(^{38}\) The note following 23 U.S.C. § 138 (Supp. V, 1970) states:

1968—Pub. L. 90-495 amended section generally so as to make it clear that the section does not constitute a mandatory prohibition against the use of enumerated lands but rather is a discretionary authority.


\(^{40}\) The Overton Park opinion, note 39 supra, is cited, with apparent approval, by Judge Sirica in the District Court opinion on the remand of the Three Sisters Bridge case. D.C. Fed'n of Civic Ass'ns v. Volpe, Civil No. 2821-69 (D.D.C. August 3, 1970). Judge Sirica attempts to resolve the "mandatory" vs. "discretionary" views on Section 138 with the following formulation:

This section embodies the intent of Congress that whenever possible parklands should not be used for highway projects. [Citation to the Overton Park opinion omitted]. It is not, however, an absolute prohibition against the use of such public parks. Rather, the statute makes the use of parklands contingent on the discretionary determination of the Secretary of Transportation that (1) there is no feasible and prudent alternative to the use of such
In any event Sections 4(f) and 138 became the keystone of DOT's environmental protection responsibilities with respect to the federal-aid highway program. Together with the National Environmental Policy Act of 1969 (NEPA), which came into effect in 1970, it established environmental protection and enhancement as a major element in the Department's mission. To a greater extent than NEPA, which emphasizes policies and methodology, Section 4(f) sets specific priorities and mandatory guidelines. It has had a definite effect on the operations of DOT in cases involving protected lands. Since the Secretary's functions under Section 4(f) and Section 138 of Title 23 have not been delegated to the operating administrations, cases potentially falling under the last sentence of the section are referred to the Secretary personally. At least in recent months the practice has developed of establishing a formal record of the considerations which have persuaded the Secretary that the use of protected lands is permissible under land, and (2) the program includes all possible planning to minimize harm.

The statute is mandatory, however, in its prohibition of the use of parklands unless the two requirements are met. Therefore, the section requires the Secretary to make at least a mental finding, based on the information known to him, that the two requirements have been met before he can lawfully approve a project.

Presumably the statute also requires that this be an honest finding. It is therefore not clear what is meant by a "discretionary determination" unless this is intended to suggest that the determination would not be subject to judicial review. There is no doubt, however, that under the Administrative Procedure Act (APA) such a determination would be subject to judicial reversal at least if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The APA also provides for judicial reversal of agency actions found, inter alia, to be "in excess of statutory . . . limitations . . ." or "without observance of procedure required by law." How ever, in Overton Park the court said it "could be concerned with the question and only the question of whether or not the determinations as made were arbitrary and capricious." The NEPA may have an extremely important influence on the federal-aid highway program. However, because of the comprehensive treatment in Reilly, The National Environmental Policy Act and the Federal Highway Program: Merging Administrative Traffic, 20 Catholic U.L. Rev. 21 (1970) this article will not include a detailed discussion of NEPA.

Section 102 of NEPA requires, e.g., "a systematic, inter-disciplinary approach" and a "detailed statement" by responsible officials on the environmental impact of proposed actions. Id. § 4332.

See, e.g., note 40 supra.


44. See, e.g., note 40 supra.

45. Projects involving lands which serve the functional purposes of the types of lands covered by the last sentence of Section 4(f), 49 U.S.C. § 1653(f) (Supp. V, 1970), are referred to the Secretary even if they have not been officially designated as "parks" or "wildlife refuges" or the like, and even if it is not known whether they have been determined to have "significance" by an official "having jurisdiction thereof."
Because of Section 4(f), either alone or in conjunction with other requirements, some such projects which would have been considered normal in other years have been questioned, suspended, or killed. And the possibilities for using Section 4(f) as a basis for judicial review of administrative actions are just beginning to be explored. While it is beyond the scope of this paper to attempt a detailed analysis of legal questions which may arise under Section 4(f), or of DOT's performance in its implementation, it is entirely clear that this section has been of revolutionary significance in terms of the concepts of administration of the highway program and of the criteria of route selection which lie at the heart of its operations.

**The National Historic Preservation Act of 1966**

In 1966 Congress supplemented earlier historic preservation legislation by the National Historic Preservation Act of 1966 which declared, in part:

- (b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life in order to give a sense of orientation to the American people;
- (c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present historic preservation programs are inadequate.

