THE FEDERAL PARTNERSHIP CONTROVERSY AND THE APPLICABILITY OF NEPA

The National Environmental Policy Act of 1969[1] (NEPA) was implemented "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment . . . ."[2] Effectuation of this policy is dependent upon the "action-forcing" provisions of NEPA.[3] One section directs federal agencies to submit an environmental impact statement[4] on all "major Federal actions significantly affecting the quality of the human environment . . . ."[5] The environmental impact statement requirement is chief

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THE FOLLOWING CITATION WILL BE USED IN THIS NOTE:
F. ANDERSON, NEPA IN THE COURTS (1973) [hereinafter cited as F. ANDERSON].

1. 42 U.S.C. §§ 4321 *et seq.* (1970).

2. *Id.* § 4321. The other stated purposes of NEPA are "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." *Id.*

3. *Id.* § 4332. The Senate Report explains:

> To remedy present shortcomings in the legislative foundation of existing programs, and to establish *action-forcing* procedures which will help to insure that the policies enunciated in section 101 are implemented, section 102 [42 U.S.C. § 4332] authorizes and directs that the existing body of federal law, regulation and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act. S. REP. No. 91-296, 91st Cong., 1st Sess. 19-20 (1969) (emphasis added).

4. 42 U.S.C. § 4332(2)(C) (1970). Environmental impact statements serve the dual purpose of making federal agencies internalize in their decision-making processes the potential environmental consequences of proposed projects, and of providing information to those external to the decision-making process. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971). The regulations propounded by the Council on Environmental Quality (CEQ) require that an impact statement describe the proposed action, its probable impact on the environment, unavoidable adverse environmental effects, alternatives to the action, and other, less important criteria. CEQ GUIDELINES, 38 Fed. Reg. 20,550, 20,553-54 (1973).

5. 42 U.S.C. § 4332(2)(C) (1970). This broad phraseology has been much maligned. The courts generally recognize that lack of precision in terminology is unavoidable in a statute which seeks to encompass the protean qualities of the "environment." This has not deterred some, however, from labeling the language "opaque" (City of New York v. United States, 337 F. Supp. 150, 159 (E.D.N.Y. 1972)), or, less generously, as an "infirmity" (Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 880 (D. Ore. 1971)). The court in Julis v. City of Cedar Rapids, 349 F. Supp. 88, 89 (N.D. Iowa 1972), found it necessary to refer to the dictionary for definitional assistance. The consensus appears to be that "[t]he statutory language . . . [is] not susceptible of precise definition." Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 789 (D. Me. 1972).

The legislative history of the Act offers little supplementary interpretive aid to the

among the action-forcing procedures.[6] Failure to file an impact statement, or the submission of an inadequate one, is sufficient ground for an injunction against further agency action on a project,[7] and it is well settled that the injunction might also apply to a nonfederal participant in the same project.[8] The propriety of enjoining the nonfederal party

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statutory language. 2 U.S. CODE CONG. & AD. NEWS 2751-73 (1969). The majority of the legislative history is devoted to considerations other than the critical enforcement procedures for implementing the policy. *See* F. ANDERSON 1-2. *See generally id.* at 10-14.

6. Compliance with this provision is required "to the fullest extent possible." 42 U.S.C. § 4332 (1970). This standard is now recognized as a mandate to the agencies. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *accord*, Scientists' Institute for Pub. Information v. A.E.C., 481 F.2d 1079 (D.C. Cir. 1973); Atlanta Gas Light Co. v. FPC, 476 F.2d 142 (5th Cir. 1973); Davis v. Morton, 469 F.2d 593 (10th Cir. 1973); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 338 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973); Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972).

Federal agencies filed some 3635 impact statements during the first three years of NEPA's existence. F. ANDERSON vii.

7. *See, e.g.*, Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); City of Rye v. Schuler, 355 F. Supp. 17 (S.D.N.Y. 1973); Natural Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972). *See also* Note, *Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline*, 81 YALE L.J. 1592, 1596-97 n.23 (1972).

Substantial economic hardship is likely to result while the injunction remains effective. Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1042 (D.C. Cir. 1973); *see* S. REP. No. 93-61, 93d Cong., 1st Sess. 23, 54-56 (1973), *cited in* Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017, 1022-23 n.6 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3448 (U.S. Feb. 18, 1975). Recognizing that an injunction will idle men and equipment, some courts have permitted construction and other activities to continue pending the issuance of an impact statement. Simmans v. Grant, 370 F. Supp. 5 (S.D. Tex. 1974); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971). Others, however, have contemplated the possibility that substantially completed projects might have to be dismantled to avoid damage to the environment. *See* Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1042 (D.C. Cir. 1973), where the court recognized that such dismantling would be an "extreme step," "only remotely possible or conceivable," but that it might be "the only way we could act to avoid potential damage to the environment . . . ."

8. Ely v. Velde, 497 F.2d 252 (4th Cir. 1974); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973); Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972); *see* Biderman v. Morton, 497 F.2d 1141, 1146-48 (2d Cir. 1974). *But see* Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973); City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).

will depend upon the nature of the relationship which exists between it and the federal participant. This Note will explore the nature of that federal-nonfederal relationship in the context of NEPA. The varying judicial attempts to define the elements comprising the joint venture, or "partnership" which will render NEPA applicable will first be examined. An analysis will then be offered to suggest what the proper determinations of the "nexus" between the federal and nonfederal parties should be. The next sections will consider when the nonfederal party should be permitted to revoke the partnership and thus be released from the obligations imposed by NEPA. This analysis will not necessarily coincide with the means of creating the nexus, and a standard will be proposed to determine when the revocability of a partnership will be consistent with the important public and private interests which might be involved. A scheme of "status quo regulations" will be suggested to provide nonfederal parties with standards by which they may determine when their relationship with the federal government will necessitate compliance with NEPA.

THE CREATION OF THE PARTNERSHIP

As used in this Note, a "partnership" will describe the relationship which has developed between the federal government and a nonfederal party, while jointly engaged in a project, such that both become subject to an injunction pending agency compliance with NEPA. For the parties to be so engaged the action must be anticipated to "significantly affect"[9] environmental quality, and it must be "major."[10]

9. Threshold determinations of "significance" are left to the appropriate agency, subject to judicial review. Courts have applied an "arbitrary and capricious" standard of review in some instances. *See, e.g.*, Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 414 U.S. 877 (1973); Town of Groton v. Laird, 353 F. Supp. 344 (D. Conn. 1972); Citizens for Clean Air v. Corps of Eng'rs, 349 F. Supp. 696 (S.D.N.Y. 1972); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971).

Other courts have applied a "reasonableness" standard. *See, e.g.*, Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973); Simmans v. Grant, 370 F. Supp. 5 (S.D. Tex. 1974).

On the other hand at least three courts have undertaken de novo review. *See, e.g.*, Kisner v. Butz, 350 F. Supp. 310 (N.D.W.Va. 1972); National Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972); Scherr v. Volpe, 336 F. Supp. 886 (N.D. Wis. 1971), *aff'd*, 466 F.2d 1027 (7th Cir. 1972).

The relative expertise of courts, as opposed to agencies, and the scope and policies of NEPA are the more important of the numerous factors involved in the determination of "significance." *See generally* F. ANDERSON 104-05; Karp, *NEPA: Major Federal Action Significantly Affecting the Quality of the Human Environment*, 11 AM. BUS. L.J. 209 (1974); Note, *Judicial Review, Delegation, and Public Hearings Under NEPA*, 1974 DUKE L.J. 423, 425-30.

10. The qualifying word "major" was inserted to emphasize that not all federal

Since NEPA imposes no direct obligations on states or private individuals,[11] it is the "federal" nature of the project which will ultimately subject the nonfederal partner to the statutory mandates.[12] It is "beyond challenge" that "reasonable conditions" may be imposed upon recipients of federal assistance,[13] and the partnership cases certainly fall within this rule. A partnership should be considered to be founded on notions of consent,[14] and the term will thus be restricted to those types of actions where federal involvement is not obligatory and the nonfederal party has made a voluntary request for federal funding or other aid.[15]

In seeking to define the elements which establish a partnership between a federal agency and a state or private party, a number of courts have sought a specific "critical" action or stage during the joint project to determine whether NEPA is applicable.[16] The critical action analysis is premised on the notion that a particular type of assistance or stage of development on a project can be isolated, such that prior

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actions are within the contemplation of NEPA. Julis v. City of Cedar Rapids, 349 F. Supp. 88, 89 (N.D. Iowa 1972). A "federal action that requires substantial planning, time, resources or expenditure" might be considered "major" (Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972)), but this standard is best employed as one of a number of factors to be evaluated on a "case-by-case determination." Simmans v. Grant, 370 F. Supp. 5, 13 (S.D. Tex. 1974). The gamut of actions and cases concerned with this issue is extensive. *See* F. ANDERSON 73-89; 26 S.C.L. REV. 119, 135-36 nn.82 & 83 (1974).

11. Biderman v. Morton, 497 F.2d 1141, 1146-47 (2d Cir. 1974).

12. *See* City of Boston v. Volpe, 464 F.2d 254, 257-58 (1st Cir. 1972), where the court was confronted with a major action which would significantly affect the environment, but paused to note that "before we face the validity of any federal action subject to the National Environment Policy Act . . . we must ask whether the action now being taken by the [Massachusetts] Port Authority and sought to be enjoined by Boston is yet a *federal* action." (Emphasis added.)

13. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).

14. Ely v. Velde, 497 F.2d 252, 256 (4th Cir. 1974); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1329 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013, 1028 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 146 (N.D. Ga. 1971).

15. *See generally* F. ANDERSON 57-61. Where action cannot lawfully begin or continue without the issuance of a federal license or permit, such action can be enjoined pending the filing of an environmental impact statement by the licensing agency. This type of case will not be considered by this Note.

16. *See, e.g.*, Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973); City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971), *cert. denied*, 409 U.S. 890 (1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973); *cf.* San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973).

The effect of finding a partnership is to make the nonfederal party subject to an injunction if the federal party does not comply with NEPA.

activity may be allowed to proceed without consideration of the NEPA requirements,[17] but after which all phases of the project must conform to the dictates of the statute if federal participation is to be permitted. The approach thus grants almost exclusive early decision-making responsibility to the nonfederal agent in that "gray area" of cases where no substantial federal assistance has yet been sought, but where the option to obtain that aid remains open.[18] It is justified on the proposition that it would be impractical to require significant federal expenditure of planning funds on a project which is still so indefinite or tentative that it may never ripen into a "major Federal action,"[19] The unavoidable risk, however, is that, pending the critical stage which will transform the project into a "major Federal action,"[20] there will have occurred action "significantly affecting the quality of the human environment"[21]—a contingency over which the federal party will have no control.[22]

Federal aid highway projects have been considered amenable to a critical stage analysis for determining the creation of a partnership between the state highway department and the Federal Highway Administration (FHWA). States are, of course, under no obligations to seek federal funding of their highway systems. They may seek such assistance pursuant to the Federal Aid Highway Act[23] by obtaining federal approval of various stages of highway design and construction.[24] The state must first approve a potential corridor for the situs of the highway, to be followed by a public hearing which will provide the necessary economic, social, and environmental data to be used in selecting a definite corridor.[25] The first federal decision, and the initial action

17. These requirements include considering alternative courses of action and irreversible resource commitments. 42 U.S.C. §§ 4332(2)(C) (iii), (v) (1970).

18. Indian Lookout Alliance v. Volpe, 484 F.2d 11, 16 (8th Cir. 1973). Initial planning decisions or other action undertaken prior to federal involvement could define the course of the project such that subsequent planning changes could no longer be made. Irreversible environmental impact based on early decisions could also effectively preclude federal participation in the project. See notes 21 & 22 *infra* and accompanying text.

19. 484 F.2d at 17; City of Boston v. Volpe, 464 F.2d 254, 258 (1st Cir. 1972) (declining to apply NEPA to state action because only a "tentative allocation" of federal funds had been made).

20. 42 U.S.C. § 4332(2)(C) (1970).

21. *Id.*

22. City of Boston v. Volpe, 464 F.2d 254, 259-60 (1st Cir. 1972).

23. 23 U.S.C. §§ 101 *et seq.* (1970).

24. *Id.* § 103; *see* Peterson & Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ENVIRONMENTAL L. REP. 50001 (1972).

25. 23 U.S.C. § 128 (1970). The state highway department must certify to the

necessary to qualify a state for federal funds, occurs at location approval. At this stage a route within the previously defined corridor is established. Following this first instance of federal consent, various designs, plans, specifications, and estimates must also earn federal approval.[26] The highway project is deemed to be a contractual obligation of the federal government upon the subsequent approval of the Secretary of Transportation.[27] After the final stage, which is construction approval, federal funds become available to the state.[28]

In determining at which of these various stages the state-federal partnership has materialized, so that the project thereafter must be considered "federal" for NEPA purposes, courts have treated location approval[29] as the "critical stage."[30] The selection of location approval as an index of sufficient federal involvement to establish a partnership can be justified by a number of policy considerations. Prior to that time there is little threat of damage to the environment, as no specific route in the approved corridor has been determined. Early federal control is desirable because of the severe impact which a highway is certain to have on the environment. The extremely strong congressional statements against environmental destruction in both NEPA[31] and the Federal Aid Highway Act[32] justify invoking NEPA at the initial federal decision in the highway plan. Delaying recognition of the partnership until a later stage would overlook one of the fundamental purposes of the environmental impact statement—the consideration of potentially detrimental consequences of a project *before* they develop.[33] Earlier recognition might result in needless federal expenditures.[34]

Secretary of Transportation that it has held the public hearings and has considered economic and social effects of the location, its impact on the environment, and other factors.

26. *Id.* § 106.

27. *Id.* § 106(a).

28. *Id.* § 118.

29. La Raza Unida v. Volpe, 337 F. Supp. 221, 228 (N.D. Cal. 1971), *cert. denied*, 409 U.S. 890 (1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973); *accord*, Indian Lookout Alliance v. Volpe, 484 F.2d 11, 16 (8th Cir. 1973); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); *see* Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); City of Rye v. Schuler, 355 F. Supp. 17 (S.D.N.Y. 1973). No statutory provision or agency regulation mandates that NEPA relate to location approval. *See also* Peterson & Kennan, *supra* note 24, at 50015-17.

30. Indian Lookout Alliance v. Volpe, 484 F.2d 11, 16 (8th Cir. 1973).

31. 42 U.S.C. § 4331 (1970).

32. 23 U.S.C. § 138 (1970).

33. "It does little good to shut the barn doors after all the horses have run away." La Raza Unida v. Volpe, 337 F. Supp. 221, 231 (N.D. Cal. 1971) *cert. denied*, 409 U.S. 890 (1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973). See note 4 *supra*.

34. The *Indian Lookout Alliance* court observed:

The first federal decision involved in approval of a state highway program is

These underlying principles amply justify the selection of location approval as determinative of the partnership, and it is apparent that the policy reasons, rather than the easy shibboleth of "critical stage," should be relied upon for precedential value. To do otherwise would be to encourage a lax approach to judicial and agency decision-making, and to threaten the extension of the rigid critical stage philosophy beyond appropriate bounds.

The search for a single critical action by which a federal-nonfederal partnership might be identified has not been limited to the federal aid highway cases. In *City of Boston v. Volpe*[35] a similar rationale was applied to a controversy involving airport construction. An injunction was sought to restrain the Massachusetts Port Authority from continuing construction of a runway pending the filing of an environmental impact statement by the Department of Transportation (DOT) and the Federal Aviation Administration (FAA), the agencies which had given their general approval for the layout of the airport. Since the injunction was sought against the Port Authority, and not against the federal agencies, the issue was whether construction of the runway was a "federal action" subject to NEPA.[36]

The court declined to enjoin the state agency from continuing construction. Neither prior federal involvement with other portions of the airport[37] nor the expectation of FAA funds for another stretch of taxiway made the runway under consideration a federal project. The critical determinant proved to be that the FAA had made only a "tentative allocation"[38] of aid to the Port Authority, and the "single decision"[39] to fund the project had not been made. The court concentrated

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granting location approval. Before that time the FHWA has no control over subsequent state action that might affect the plan. It would be impractical to require the expenditure of considerable amounts of time and money by the federal government on indefinite or tentative proposals before it can be said that they have become a major federal action. 484 F.2d at 17.

35. 464 F.2d 254 (1st Cir. 1972).