The 1966 Act provided, *inter alia*, for the maintenance of a National Register of "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, and culture", for a program of matching funds, and for the establishment of a National Register of Historic Places.

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49. For example, in July 1969, the proposed Riverfront Expressway, which would have passed through the Vieux Carré historic district in New Orleans, was removed from the interstate system. But highway projects have a way of not staying dead. One never knows when an apparently discredited proposal will be revived, since there are usually strong commercial reasons (and presumably sincere transportation objectives) behind location alternatives which reach the stage of being recommended by a state highway department to the FHWA.
50. Traditionally questions of highway location have been considered to be largely a matter of state prerogative, albeit subject to federal approval, as were choices among land use priorities. Moreover FHWA and its predecessor agencies have always striven to keep the federal approval function on highway location decisions in their own hands as "operational" matters, rather than in the hands of the cabinet members for whom they have worked or the non-highway staff assistants to the department heads.
53. Id. § 470(b), (c).
54. Id. § 470a(a)(1). The National Register is published by the National Park
grants-in-aid to states for preservation projects; and for the establishment of an Advisory Council on Historic Preservation, composed of certain officials and ten presidential appointees from outside the federal government.

Section 106 of the Act provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Service of the Department of the Interior as the "National Register of Historic Places." Highway planners have serious problems with the inclusion of "districts"; while it is ordinarily feasible to avoid or otherwise provide for a specific building, planning is complicated when the area of concern is a major urban district, such as the Vieux Carré in New Orleans and the Georgetown Historic District in Washington.

The Office of Archaeology and History of the National Park Service has prepared the following criteria for use in evaluating properties nominated for inclusion in the National Register:

National Register Criteria

The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects of national, 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.


56. Id. § 470f(a).
57. Originally seven officials were members of the Advisory Council on Historic Preservation: the Secretaries of the Interior, Housing and Urban Development, Commerce, and Treasury; the Administrator of the General Services Administration; the Attorney General, and the Chairman of the National Trust for Historic Preservation. Id. The membership was expanded in 1970 to include the Secretaries of Agriculture and of Transportation and the Secretary of the Smithsonian Institution. Act of May 9, 1970, 84 Stat. 204.
These requirements complement and reinforce the obligations of the Secretary of Transportation under Section 4(f) of the Department of Transportation Act to make a “special effort . . . to preserve . . . historic sites” and to refrain from approving any program or project which requires the use of . . . any land from an historic site of national, State, or local significance as so determined by . . . [federal, state, or local officials having jurisdiction thereof] 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 such . . . historic site . . . .

The overlap is not exact. For instance, Section 106 refers to National Register properties, and Section 4(f) refers to any “historic sites,” in the “special effort” clause, and to any such sites determined to have “significance,” for purposes of the “shall not approve” provision, whether or not they are on the National Register. Such determination of “significance” may be made by any appropriate federal, state or local officials. Furthermore, apart from requiring the “special effort . . . to preserve” historic sites, Section 4(f) prohibits the “use . . . of any land” from protected sites. Section 106, on the other hand, turns on whether an undertaking will “affect” a National Register property.

The difference between the two acts could be significant if the question arose as to what the Secretary of Transportation is required to do, as distinguished from what he is permitted to do, to save a National Register site. While the “special effort” clause in Section 4(f) can be readily invoked by the Secretary to justify action (including refusals to act) to save a site, it is not very readily invoked against him to require an action which he may be reluctant to take, at least in the absence of a guide as to the type of effort which should be made. The “shall not approve . . .” clause in Section 4(f) has more bite. It is, however limited to cases where there is to be “use” of land from a historic site. Whether or not “use” must be construed so narrowly as to amount to a “taking” or a “trespass,” it is clear that there could be projects sufficiently remote physically from a site as to make the applicability of the “use of any land” concept unpersuasive, and yet these projects could be sufficiently obtrusive visually as to fall within the Advisory Council’s “Effect Criteria.” In such case, if the property were included in the National Register, it would be necessary to give the Advisory Council “a reasonable opportunity to comment.” The Secretary would then be required under Section 106 “to take into account the effect of the undertaking” on the site. This presumably means more than that he should think about the “effect.” The Advisory Council’s Section 106 “comment” could be the basis for holding

the Secretary accountable under the first sentence of Section 4(f) for making
the required "special effort" to preserve the site, even if no "use" of the
site's land would be involved for purposes of the last sentence of Section 4(f).