36. *Id.* at 257. See note 12 *supra* and accompanying text.

37. An unconnected runway in a different section of the same airport, financed by federal funds, was held not to be "so interrelated" with the proposed taxiway to federalize the latter. "We do not accept the general proposition that once the federal government has participated in a development, that development is necessarily forever federal." *Id.* at 258.

38. *Id.* FAA regulations provide:

> If the [federal] Administrator selects a proposed [airport development] project for inclusion in a program, a *tentative allocation* of funds is made for it and the sponsor is notified of the allocation. The tentative allocation may be withdrawn if the sponsor fails to submit an acceptable project application . . . . 14 C.F.R. § 151.21(b) (1974) (emphasis added).

39. 464 F.2d at 259; *see* Airport and Airway Development Act of 1970, 49 U.S.C. § 1716 (1970).

almost exclusively on the lack of a funding decision in determining that no partnership had been formulated.

The fundamental objection to such an analysis, and to a critical action orientation in general, is that the federal decision to grant or deny the nonfederal party the requested assistance becomes mere "bald approval or rejection with no opportunity for modification"[40] of the project plans. The likelihood that extensive preparations and investments will be made by the state or private party before the crucial decision is made is greatly increased. Irreversible environmental damage could easily be inflicted during this initial period. This damage could make it impossible for a federal agency to file an acceptable environmental impact statement; thus federal participation would be precluded. The nonfederal party could well be unable to complete the project without the anticipated federal aid, and thereby suffer substantial economic loss. NEPA directly seeks to avoid such shortsightedness with its policy of *preventive* protections[41] and its insistence upon consideration of alternative courses of action.[42] Environmental impact statements, however, must be required and written at a late enough point in the planning of a project to contain meaningful information, but still early enough so that whatever information has been accumulated can contribute to the decision-making process.[43] The achievement of this balance is better served by a more flexible approach than relying upon a single critical action to give rise to the creation of a partnership, before which a project is for all purposes nonfederal and after which it is absolutely federal. The First Circuit, only eight-and-one-half months after rendering its decision in *City of Boston* expressed discontent with the critical action philosophy upon which it had relied. In *Silva v. Romney*[44] the court admitted to

> a sense of growing uneasiness in seeing decisions determining the obligations of federal and non-federal parties under NEPA turn on any

40. 464 F.2d at 260.

41. Senator Jackson, the sponsor of the Senate bill, cited four important new approaches whereby NEPA would be able to deal with environmental problems on a "preventive and an anticipatory" basis as opposed to dealing with "crises" and efforts to reclaim resources already depleted: the declaration of national policies and goals; the procedures for implementing those goals; the establishment of the Council on Environmental Quality (CEQ)—a three-member board appointed by and serving in a purely advisory capacity to the President—and the requirement of an annual environmental quality report, to be submitted to Congress by the President. 115 CONG. REC. 40,416 (1969) (remarks of Senator Jackson).

42. 42 U.S.C. § 4332(2)(C)(iii) (1970).

43. Scientists' Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079, 1094 (D.C. Cir. 1973). See note 34 *supra*.

44. 473 F.2d 287 (1st Cir. 1973).

one interim step in the development of the partnership between the parties. Such an approach unrealistically stresses adventitious factors which bear little relationship to either the broad concerns of NEPA or the interests of the potential grantee, private or public.[45]

In *Silva* a housing project was undertaken by a private developer with a commitment by the Department of Housing and Urban Development (HUD) to provide a mortgage guarantee and an interest grant for the project.[46] Neighborhood residents sought to enjoin construction and the district court granted them preliminary relief as to HUD.[47] On appeal, the First Circuit upheld the district court's holding that not only could an injunction be issued to prevent HUD from financing the project, but that the private developer could properly be enjoined from cutting trees and conducting other construction activities pending the issuance of an impact statement.[48]

In analyzing the considerations involved in the creation of the partnership between the developer and HUD, the court declined to rely on any single critical action. It instead examined what it identified as the overall "nexus"[49] which had developed between the parties. The court considered the "180-day commitment" issued by the Federal Housing Authority (FHA) which created a contract between the Authority and the developer, and the approval of the project by HUD as federal action which was "so extensive"[50] that the nonfederal partner could readily be enjoined from further activity. However real the differences were between *City of Boston* and *Silva*,[51] the analytical shift from the critical action approach to an examination of the

45. *Id.* at 290.

46. The Forest Glen housing project, on which some construction had begun, was to be located on approximately eleven acres of undeveloped woodland in Stoughton, Massachusetts. HUD made a mortgage guarantee in the amount of $4,000,000 and an interest grant of $156,000. The project was to include 138 dwelling units which would provide housing for between 450 and 475 persons. Silva v. Romney, 342 F. Supp. 783, 784 (D. Mass. 1972), *vacated*, 473 F.2d 287 (1st Cir. 1973).

47. *Id.* at 785.

48. 473 F.2d at 290. The court vacated the order, however, and remanded the case on other grounds. The case is still being litigated. The latest reported decision held that HUD had filed an inadequate impact statement and that thus the project could not proceed. Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973).

49. 473 F.2d at 290.

50. *Id.* The court emphasized that it was not relying on the "critical action" of the execution of the contract to establish the partnership:

> [T]he mere fact that a binding contract has been entered into between HUD and the developer is but one manifestation of and quite irrelevant to an ongoing planning process by all parties to the project which must provide for the reasonable expectations of the parties. *Id.* at 290-91.

51. These differences have been described by some as "artificial." *See, e.g.*, F. ANDERSON 72; 8 SUFFOLK U.L. REV. 251, 256-59 (1974).

overall nexus between the parties in the latter case represents a welcome development in defining the determinants of a partnership.

Typifying the nexus analysis of the partnership relation is *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department.*[52] The controversy centered about the "North Expressway", which was to be a federal aid highway through the city of San Antonio.[53] A citizens' group appealed to the Department of Transportion, and other federal agencies, to persuade the Secretary of Transportation to withhold approval of the Expressway since the proposed routing would have taken it through portions of the city's Brackenridge-Olmos Basin Parklands.[54] The Secretary agreed to withhold approval of this "middle segment" of roadway pending a study of possible alternative routes, and of the detrimental effects which would befall the park. When the Texas Highway Department declined to make the study, withdrawal of federal approval of the "end segments" to the north and south of the parklands was forthcoming.

In 1970 an agreement was reached whereby federal approval would be given to the end segments while alternatives to the middle segment, through the park, would be studied. No impact statement had been filed and construction was again ordered enjoined. The court rejected the state's argument that since no funds had changed hands for the middle segment, the critical determinant which would make the

52. 466 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).

53. Planning of the roadway began in the 1950's, and the state settled on the proposed route in 1963. The City of San Antonio then spent several years acquiring portions of the proposed right of way, and not until 1967 did the San Antonio Conservation Society request the City Council to seek rerouting to avoid parklands. The federal government was to share in fifty percent of the project's cost—estimated to be approximately $18,000,000. There was no question of "retroactive" application of NEPA because of post-1970 federal funding authorizatious. 466 F.2d at 1014-16, 1025. For a discussion of a case dealing with the possible retroactive application of NEPA, see note 61 *infra.*

54. The parklands provided open spaces and a scenic recreation spot in the middle of densely populated San Antonio. Although there was a factual dispute concerning the exact area of parkland threatened by the expressway, the court estimated it to be between 116 and 250 acres. 446 F.2d at 1020. In addition to the NEPA protections, section 18(a) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 (1970), and section 18(b) of the Federal Aid Highway Act of 1968, 49 U.S.C. § 1653(f) (1970), espoused, in identical terms, strong policies against despoliation of parklands:

> 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 . . . . [T]he Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park . . . of national, State, or local significance . . . 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 park . . . resulting from such use.

Expressway a "federal" project was lacking.[55] The court instead examined the several factors contributing to the state-federal nexus and concluded that the injunction could apply to the Texas Highway Department as a partner to the project. With particular emphasis on the voluntary nature of the state's engagement of the federal agency,[56] the court noted several specific elements which intertwined to form the nexus and thus to create the partnership. Important considerations included the Secretary of Transportation's authorization of federal participation, the completion of more than one-third of the southern segment of roadway, and the advertisement and letting of contracts premised on federal participation in the highway project.[57] The nexus approach was affirmed despite the invitation to base the decision on the "critical" commitment of federal funding.

Application of a nexus analysis to the creation of a partnership between federal and nonfederal participants in a project is to be preferred for a number of reasons. By necessity the courts must exercise discretion in interpreting the language "major Federal actions significantly affecting the quality of the human environment."[58] The nexus approach is inherently more flexible than scrutinizing a project to find a single "critical action" which will elicit the NEPA imperatives. Flexbility in determining the appropriate time at which a partnership should be deemed to be created is necessary to furnish appropriate safeguards to NEPA's environmental policy and to protect the interests of the parties undertaking the project. Reliance upon an invariant criterion, such as a funding decision or the formal execution of a contract, to make the determination "unrealistically stresses adventitious factors"[59] which the increased stability offered by the critical action analysis cannot counterbalance.

The nexus analysis will better serve environmental policy by allowing courts to exercise discretion, commensurate with the breadth of NEPA, "on a case-by-case" basis.[60] Examination of the partnership demands intensive scrutiny within the context of NEPA[61] be-

55. 446 F.2d at 1028.

56. *Id.*

57. *Id.*

58. 42 U.S.C. § 4332(2)(C) (1970). See note 5 *supra.*

59. Silva v. Romney, 473 F.2d 287, 290 (1st Cir. 1973). See text accompanying note 45 *supra.*

60. Simmans v. Grant, 370 F. Supp. 5, 13 (S.D. Tex. 1974).

61. Judge Coffin in his concurring opinion in Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973), observed:

> [W]here important and overriding public concerns are manifested in statutes like NEPA which are meant to have sweeping application and which cannot be said to confer any primary benefits on the United States as a contract party

cause of the vital national goals[62] which it was enacted to achieve.[63] The selection of a critical action to trigger the application of NEPA implies that some particularly significant decision has been made which effectuates the Act. This approach ignores "the effect of many Federal decisions about a project or complex of projects [which] can be individually limited but cumulatively considerable."[64] The use of a single criterion for defining the partnership cannot adapt to the "controversial"[65] cases where the potential impact on the environment is likely to be particularly "significant."[66] The nexus approach, however, can be adapted to the vagaries of the statutory language and to situational anomalies. It enlarges the judicial inquiry into a study of the cumulative impact of a number of individually insignificant decisions and of the "further actions contemplated"[67] by an agency instead of concentrating on past "critical" actions.

The federal and nonfederal parties will both benefit from the

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. . . compliance with these new laws is a necessary appurtenance to the partnership status of the nonfederal contracting party . . . . *Id.* at 895.

In *Jones*, the First Circuit remanded the case because the district court had not explored beyond the initial execution of a federal loan and capital grant contract, which had been executed before the effective date of NEPA, to make inquiries concerning post-NEPA federal action. *Id.* at 892-93.

62. "[A] concept of partnership . . . implies a reasonable reservation of powers in any federal-nonfederal contract to achieve vital national goals." *Id.* at 894. That the purposes and policies of NEPA (42 U.S.C. §§ 4321, 4331 (1970)) are "critical" (*id.* § 4331(a); S. REP. No. 91-296, 91st Cong., 1st Sess. 8 (1969)) and that the procedural requirements are to be enforced "to the fullest extent possible" (42 U.S.C. § 4332 (1970)), is beyond cavil.

63. "[The judicial] duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

64. CEQ GUIDELINES, 38 Fed. Reg. 20,550, 20,551 (1973); *see* Citizens Organized to Defend the Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (S.D. Ohio 1972) ("[a] ripple begun in one small corner of an environment may become a wave threatening the quality of the total environment"). *See also* Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 367 (E.D.N.C. 1972); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879-80 (D. Ore. 1971).

65. *See* CEQ GUIDELINES, 38 Fed. Reg. 20,550, 20,551 (1973): "Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases."

66. *See* Simmans v. Grant, 370 F. Supp. 5, 13 (S.D. Tex. 1974) ("the issue as to whether a project is 'major' or involves a 'significant' impact are not necessarily unrelated"). *See also* Citizens for Balanced Environment & Transp., Inc. v. Volpe, No. 74-1730, at 5462 (2d Cir., Sept. 16, 1974) (the dissenting opinion in this highway case suggested that when application of NEPA turns on a "close question" concerning whether a project should be considered "federal," consideration should be giveu to whether or not it involves a "major" undertaking and whether its impact on the environment will be "significant"); 26 S.C.L. REV. 119, 134 (1974).

67. CEQ GUIDELINES, 38 Fed. Reg. 20,550, 20,551 (1973).

application of a nexus analysis to their relationship instead of a critical action test. The latter approach inadequately protects against the possibility that a number of cumulative actions will have preceded the "critical" one, so that the federal decision to provide further aid becomes little more than "bald approval or rejection."[68] To guard against arbitrary agency action at the time when the decision is to be made the courts should be free to anticipate that several "pre-critical" action determinants will combine to form a partnership nexus and to require that the agency prepare an impact statement and consider alternative courses of action while the nexus is developing. The nonfederal party would thereby be made aware of the contingencies upon which it could obtain federal aid without the attendant risk of forfeiting a substantial investment when a single "critical" decision, such as to fund or not, is finally announced.[69] The flexibility of the nexus analysis complements the "broad concerns" of NEPA and the individual interests of the parties to a project.[70] It's advantages override whatever stability and simplicity which might be offered by the critical action approach to the creation of a partnership.

THE REVOCABILITY CONTROVERSY

The NEPA action-forcing procedures apply only to "major *Federal* actions"[71] which significantly affect the quality of the environment. They do not impose direct duties on states or private parties.[72] This section of the Note will discuss the issues raised by the attempt of a nonfederal partner to divest an enterprise of its federal character by renouncing the federal aid which established the joint venture and by declaring its intention to revoke the partnership. When an action is enjoined because of non-compliance with NEPA the revocability controversy will arise if the nonfederal party, to avoid the injunction, wishes to proceed on the project independently. The existence of sufficient federal action to create the partnership nexus will not necessarily be conclusive on the issue of revocability. The nexus determinants will, however, prove to be highly interrelated.

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68. City of Boston v. Volpe, 464 F.2d 254, 260 (1st Cir. 1972). See text accompanying note 40 *supra*.

69. *See* Silva v. Romney, 473 F.2d 287, 291 (1st Cir. 1973). The risk to the nonfederal party is that the project, while otherwise qualified to receive funding, could not be federally financed because of irregularities which would have been considered and corrected by preparation of an impact statement.

70. City of Boston v. Volpe, 464 F.2d 254, 260 (1st Cir. 1972). See text accompanying note 40 *supra*.

71. 42 U.S.C. § 4332(2)(C) (1970) (emphasis added).

72. See note 11 *supra* and accompanying text.

One of the first reported attempts of partnership revocation is found in the case of *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department.*[73] The Texas Highway Department announced that it was withdrawing its request for federal funds for a highway on which construction had been enjoined because of NEPA violations and that it would build the highway "with 100% state money if necessary."[74] The state declared that it was "absolutely committed"[75] to building the expressway along the proposed route since the southern segment of the road was nearly one-third complete, millions of dollars had been spent acquiring the right of way, and construction contracts had been awarded. To have abandoned the project at that stage, the state urged, would have resulted in damage suits and the forfeiture of investments in the construction whieh had already begun.[76] The Fifth Circuit rejected these arguments, likening the attempt to proceed independently to the "circumvention of an Act of Congress,"[77] and found that the state-federal partnership[78] had become *irrevocable.*

At the time the partnership had been created the state highway department was bound to abide by the NEPA requirements. The nonfederal partner thus became subject to injunction when the statute was violated through failure to file an impact statement. The court refused to recognize the renunciation of funds as revoking the partnership. Instead it considered the many additional factors which were important in creating the partnership nexus and which were decisive in the determination that the nexus could no longer be reversed. The state had voluntarily sought the federal assistance and had elicited federal participation in constructing a substantial part of the southern section of the highway. The state had also advertised the project and let contracts on it premised on Department of Transportation (DOT) involvement.[79] The court's conclusion that the state was no longer free to renounce the partnership was made in forceful language:

> [T]he North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those

73. 446 F.2d 1013 (5th Cir. 1971), *cert. denied,* 406 U.S. 933 (1972). See text accompanying notes 52-59 *supra.*

74. 446 F.2d at 1027.