The Urban Impact Amendment to Section 128 of Title 23
Before 1968 this section had required that hearings be held, or the oppor-
tunity afforded, to consider the economic effects of highway projects in
urban areas. The Federal-Aid Highway Act of 1968 provided amendments
which are indicated below in italics:

Any State highway department which submits plans for a Fed-
eral-aid highway project involving the bypassing of, or going
through, any city, town, or village, either incorporated or unin-
corporated, shall certify to the Secretary that it has had public
hearings, or has afforded the opportunity for such hearings, and
has considered the economic and social effects of such a location,
its impact on the environment, and its consistency with the goals
and objectives of such urban planning as has been promulgated
by the community.60

The implementation of this provision is discussed below, in connection
with the administrative provisions which were promulgated for its adminis-
tration.

Administrative Developments

PPM 20-8: The Two-Hearings Procedure

On January 14, 1969, FHWA and BPR issued an epochal directive des-
ignated "Policy and Procedure Memorandum 20-8" (PPM 20-8).61 The
crowning achievement of Secretary Boyd's staff in his Office of the Secre-
tary of Transportation, reflecting compromises hammered out in the final
days of the Johnson administration,62 PPM 20-8 has apparently weathered
the transition to become an accepted feature of the Nixon administration's
highway procedures under Secretary Volpe.

The PPM is designed to assure consideration of "social, economic, and
environmental effects" of proposed alternate highway locations and de-
signs.63 It provides for a "corridor public hearing" before a highway route

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15663 (1968), led to opposition by all fifty governors. Among the changes made in the
final version was the deletion of an explicit procedure for appeal, to Washington, of
field approvals of corridor locations and hearing. It was made clear, however, that
the earlier practice, under which informal appeals to Washington were permitted,
location is approved, and again, after route selection, a "design public hearing" "before the State highway department is committed to a specific design proposal." 64 The PPM sets out a non-exclusive list of such effects:

c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses to the community and to highway users. It includes all such effects that are relevant and applicable to the particular location or design under consideration such as:

(1) Fast, safe and efficient transportation.
(2) National defense.
(3) Economic activity.
(4) Employment.
(5) Recreation and parks.
(6) Fire Protection.
(7) Aesthetics.
(8) Public utilities.
(9) Public health and safety.
(10) Residential and neighborhood character and location.
(11) Religious institutions and practices.
(12) Conduct and financing of Government (including effect on local tax base and social service costs).
(13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
(14) Natural and historic landmarks.
(15) Noise, and air and water pollution.
(16) Property values.
(17) Multiple use of space.
(18) Replacement housing.
(19) Education (including disruption of school district operations).
(20) Displacement of families and businesses.
(21) Engineering, right-of-way and construction costs of the project and related facilities.
(22) Maintenance and operating costs of the project and related facilities.
(23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion. This list of effects is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design. 65

64. Id. ¶¶ 4a, b.
65. Id. ¶ 4c. This was not the first requirement by BPR designed to protect environmental values. Previous efforts had, however, emphasized techniques of "coordination" with other officials rather than of "analysis" and public participation, and
Perhaps even more important, the PPM provides in the fifth paragraph:

a. When a State highway department begins considering the development or improvement of a traffic corridor in a particular area, it shall solicit the views of that State's resources, recreation, and planning agencies, and of those Federal agencies and local public officials and agencies, and public advisory groups which the State highway department knows or believes might be interested in or affected by the development or improvement. The State highway department shall establish and maintain a list upon which any Federal agency, local public official or public advisory group may enroll, upon its request, to receive notice of projects in any area specified by that agency, official, or group. The State highway departments are also encouraged to establish a list upon which other persons and groups interested in highway corridor locations may enroll in order to have their views considered. If the corridor affects another State, views shall also be solicited from the appropriate agencies within that State. All written views received as a result of coordination under this paragraph must be made available to the public as a part of the public hearing procedures set forth in paragraph 8.

b. Other public hearings or informal public meetings, clearly identified as such, may be desirable either before the study of alternate routes in the corridor begins or as it progresses to inform the public about highway proposals and to obtain information from the public which might affect the scope of the study or the choice of alternatives to be considered, and which might aid in identification of critical social, economic and environmental effects at a stage permitting maximum consideration of these effects. State highway departments are encouraged to hold such a hearing or meeting whenever that action would further the objectives of this PPM or would otherwise serve the public interest. (Emphasis added).