75. *Id.*

76. *Id.* at 1029 (dissenting opinion).

77. *Id.* at 1027.

78. The court characterized the relationship as an unhappy "marriage" which had produced "an already huge concrete offspring whose existence it is impossible [to] ignore." *Id.* at 1028. The dissent labeled it a mere "proposal," *id.* at 1029, but the majority view appears to be more realistic.

79. *Id.* at 1028.

laws. The supremacy of federal law has been recognized as a principle of our Government since the birth of the Republic. . . . The State may not subvert that principle by a mere change in bookkeeping or by shifting funds from one project to another.[80]

Three years later the court was forced to allow construction on the expressway to proceed,[81] since the application of NEPA was precluded by the passage of section 154 of the Federal Aid Highway Act of 1973.[82] That provision expressly severed all federal connections with the San Antonio North Expressway upon repayment of the federal aid funds to the United States Treasury by the State of Texas.[83] Absent

80. *Id.* at 1027.

81. Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3448 (U.S. Feb. 18, 1975).

82. Section 154, Pub. L. No. 93-87 (Aug. 13, 1973). Section 154 provides:

(a) Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project.

(b) The amount of all Federal-aid highway funds paid on account of sections of the San Antonio North Expressway . . . shall be repaid to the Treasurer of the United States . . . .

83. Section 154 was retained as a rider to the Federal-Aid Highway Act when an amendment proposed by Senator Buckley to strike the section was defeated. *See* 118 CONG. REC. S 14,839-46 (daily ed. Sept. 13, 1972). The Senators from Texas defended the "uniqueness" of the San Antonio situation (*id.* at S 14,841-42, S 14,845 (remarks of Senator Bentsen)), although in reality the facts represented as "unique" were that San Antonio stood to lose substantial monetary investments and faced four and one-half million dollars worth of damage suits because construction of the highway had been halted due to its noncompliance with federal law and that it was now willing to reimburse federal funds to avert those losses.

Senator Bentsen stated that "[t]he people of San Antonio voted on a bond issue on this specific project by a vote of 2-to-1 that they thought this is where the freeway should be built." *Id.* at S 14,842. The bond issue had actually passed two years *before* it was decided that the North Expressway would be routed through the park. Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013, 1015 n.1 (5th Cir. 1971), *cert. denied,* 406 U.S. 933 (1972). The Senator's financial statistics ("a $20 million project, and only $1.8 million of it was Federal funds") and geographic figures ("We are talking about a road that cuts across 4 acres of a golf course at the corner of Brackenridge Park. And across 5 acres that were already isolated on the golf course.") were also at variance with the court findings. 118 CONG. REC. S 14,842 (daily ed. Sept. 13, 1972) (remarks of Senator Bentsen). See notes 53-54 *supra.*

The majority report of the Senate Public Works Committee, in justifying the passage of section 154, noted the deterioration of prior construction, the damages pending against the state by contractors, and the "desire" to complete the project with wholly local financing. S. REP. No. 93-61, 93d Cong., 1st Sess. 23, 54-56 (1973), *cited in* Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017, 1022-23 n.6 (5th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3448 (U.S. Feb. 18, 1975). The very fact of the lawsuit, of course, put the "desire" of the people

such congressional intervention, *San Antonio* stands for the proposition that federal participation in a project and the commitments which it fosters (*e.g.*, substantial planning, construction, advertising, letting of subcontracts) might properly lead to the judicial determination that the partnership is irrevocable—that the nexus cannot be unraveled without a serious sacrifice of national environmental policy.[84] The NEPA policies which would be circumvented seem clear. The attendant obligations[85] of a NEPA partnership include the assumption of the duties to consider the environmental impact of the project[86] and alternatives to the proposed action.[87] When, as in *San Antonio*, the nonfederal partner has reaped benefits from a federal agency, its offer to renounce funding in order to escape injunction should not be accepted if the environment has already been "significantly affected" and renunciation of funds will not, of itself, divest the project of its "major federal" character. In *San Antonio* considerable construction had irreparably affected the environment, and the availability of federal funds was but one of the several links of the nexus which had established the partnership. Renunciation of the funds was properly considered an ineffective gesture to avoid the injunction and revoke the partnership.

Purporting to remain true to the *San Antonio* philosophy, yet reaching a different result—that an established state-federal partnership was revocable—were the two cases of *Ely v. Velde*, *Ely I*[88] and *Ely II*.[89] The state of Virginia had planned, as part of an extensive

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of San Antonio at issue. The report stressed that it was "not intended to be an adverse comment on" the prior decision of the Fifth Circuit, and that the "unusual action" was "warranted only because of unusual circumstances." *Id.* For the view that these conditions were neither unusual nor warranted, see 118 CONG. REC. S 14,839-46 (daily ed. Sept. 13, 1972) (remarks of Senators Buckley and Nelson).

Senator Buckley maintained that this legislation would be "the first step in an unending process of undermining on a case-by-case basis the environmental protection statutes which we now recognize as essential to safeguard the country's environment." *Id.* at S 14,839. While it is too soon to determine whether this prediction will be borne out, such piecemeal legislation does seem inconsistent with the comprehensive environmental scheme contemplated by NEPA. Section 154 sets an unfortunate, and hopefully aberrational, precedent regarding national environmental policy.

84. Peterson & Kennan, *supra* note 24, at 50022-23.

85. La Raza Unida v. Volpe, 337 F. Supp. 221, 227 (N.D. Cal. 1971), *cert. denied*, 409 U.S. 890 (1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973): "The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations."

86. 42 U.S.C. § 4332(2)(C)(i) (1970).

87. *Id.* § 4332(2)(C)(iii).

88. Ely v. Velde, 451 F.2d 1130 (4th Cir.), *aff'g in part and rev'g in part* 321 F. Supp. 1088 (E.D. Va. 1971).

89. Ely v. Velde, 497 F.2d 252 (4th Cir. 1974), *rev'g* 363 F. Supp. 277 (E.D. Va. 1973).

modification of its correctional system, to erect a reception and medical center for inmates in the historic community of Green Springs.[90] Pursuant to the Omnibus Crime Control and Safe Streets Act of 1968,[91] the state applied for a federal block grant [92] to be devoted to a number of law enforcement endeavors. Certain funds had been "earmarked"[93] for construction of the center, and the project had been approved by the Law Enforcement Assistance Administration (LEAA) without consideration of either the National Historic Policy Act (NHPA)[94] or NEPA.

Although no federal funds had been drawn upon, citizens of Green Springs obtained an injunction against allocation of federal moneys pending compliance with NHPA and NEPA. In *Ely I* the Court

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90. Green Springs is a culturally rich community in Louisa County, Virginia. Three of the homes there were included on the National Register for Historic Places, as provided in the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (1970) (NHPA). Federal agencies were thus required to consider the effects of any actions supported by federal funding on such residences, prior to the approval of expenditures. *Id.* § 470(f). The proposed medical center would have consisted of at least four buildings, fenced-in, with thirty-foot guard towers. The facility would have housed 400 to 500 inmates, provided a parking lot for 150 cars, and utilized approximately 40,000 gallons of water daily. Ely v. Velde, 451 F.2d 1130, 1134 (4th Cir. 1971).

91. 42 U.S.C. §§ 3701 *et seq.* (1970).

92. The Safe Streets Act declares that "crime is essentially a local problem that must be dealt with by State and local governments" and that, accordingly, congressional policy is "to assist State and local governments in strengthening and improving law enforcement and criminal justice at every level by national assistance." *Id.* § 3701. That assistance takes the form of a "block grant," which by its nature vests broad discretion in the state's plan of allocations. Such a graut is accompanied by a minimum of federal ties. Block grants are awarded on the very broad condition that the state submit a plan "which conforms with the purposes and requirements of" the Safe Streets Act, *id.* § 3733(a), and that plan need only delineate the "direction, scope and general types of improvements to be made in the future," *id.* § 3733(a)(5)(E). Funds can be withheld only if there is a "substantial failure" to comply with these guidelines. *Id.* § 3757.