The ultimate nub of the PPM's requirements, and a promising point of departure as to a state highway department's compliance, is contained in the ninth and tenth paragraphs:

State highway departments shall consider social, economic and environmental effects before submission of requests for location or design approval, whether or not a public hearing has been held. Consideration of social economic, and environmental effects shall include an analysis of information submitted to the State highway department in connection with public hearings or in response

had been particularly sensitive to the interests of hunters and sports fishermen. See, e.g., BPR Instructional Memorandum 21-5-63, June 12, 1963, entitled "Coordination of public interests of highway improvements with those of fish and wildlife resources," and BPR Circular Memorandum of May 25, 1964, entitled "Protection or improvement of public recreational resources and historical resources."
to the notice of the location or design for which a State highway department intends to request approval. It shall also include consideration of information developed by the State highway department or gained from other contacts with interested persons or groups...

Each request by a State highway department for approval of a route location or highway design must include a study report containing the following:

1. Descriptions of the alternatives considered and a discussion of the anticipated social, economic, and environmental effects of the alternatives, pointing out the significant differences and the reasons supporting the proposed location or design. In addition, the report must include an analysis of the relative consistency of the alternatives with the goals and objectives of any urban plan that has been adopted by the community concerned.

   a. Location study reports must describe the termini, the general type of facility, the nature of the service which the highway is intended to provide, and other major features of the alternative.

   b. Design study reports must describe essential elements such as design standards, number of traffic lanes, access control features, general horizontal and vertical alignment, right-of-way requirements and location of bridges, interchanges, and other structures.

2. Appropriate maps or drawings of the location or design for which approval is requested.

3. A summary and analysis of the views received concerning the proposed undertaking.

4. A list of any prior studies relevant to the undertaking.

c. At the time it requests approval under this paragraph, each State highway department shall publish in a newspaper meeting the requirements of paragraph 8.a.(1), a notice describing the location or design, or both, for which it is requesting approval. The notice shall include a narrative description of the location or design. Where practicable, the inclusion of a map or sketch of that location or design is desirable. In any event, the publication shall state that such maps or sketches as well as all other information submitted in support of the request for approval is publicly available at a convenient location. (Emphasis added).

However reluctant the courts may be to second-guess an administrative agency on the merits of its operating decisions, it seems probable that they will hold highway departments to the observance of applicable procedures, such as those prescribed in PPM 20-8. It would be possible, of course, for a

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state highway department to defeat the purposes of the memorandum, if it wished to do so, by going through the motions of consultation and hearings.

A curious semantic issue may be noted: for some years BPR has evidenced a preoccupation with the concept that its administrative directives should not be called "regulations". It has not been clear to outsiders what magic was thought to inhere in that word. One practical effect, which may have been a motivating factor, has to do with internal relationships within the departments in which BPR has operated. For example, when BPR was within the Department of Commerce, the function of issuing or reversing federal-aid highway "regulations" was reserved to the Secretary although the Administrator of FHWA could promulgate "policies and procedures." See 23 C.F.R. §§ 1.32, 1.37 (1967). Another motivation may have been a desire to preserve for itself administrative discretion to disregard its own directives, without being subject to review by others. The Comptroller General has opposed at least the latter aspect of this effort. He ruled that policies and procedures of the FHWA have the force and effect of law and are not subject to retroactive waiver. 43 Comp. Gen. 31 (1964).

In D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe, supra, the court of appeals referred to PPM 20-8 as "the Secretary's regulations implementing Section 128. . . . In any case of non-compliance, the Bridge cannot proceed until . . . hearings which conform to the regulations have been held." - F.2d at -.