In *Ely I* the block grant to the state of Virginia from the Law Enforcement Assistance Administration (LEAA) was $4,150,000, of which $775,000 was to be used for the construction of the Center. 451 F.2d at 1132 n.2. By the time *Ely II* reached the courts, federal contributions to construction of the Center were $870,000. 363 F. Supp. at 279. For elaboration on the federal block grant scheme, see *Ely II*, 451 F.2d at 1133 n.8. *See generally* Agnew, *The Case for Revenue Sharing*, 60 GEO. L.J. 7 (1971); Couman, *Grave Doubts About Revenue Sharing*, 60 GEO. L.J. 29 (1971); Strauss, *Revitalizing Our Federal System: The Rationale for Revenue Sharing*, 21 DEPAUL L. REV. 889 (1972). *See also* F. ANDERSON 60-61; 1972 DUKE L.J. 667.

93. *Ely I*, 321 F. Supp. at 1090. This term was used to indicate that in the comprehensive plan filed with LEAA and approved by that agency, specific amounts were designated for construction of the Center. Federal funding would support approximately twenty percent of the construction costs. *Id.*

94. 16 U.S.C. §§ 470 *et seq.* (1970). See note 90 *supra.*

of Appeals for the Fourth Circuit cited the LEAA's "overall involvement"[95] in the center as supportive ground for enjoining the commitment of federal funds,[96] yet refused to enjoin state officials from proceeding with construction on their own.[97] The state, however, did not immediately relinquish its hopes for federal assistance. In order to secure financial aid for the center state officials cooperated with the LEAA in drafting an environmental impact statement. The Virginia legislature appropriated new funds for constructing and equipping the center, at the same time indicating an intent to secure federal revenue for the project.[98] When state and federal reactions proved to be adverse,[99] state penal officials announced that they were requesting with-

95. "[I]n view of the LEAA's overall involvement in the promotion and planning of the Center, as well as the cumulative impact of the proposed federal action, the NEPA definition of 'major federal action' has been satisfied." *Ely I*, 451 F.2d at 1137-38 n.22. In a rather unsatisfactory opinion, which nonetheless seems to have reached a correct conclusion, the Fourth Circuit did not expand upon the "overall involvement" concept, which later gave the district court in *Ely II* difficulty.

In failing to find the necessary "federal aura" the *Ely II* district court observed:

> The Court does not consider these contacts substantial . . . . [T]here has been virtually no federal involvement in the planing of the Medical and Reception Center. The Court reaches this conclusion notwithstanding the comment of Judge Sobeloff . . . concerning "the LEAA's overall involvement in the promotion and planning of the Center." Such comment was made in a different context from that in which the Court presently considers LEAA involvement with the Center. 363 F. Supp. at 287.

Judge Sobeloff's "overall involvement" commeut does seem at variance with the interrelatedness of the creation and revocability of a partuership and inconsistent with the Fourth Circuit's resolution of *Ely II*. See note 107 *infra* and accompanying text.

96. 451 F.2d at 1138. These funds were dispersed to other criminal justice projects not inconsistent with the block grant plan.

97. The *Ely I* court made the erroneous statement that the "short answer" to the applicability of NEPA to the state officials is the fact that "NEPA, by [its] very language, impose[s] no duties on the states and operate[s] only upon federal agencies." 451 F.2d at 1139. *Cf.* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958). See text accompanying note 19 *supra*. It was perhaps meant that NEPA, being a federal statute, imposes no direct duties upon nonfederal entities, a position for which there is ample support. *See* Biderman v. Morton, 497 F.2d 1141, 1146-47 (2d Cir. 1974).

98. Ch. 804, § 28 [1972] Va. Acts of Assembly 1252. "Item 71. Plans and programs, from *special revenues received from the Federal government* . . . . Out of this appropriation $300,000, in addition to the previous allocation of $775,000, shall be allocated to the State Board of Welfare and Institution for the Construction of a Classification Center and Hospital (first phase of the projected plan for a new State Penitentiary)." (Emphasis added). The State had intended to allocate $370,000 of the federal grant to the Center in fiscal year 1971, and $500,000 in fiscal year 1972. When the request for federal funds was withdrawn, the 1973 Virginia General Assembly reappropriated $2,022,000 out of its general fund to finance the Ceuter. *Ely II*, 363 F. Supp. at 282-83.

99. 497 F.2d at 255 n.7. The reactions were in the forms of letters from the Department of the Interior and the Environmental Protection Agency to the LEAA, aud

drawal of the federal grant for the Green Springs project, but that they would retain those funds and reallocate them to other projects in the penal system.[100] They intended to build the center entirely through state financing.

Area residents again filed suit (*Ely II*)[101] and the Fourth Circuit refused to allow the state to proceed with construction in Green Springs while federal funds allocated for the center were retained.[102] The court reasoned that the state had voluntarily requested federal participation in the center, had obtained the aid premised on compliance with NEPA and NHPA,[103] and accordingly would not be able to use the federal funds to construct the facility without that compliance. The federal grant served two aspects of national policy—contributing to law enforcement in Virginia and encouraging the preservation of environmental values at the designated construction site, Green Springs.[104] The subversion of either policy while the state retained the allotted federal money would so taint those funds that federal law would be violated.[105]

The court was satisfied that the state could be enjoined on the basis of its earlier ruling that a NEPA partnership could be founded on acceptance of a federal block grant.[106] The fact that the partnership had been created did not preclude the possibility that it might be revoked, however, and the court was able to offer the state partner "less

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a memorandum from the Virginia Director of the Division of State Planning and Community Affairs to the State Secretary of Administration.

100. See note 96 *supra*.

101. Ely v. Velde, 363 F. Supp. 277 (E.D. Va. 1973), *rev'd*, 497 F.2d 252 (4th Cir. 1974).

102. The district court, after giving careful consideration to the *San Antonio* rationale that "there may be so many federal contacts with a project after its tentative federal imprimatur that the project becomes so imbued with a federal character as to preclude it from being viewed as anything but federal," had rejected its applicability to the facts of *Ely II*. 363 F. Supp. at 285. Finding "virtually no evidence of federal contacts," *id.* at 286, and maintaining that here, at least, "it is federal funding which makes a project federal in nature," *id.* at 285, the court concluded that "[t]he instant plans are, to say the least, Virginia born and Virginia bred and are, depending on one's point of view, neither blessed nor damned with Federal involvement," *id.* at 287. The emphasis on funding is reminiscent of the "critical action" philosophy, with its attendant daugers of irreversible environmental impacts occurring prior to the time of the "critical" federal involvement. *See id.* at 285.

103. *Ely II*, 497 F.2d at 256.

104. *Id.* at 256. While the court declared that the money "served" the two policies, it might have more correctly stated that the funds were to "serve" law enforcement policy, but were "conditioned on" compliance with environmental policy.

105. *Id.*

106. *See* Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

drastic"[107] remedies than the binding injunction which issued in *San Antonio*. This approach was feasible only because the nexus which had been established was a reversible one.

> [T]he center had not become an irrevocably federal project at the time the state withdrew its request for funds for the following reasons: 1) construction had not then begun; 2) no part of the federal grant was ever spent on any phase of the project; 3) unlike highways, no other federal project is closely related to construction of the center nor is its construction an indispensable part of a larger project in which the federal government is participating.[108]

Because construction had not begun, there had been no detrimental impact on the environment, and since no federal funds had been spent on the project and it was not related to other projects, severance of the partnership could be achieved with a "clean break."[109] The state of Virginia was therefore given the option, unlike the Texas Highway Department in *San Antonio*, of revoking the partnership by reimbursing the federal funds appropriated for the center.[110] Upon revocation

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107. *Ely II*, 497 F.2d at 256-57.

108. *Id.* at 257. The court approvingly cited *City of Boston* and suggested that LEAA's approval of construction funds involved only a single project and that there were no further federal commitments. This is, apparently, inconsistent with the finding of "overall involvement in the promotion and planning of the Center" in *Ely I*. See note 95 *supra*. The *Ely II* construction of the factual situation must be assumed to be controlling, crucial as it is to the finding of revocability. The "overall involvement" suggested in *Ely I* was offered in a footnote and must be interpreted as dictum supportive of the proposition that the federal block grant constituted "major Federal action" for NEPA purposes. The more reasonable definition of federal action in a project which qualifies as "major" does include planning and promotional activities. *See, e.g.*, Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972).