In the Overton Park opinion, supra, the district court stated, of PPM 20-8:

We recognize the requirement that an administrative agency follow its own procedural regulations. Vitarelli v. Seaton, 359 U.S. 535 (1959). We further assume that the involved Policy and Procedure Memorandum should, for this purpose, be treated as a regulation. While doing so, however, we might say that we have considerable doubt that the Policy and Procedure Memorandum was intended to have the effect of a regulation . . . .

309 F. Supp. 1189. If the court meant by this statement that PPM 20-8 should be treated as a "regulation," despite FHWA's contrary intention, the court's view would appear to be consistent with that of the Comptroller General. A more useful approach may be suggested by Thorpe v. Housing Authority, 393 U.S. 268 (1969), in which the provisions of a "circular" issued by the Department of Housing and Urban Development were held to be binding on a local housing authority, without regard to whether they were called a "regulation," but solely on the basis that they had been issued in accordance with the Department's "general rule-making power" and were intended to be "mandatory." While Thorpe did not involve an attempt to enforce a rule against the issuing agency, it may support the contention that the test for judicial enforcement is not whether a rule was intended to be a "regulation," but whether it was intended to be mandatory. It is entirely clear that PPM 20-8 was intended to be "mandatory," whether or not it was intended to be a "regulation."

In the meantime, as of April 18, 1970, BPR promulgated an amendment to 23 C.F.R. § 1.32, stating that "[n]o such direction, policy, rule, procedure or interpretation contained in a Federal Highway Administration order or memorandum shall be considered a regulation or create any right or privilege not specifically stated therein." 35 Fed. Reg. 6322 (1970). It is doubtful that the courts would tolerate an agency's attempt to shield itself from judicial review by such rulemaking, especially in view of the Supreme Court's "generous" treatment of claims to judicial review under Section 10(a) of the APA, which provides that a "person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (Supp. V, 1970). See, e.g., Tooahnippah v. Hickel, 397 U.S. 598 (1970); City of Chicago v. United States, 396 U.S. 162 (1969); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The amendment to § 1.32 does provide that indices to FHWA orders, PPM's, etc., may be obtained from the Office of the FHWA Records Officer, 1717 H St., N.W., Washington 20591, and that copies are available for inspection at the facilities listed in 49 C.F.R., pt. 7, app. D (1970).
By the adroit construction of a record purporting to reflect an "analysis" of the views received, the department might insulate itself from attack on grounds of procedural insufficiencies, while at the same time giving little weight in fact to the views of the outsiders who were "consulted" or who appeared at hearings.

Fortunately, the degree of sophistication necessary in order to develop a plausible record by such maneuverings has not yet characterized the paperwork of most state highway departments. This may be attributable to a widespread reluctance on the part of highway officials to use their own lawyers, which leads to mixed results in terms of the public interest. On the one hand the public can suffer if engineers who try to be their own lawyers delude themselves as to the meaning of applicable legal requirements. On the other hand the record produced by this process can be a joy to litigants, if sufficiently effective use is made of discovery techniques.

It is in the area of "analysis" of opposing suggestions that the existing process is probably most vulnerable to impeachment. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, for instance, the district court discussed a problem in connection with the state's transcript of the hearing under PPM 20-8. The tape recorder had broken, so the testimony of some of the witnesses was not included in the transcript. The court agreed, however, that "the opportunity to file written statements later constituted a substantial compliance . . . ." It does not appear from the opinion, however, whether the "analysis" required to be furnished by the state highway department was forwarded before or after the deadline for receipt of the written statements, or whether the "analysis" adequately discussed the points raised by the witnesses whose testimony was omitted from the transcript. For instance, one of the witnesses whose testimony was lost due to the defective recorder was a responsible federal government official, an assistant director of the Bureau of Outdoor Recreation of the Department of the Interior. He urged that the road not go through Overton Park at all, but if there were no alternative, that the road be either tunnelled or completely depressed with platform "lids." The tunneling alternative was said to cost an additional

67. The mechanism for such delusion is complex. The individuals involved are typically literate, subjectively earnest, experienced in the workings of politics and of administrative processes, and well-informed about the intentions of proponents of their program, including the legislative committees which sponsor their legislation. Without legal guidance they are ill-equipped, however, to gauge the significance of cross-currents in the legislative process, or of developments in judicial attitudes which will require changes in the methods of administration to which they have become accustomed.