Federal planning and promotion would parallel some of the cementing ties in *San Antonio*, a case with which *Ely II* purported to be consistent. There was no evidence presented in the *Ely* cases concerning subcontracts being issued premised on federal involvement, nor any indication that LEAA had any more substantial involvement with the plans than to give them final approval. Furthermore, the magnitude of federal monetary aid to the Green Springs project was to be approximately $870,000, or only twenty percent of the costs. See note 92 *supra*. Given these considerations it seems that the *Ely II* court might have been justified in finding the severable relationship that it did, although the import of the underlying facts in the case would have merited fuller elaboration by the court.

109. The dissenting judge in Citizens for Balanced Environment & Transp., Inc. v. Volpe, 503 F.2d 601, 606 (2d Cir. 1974), would have found federal action in a roadway under construction in Connecticut, because "[t]his is not a case where there is a *clean physical break*" between the federally financed and state funded systems. (Emphasis added.) The "clean break" analogy is not inapposite in determining the possibility of revoking a partnership. See note 108 *supra* and accompanying text.

110. The state was given the further option of retaining federal funds and either complying with NEPA, thereby serving both the law enforcement and environmental policies, or abandoning the Green Springs site, thereby avoiding subversion of environmental

the state would be at liberty to proceed with the Green Springs project on its own accord. By doing so, in the court's view, the state would subvert neither the federal policy of law enforcement nor that of environmental protection.[111] The partnership nexus had not become irrevocably established.

When Should A Partnership Be Revocable?

A partnership is indicative of a voluntary commitment by a nonfederal party to participate in a joint venture with the federal government.[112] The joint project must involve "major Federal actions significantly affecting the quality of the human environment"[113] in order to be subject to an injunction under the NEPA provisions. Renunciation of the partnership is intimately dependent upon whether major federal action had taken place and upon the nexus by which the partners are joined. The distinctions between *San Antonio* and *Ely II* indicate that consideration must be given to these factors, and to the relationship of the parties, in determining if there still lingers "major Federal action" after the attempted renunciation. It is also necessary to inquire whether any "significant" irreversible environmental impact occurred during the partnership.

The degree to which the pre-partnership relationship of the federal and nonfederal parties can be restored should be considered in developing standards for revocability. Cases involving federal action which is not "major," as required by NEPA,[114] and which therefore do not establish partnerships, generally lack the "substantial planning, time, resources or expenditure"[115] necessary to solidify the federal-nonfederal nexus.[116] Accepting these criteria as indices of major fed-

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policy while, due to the nature of the block grant, still serving the law enforcement policy. *Ely II*, 497 F.2d at 257.

111. LEAA funds allocated specifically for the Center in Green Springs were "impressed with a commitment to preserve the environment" there. *Id.* By returning the funds, Virginia would therefore not subvert environmental policy if it chose to erect the Center in Green Springs on its own.

112. See note 15 *supra* and accompanying text.

113. 42 U.S.C. § 4332(2)(C) (1970). See notes 9-12 *supra* and accompanying text.

114. See note 10 *supra.*

115. Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972); *cf.* Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n, 464 F.2d 1358 (3d Cir. 1972), *cert. denied*, 409 U.S. 1118 (1973); Movement Against Destruction v. Volpe, 361 F. Supp. 1360 (D. Md. 1973); Maddox v. Bradley, 345 F. Supp. 1255 (N.D. Tex. 1972); Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972).

116. *Compare* Silva v. Romney, 473 F.2d 287, 290 (1st Cir. 1973) ("The nexus here between HUD and the developer is so extensive that the district court had power to en-

eral action,[117] it is apparent that in *San Antonio* federal expenditures had been made on the southern segment of the roadway and that the Department of Transportation had reviewed and assisted in the planning of several stages of the highway development.[118] In *Ely II*, however, federal funds had been committed to the Green Springs project but none had been spent by the state. The nature of the block grant provided for minimal federal review procedures,[119] and the drafting of an impact statement by LEAA could be considered too insubstantial an involvement to constitute "major federal action" with regard to the proposed penal center. The federal commitments were such that the agency could be substantially restored to its pre-partnership status in each of the areas of planning, time, resources, and expenditure.

The nature of the environmental impact which has occurred during the partnership also must be examined in determining whether revocation of the partnership should be permitted. In *San Antonio* the construction of a substantial portion of the southern segment of the highway undeniably had an irreversible and "significant" effect on the quality of the environment.[120] In marked contrast, construction of the reception center in *Ely II* had not begun when the state offered to return the funds. Since significant environmental effects had not been incurred, revocation of the partnership would not have thwarted federal environmental policies.

When considering whether "major Federal action" is involved in a partnership project, or whether there has been a "significant" environmental impact which cannot be substantially reversed before revocation, the courts must be aware of the compelling nature of national environmental policy.[121] By the voluntary creation of a partnership,

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join the developer's actions . . . .") *with* Proetta v. Dent, 484 F.2d 1146, 1148 (2d Cir. 1973) ("[T]he nexus between the City [of New York] and [the Economic Development Administration] is insufficiently proximate to warrant restraint of the former for lack of statutory compliance by the latter.").

117. A case-by-case analysis, however, is both necessary and proper to make the final determination. Simmans v. Grant, 370 F. Supp. 5, 13 (S.D. Tex. 1974); *see* F. ANDERSON 89.

118. Several of the commitments were thus of an irreversible nature and made the state potentially liable for approximately four-and-one-half million dollars in damages. See note 83 *supra*.

119. See note 92 *supra*.

120. 446 F.2d at 1028. The court observed that "almost 1/3 of the southern 'segment' of the . . . [e]xpressway" had been erected. *Id.*

121. Critical problems include the "profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation and new and expanding technological advances . . . ." 42 U.S.C. § 4331(a) (1970).

the state or private partner will have implicitly assumed the constraints and obligations imposed by NEPA,[122] and thereby undertaken the duty "to contribute to the preservation and enhancement of the environment."[123] This commitment is made both to "present and future generations of Americans."[124] Renunciation of the federal partnership consequently entails a renunciation of the commitment to these aspects of national environmental policy. Such a disavowal, within the context of NEPA, will not be permitted lightly.[125]

Countervailing considerations, however, caution against overextension of NEPA. There exist affirmative environmental interests and obligations upon states and individuals in the absence of federal regulation.[126] In that sense national environmental policy does not exist in a "vacuum," nor was it so intended.[127] Principles of federalism also suggest that a nonfederal entity should not be bound by federal law when it is free from substantial commitments to the federal government.[128]

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122. *Cf.* Ivanhoe Irrigation Dist. v. McCracken, 351 U.S. 275, 295 (1958); Ely v. Velde, 497 F.2d 252 (4th Cir. 1974); Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).

123. 42 U.S.C. § 4331(c) (1970).

124. *Id.* § 4331(a).

125. *See* Jones v. Lynn, 477 F.2d 885, 895 (1st Cir. 1973) (concurring opinion).

126. A number of states have enacted environmental legislation of their own. *E.g.*, FLA. STAT. ANN. §§ 403.412 *et seq.* (1971); MICH. COMP. LAWS ANN. §§ 691.1201 *et seq.* (1970); MINN. STAT. ANN. Ch. 116.B (1971); *see* Comment, *States Enact Environmental Protection Measures*, 2 ENVIRONMENTAL L. REP. 10,177 (1972). Illinois has recently adopted a constitutional provision expressly guaranteeing "the right to a healthful environment" (ILL. CONST. art. XI, § 2) and a number of other state constitutious at least acknowledge environmental rights. *See, e.g.*, FLA. CONST. art. II, § 7; MICH. CONST. art. 4, § 52; N.Y. CONST. art. XIV, § 4. There has, interestingly, beeu no federally recognized constitutional right to environmeutal protection. Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971). Senate bill S. 1075, 91st Cong., 1st Sess. (1970), would have guaranteed each citizeu a fundamental aud inalienable right to a healthful environment, but the language was modified to provide that "each person should enjoy a healthful environment." *Conference Report No.* 91-765, 2 U.S. CODE CONG. & AD. NEWS 2767, 2768-69 (1969); *see* A. REITZE, ENVIRONMENTAL LAW, at One-13 (2d ed. 1972). For consideration of possible sources of constitutional protection in the fifth, ninth, and fourteenth amendments, and other suggestions, see Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203 (1974); A. REITZE, *supra* at One-12 to One-17.