69. Id. at 1193.
$107 million, and was apparently considered unreasonable by the judge.\textsuperscript{70}
Whatever merits there might be in tunneling, even at such costs,\textsuperscript{71} the court did not discuss what consideration had been given to the alternate suggestion, either in the state highway department's "analysis" or thereafter.\textsuperscript{72}

If properly used by litigants, PPM 20-8 should assist, together with discovery proceedings, in flushing out issues such as this and in ascertaining whether they were in fact considered by state highway departments in the "analysis" which is required, or by the Secretary in the exercise of his functions under Section 4(f).\textsuperscript{73} While the PPM 20-8 hearings presumably satisfy the requirements of Section 128 of Title 23,\textsuperscript{74} they go beyond the requirements of Section 128 in at least two respects: they are not limited to "urban" situations, and they require separate hearings as a prerequisite to corridor selection and again before design approval.

\textit{Organization in the Office of the Secretary}

The professional organization for carrying out highway program operations in DOT is contained in FHWA. However, to assure that environmental questions are properly coordinated between the highway program, other operations of DOT and other government agencies, and to assist in preparing the Secretary for his personal review of such questions, a staff for environmental affairs is maintained in the office of the Secretary. Such a staff was established by Secretary Boyd as his Office of Environmental Impact.\textsuperscript{75} Under Secretary Volpe the environmental responsibility has been upgraded and expanded and a new position has been created: Assistant Secretary for Environment and Urban Systems. The Secretary has ordered that all mat-

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 1195.
\item \textsuperscript{71} Some urban freeways cost $20 million per mile. Perhaps the equivalent of five miles of freeway cost is not unreasonable for a technique which can both save a major park and avoid the destruction to housing which an alternate route might entail.
\item \textsuperscript{72} The protection of serious park values in this case depended on whether a semi-depressed road, lowered as much as possible consistent with natural drainage, should have been approved, as was done, or whether instead the use of mechanical drainage should have been required, thereby permitting complete depression of the road at an extra cost of perhaps $3 million. This is a conventional construction and operational technique for urban freeways, and is used, for instance, on I-95 in Washington, D.C., where the freeway is depressed below the water table level. It was understood that the city engineer of Memphis did not like mechanical drainage. \textit{Quaere}, would such objection justify approval of the project in light of the Secretary's obligation under Section 4(f) of the Department of Transportation Act not to approve the use of parkland in the absence of "all possible planning to minimize harm?" \textit{See} 49 U.S.C. § 1653(f) (Supp. V, 1970).
\item \textsuperscript{73} An additional discussion of PPM 20-8, and related issues, is presented in Williams, \textit{Federal Aid Highway Routing Procedures: a Voice for all Parties, 3 PROSPECTUS 367} (1970).
\item \textsuperscript{74} \textit{See} text accompanying note 60, \textit{supra}.
\item \textsuperscript{75} DOT Press Release No. 14168, December 4, 1968.
\end{itemize}
ters within DOT which may involve Section 4(f) of the Department of Transportation Act or Section 106 of the National Historic Preservation Act of 1966 “must be coordinated” with the new Assistant Secretary (who is also responsible, with the General Counsel, for arranging compliance with the National Environmental Policy Act of 1969).

**Housing Impacts**

A major problem in the routing of urban freeways has been the disruption to residents of housing (usually low-income) in the path of the roads. In 1968 Congress amended Title 23 to provide for an expanded program of relocation benefits for displaced persons. In addition Congress provided:

The Secretary shall not approve any project . . . which will cause the displacement of any person, business or farm operation unless he receives satisfactory assurances from the State Highway department that—

1. fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title;

2. relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and

3. within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.

On February 16, 1970 Secretary Volpe made the following announcement at a special news conference:

The reason for today’s news conference is to announce the Department of Transportation’s new policy involving persons to be displaced by Federal and Federally-assisted construction. The policy, basically, is that projects of the Department of Transportation, will not be approved if they involve the dislocation of people, black or white, unless and until adequate replacement

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76. Memorandum from Secretary of Transportation John A. Volpe to the Assistant Secretaries, General Counsel, and all Administrators, Apr. 25, 1969.
housing has already been built or provided for.

Such housing must conform with the Federal Fair Housing Act.

Each year, Department of Transportation projects displace 70,000 persons, some 50,000 by Federal highway construction alone.

To accomplish the new displacement housing policy, I have set forth three principal points in my directive to Department officials:

1. There must be specific written assurance that inadequate replacement housing will be available (built, if necessary) before the initial approval of any project.

2. Construction will be authorized only upon verification that replacement housing is in place and has been made available to all affected persons.

3. All replacement housing must be fair housing—open to all persons regardless of race, color, religion, sex or national origin.

This policy is one that has received high priority with us for several months now. Originally it was conceived solely in connection with highway construction projects. We recognized quickly, however, that such a policy should be applied across our entire field of responsibility—including aviation, mass transit, railroads and Coast Guard activities also.

Construction of transportation projects can have longlasting environmental, and other impacts on our way of life. We are determined that the great demand for construction capacity that faces this nation will be met, but that it will be met with full consideration given to the extremely important factors of environment and housing. 

There is a serious problem with the administration of this policy: whose money is to be used to build the replacement housing? It has been proposed that highway trust funds be made available for this purpose, and it is expected that such proposals will be considered by Congress in 1970. In the meantime affected residents may be able to challenge construction projects which are undertaken where it is questionable whether "adequate replacement housing has already been built or provided for."

Summary

The new provisions in highway and historic preservation legislation since
1966, together with the National Environmental Policy Act of 1969, establish requirements for a broad consideration of non-transportation social values in the highway planning process.\textsuperscript{82} Related administrative developments, coupled with a progressively responsive reaction in the courts toward requests for judicial review, afford the public (including private citizens, professional associations, and non-highway governmental agencies) significant rights to participate in highway planning and to require consideration of environmental consequences in the course of such planning. Although traditional attitudes and habits of state highway departments may delay accommodation to these changes, such accommodation may be enforced with the assistance of new administrative procedures and organizational arrangements in DOT, and through access to the judiciary.

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\textsuperscript{82} Other provisions may have a similar effect. For example, 23 U.S.C. § 134 (Supp. V, 1970) requires that transportation projects in urban areas of more than fifty thousand population be "based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities." 23 U.S.C. § 109 (Supp. V, 1970) requires that highway plans "adequately meet traffic needs . . . in a manner conducive to safety, durability, and economy of maintenance . . . and to conform to the particular needs of each locality." Plaintiffs in the Three Sisters Bridge case argued, unsuccessfully in the District Court, that this required consideration of air pollution effects of the proposed project, D.C. Fed'n of Civic Ass'ns v. Volpe, Civil No. 2821-69 (D.D.C., Aug. 3, 1970). A relatively unsuccessful related effort was initiated under the Highway Beautification Act of 1965 for billboard control and junkyard control, together with a more effective program for landscaping and scenic easements. 23 U.S.C. §§ 131, 136, 319 (Supp. V, 1970).
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Mrs. Johnson reviews the major provisions of the Highway Beautification Act of 1965, the recent restudy, and the currently proposed amendments to the Act, which are now before the House. She then attempts to measure the impact of the Highway Beautification Act on the urban environment. Generally, the Act has shown more concern with rural than with urban needs, and rightly so, as the author presents the argument, because cities have greater resources to control roadside clutter on their own.

The author recommends a program of state and local legislation and regulation which would include: coordination of land-use planning by adjoining communities; an end to the comprehensive zoning techniques which perpetuate so-called “garbage-can districts”; amortization techniques for the gradual elimination of non-conforming uses and structures; performance standards, rewarding high quality development; borrowing of the concept of scenic easement from the rural highways; tax incentives encouraging open space land use (parks, malls, pedestrian lanes); and urban highway corridor zoning to prevent disorderly commercial and residential development. The author contends that a national zoning policy, imposed by federal legislation, would be a poor cure for inadequate local zoning standards. She admits, nonetheless, that some federal action may be necessary to remedy urban blight caused by junkyards and billboards if local zoning authorities remain unresponsive.