127. NEPA specifically urges a policy of federal-state cooperation rather than one of federal dominance. 42 U.S.C. § 4331(a) (1970).

128. Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973); Ely v. Velde, 363 F. Supp. 277, 285-87 (E.D.Va. 1973), *rev'd*, 497 F.2d 252 (4th Cir. 1974). If *Ely II* indicates that a state-federal partnership is revocable only where a substantial purge of federal commitments can transpire, the allowance to the state of its autonomy, though not at the expense of the federal politic, represents a pragmatic concession to the philosophy of federalism.

Examination of the policy considerations concerning the revocability of a partnership, encompassing all of the interests which are affected by the joint venture, suggests that *the nonfederal partner should be bound to the partnership only when relinquishment of the requested federal assistance will not return each party, and the environment, substantially to the condition which existed before the partnership relation.* The standard of revocability is interrelated both with the nexus which resulted in the initial evolvement of the partnership and with the federal action and environmental impact which occurred during the participation of the federal partner. This standard proposes that when either the "federal action" or a "significant effect" upon the environment cannot be reversed to recreate substantially the status quo ante, the partnership should be considered irrevocable.

The standard can be applied only with consideration of the specific facts of partnership cases. If, in *Goose Hollow Foothills League v. Romney*,[129] the city developer had attempted to revoke its partnership with HUD by returning a substantial loan for the erection of a high rise apartment building, the revocation would not have been permitted under the proposed status quo ante standard. Because fourteen percent to seventeen percent of the construction had been completed on the building,[130] with the expenditure of portions of the loan, revocation would have been precluded both on the "significant environmental impact" and "major federal action" branches of the standard.

There are indications that, in the federal aid highway controversies, location approval[131] by DOT would be sufficient to prohibit revocation of the state-federal partnership. Relying on the statement of environmental policy in the Federal Aid Highway Act of 1968,[132] the Ninth Circuit declared that it would be "much too late"[133] for the state to withdraw a highway from the federal aid system after location approval had taken place. The court reasoned that any withdrawal must come "prior to causing significant harm . . . to the environment"[134] and was of the opinion that the threat of such impact could not be avoided. To restate the court's decision in terms of a partnership analysis, the partnership formed on the federal aid highway

129. 334 F. Supp. 877 (D. Ore. 1971).

130. *Id.* at 880.

131. See text accompanying notes 23-24 *supra.*

132. 23 U.S.C. § 138 (1970). See note 32 *supra.* The district court gave extensive consideration to the NEPA policy statements as well. La Raza Unida v. Volpe, 337 F. Supp. 221, 228-30 (N.D. Cal. 1971), *cert. denied*, 409 U.S. 890 (1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973); *see* Peterson & Kennan, *supra* note 24, at 50,022.

133. La Raza Unida v. Volpe, 488 F.2d 559, 562 (9th Cir. 1973).

134. *Id.* at 563.

could not be revoked because the environmental status quo ante of the partnership could not be restored.[135]

An increasingly significant type of federal-nonfederal relationship is the awarding of a block grant.[136] A revocability analysis in this context must begin with the observation that any project requiring substantial federal planning and preparation can be considered to involve "major federal action."[137] *Ely I* decided that the awarding of a federal block grant could qualify as major action, but *Ely II*, examining the revocability determinants of the partnership, held that such funding could be revoked without being inconsistent with the NEPA policies. The minimal federal entanglement with the funding scheme,[138] coupled with the lack of environmental harm and federal commitments, enabled the status quo to be maintained as long as the funds were not spent in Green Springs. The status quo ante standard for determining partnership revocability is likely to be satisfied in such instances. Where a federal block grant is involved and the environment has not been irreversibly altered during the course of the partnership, there should be a finding of revocability.

The Need for Status Quo Regulations

NEPA is primarily a preventive and alternative-minded statute.[139] To await significant environmental impact or irrevocable federal commitments in connection with a project *before* deciding that NEPA should be applicable is not consistent with the future-oriented NEPA provisions. Standards to delineate the evolution of a partnership and to anticipate major federal actions and significant environmental effects would help to achieve national environmental goals.

Chief Judge Coffin,[140] of the First Circuit, has suggested a viable

135. When the environment has not been harmed by state action prior to location approval, and where the approval will require insignificant inspection and review, a federal aid highway partnership would seem amenable to revocation.

136. It appears that federal block grants will be significant in a number of areas. In addition to the Safe Streets Act policy of awarding block grants, Congress has provided that such grants be available for funding housing. Housing and Community Development Act of 1974, Pub. L. No. 93-383 (Aug. 22, 1974). Many of the NEPA responsibilities have been delegated to applicants for federal block grants under that Act, removing much of the burden of filing environmental impact statements from HUD. *See id.* § 104(h).

137. Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972).

138. See note 92 *supra.*

139. See notes 41-42 *supra* and accompanying text.

140. Author of Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973); and City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).

means of realizing the NEPA mandate of foresight at a time when loss and harm might still be avoided. A "status quo regulation" promulgated by the federal agencies would inform state or private parties what action might be taken on a project while an environmental impact statement was undergoing preparation.[141] Since the nonfederal party will have voluntarily requested federal aid in the partnership context,[142] the limitations which might be imposed on the project during the emergence of the partnership relation seem justified.[143] The nonfederal party would benefit by being aware of the conditions which he must meet for ultimate approval of federal participation, and would receive some assurance against arbitrary agency action or changes in policy as the partnership was developing. More expeditious processing of aid applications would also be facilitated were the nonfederal party to engage in environmental studies of its own, being aware that compliance with the NEPA regulations might later become necessary.[144] The federal agency and the courts would similarly benefit from a status quo regulation. The agency would be able to conduct its environmental investigations with confidence that the conditions it was studying would not be changed by the nonfederal party to the extent that the agency's results would be invalid at the conclusion of its research.[145] The courts could avoid the burdens of excessive supervision of agencies and projects, and when review became necessary, the predetermined guidelines could help furnish firmer decisional grounds for those cases falling in the "regulatory gap" between the NEPA and agency provisions.[146] The environment would be an obvious beneficiary of such a regulatory scheme.

In addition to regulations for the pre-partnership period, guidelines should also be enunciated to provide a definition of when a partnership becomes irrevocable. Each agency likely to be involved in a project with a nonfederal party would draft regulations directed toward the types of projects that the agency is likely to sponsor. For particular factual situations, the regulations should indicate what actions are likely to result in irreversible environmental impact as well as enumerating what types of commitments will amount to major federal action.

Although these regulations would be interpretative rules and prob-

141. Silva v. Romney, 473 F.2d 287, 291-92 (1st Cir. 1973).
142. See text accompanying note 15 *supra*.
143. *See* 473 F.2d at 292.
144. *Id.* at 291.
145. *Id.*
146. *Id.* at 292.

ably would not be binding on the courts,[147] the promulgation of these guidelines would certainly assist in disclosing the agencies' expectations to the nonfederal parties. Furthermore, the regulations could help to strike a balance between states' and individuals' rights and the sound policies of national environmental legislation.

CONCLUSION

NEPA represents the congressional response to the necessity of synthesizing and implementing a comprehensive scheme of environmental protection. A nonfederal party participating in a "major action" which "significantly affects" the quality of the environment will become subject to the requirements of the Act if a sufficient "nexus" has developed between that party and a federal agency also participating in the project. The determinants of the partnership nexus will vary from case to case and may well be a function of a number of individually insignificant decisions or actions which will have accumulated to establish the partnership. If, after the partnership has been created, the nonfederal party seeks to renounce the federal assistance and its corresponding NEPA obligations, additional analysis of a number of revocability determinants will be needed. It is suggested that the nonfederal party should be irrevocably bound to the partnership when the relinquishment of the requested federal assistance will not substantially restore each party, and the environment, to the status quo ante. By adopting such a standard, and through the drafting of status quo regulations to provide some guidance as to when a partnership should be considered established and when it becomes irrevocable, the interests of the federal government, the states, and private individuals can be reconciled in a manner consistent with sound environmental policy.

147. Rules issued in absence of a grant of power to make law through rules are interpretative. Courts are free to substitute judgment as to content of interpretative rules, but they often give weight or great weight to the views of the agency, sometimes even to the extent of giving force of law to the rules. 1 K. DAVIS § 5.06.