

**HUD AND THE HUMAN ENVIRONMENT:
A PRELIMINARY ANALYSIS OF THE IMPACT OF THE
NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
UPON THE DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT***

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I. INTRODUCTION

On a hill above the university where we work there is a neighborhood of old stone houses, comfortable homes with well-tended gardens. This was once a (if not the) desirable residential community. But time has exacted its toll. Most of the homes are too large for modern taste. The carriage houses, once occupied by domestic employees, are now leased to familial strangers. An eight-story apartment building, faced with raw, new brick, towers among its more reticent neighbors. In a sense, however, the neighborhood remains much as it once was. For a city neighborhood the lots are large. Thanks to the open space requirements of the zoning code, even the apartments have a bit of park with lawns and trees and hedges. It is a comfortable neighborhood. By suburban standards, the inhabitants have resided there for a long time. Many of the home owners are retired. The rest, as often as not, are connected with the university.

However, according to modern economic values, the neighborhood is an anachronism. Were the houses, trees, and people cleared away, the land would be more valuable for high-rise buildings and commercial space. Recognizing this, at least in part, the city now wants to erect a housing project for the elderly in the park behind the apartment house, 14 stories high with tiny apartments, containing approximately four hundred units. If the project is built, it will be financed by public housing funds made available through the United States Department of Housing and Urban Development.¹ The residents are worried—they

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¹ See 42 U.S.C. §§ 1401 et seq. (1970).

say that they are "liberal," that they favor public housing, but they do not like high-rise buildings destroying the backwater where they had hoped to end their days. The local politicians speak of the inevitability of progress; perhaps what they mean is that, if there is public housing for elderly, quiet citizens, there will be a better chance to resist scattered-site public housing for the more disconcerting poor from the ghettos down the hill.

Going down the hill, one moves into another world; frame buildings with tarpaper roofs, dirty brick four-story walk-up apartment houses, storefront clubs, stores that sell sausages, bakeries, restaurants, young men, when it is not too cold, standing, watching the girls. There are few trees in this ethnic enclave, but the streets are filled with life. In the summer there is a festival and the saints from the church are taken on parade along the streets. This is not necessarily a nice neighborhood. Much of the housing is not up to standard. The older inhabitants are often bitter and defeated; the younger, bored and at times nasty. Racial and ethnic hostility runs high.

Adjoining this ethnic residential area is the university with its brick dormitories, financed in part by a program of the Department of Housing and Urban Development,² rising upwards along the hill where once there were homes. Yet it is not merely a university community; it is the beginning of what can only be described as an urban desert: several desolate blocks of flattened land covered with oily gravel and sand, relieved only by a few hardy but ugly weeds. The signs along the desert say, as they have said for years: "No Trespassing: City Property." This is, or more appropriately was, an urban renewal site; it evidences the millions in federal money frittered away over the years with nothing built.³ The homes and shops where people once lived and worked vanished years ago as completely as the beech forest which preceded them. The blight of this desert creeps into the remaining shopping district, runs fingers among the neighboring homes, and slips into land owned by the university.

One then becomes immersed in a dying city—square mile after square mile of substandard housing, frame dwellings for the most part, interspersed with a few brick walk-up apartment buildings. When the buildings are abandoned, as they most certainly will be—after a time even the poorest cannot live there—they remain as fire hazards and sinks of human despair, for the city cannot afford to tear

² Housing Act of 1950 §§ 401-04, 12 U.S.C. §§ 1749-49d (1970).

³ This phenomena may be explained by the fact that Congress encouraged urban renewal sites to be located in areas adjacent to universities by providing that capital expenditures by universities are included as part of the local government's matching share of federal renewal grants-in-aid. See 42 U.S.C. § 1463(b) (1970).

them down.⁴ Sometimes these abandoned buildings belong to real estate investors, sometimes they are people's homes and savings, abandoned because of old age, unemployment, or sheer hopelessness. Most of this area is a black ghetto, interspersed with dwindling ethnic concentrations. Some blocks are good blocks, homes of communities. Some are very bad, a place where one stops for a time when there is nowhere else to go. Most of the area is, and has for years, been slated for urban renewal.⁵ The rest is part of a recently funded Model Cities program.⁶ This is the environment where we work, an urban environment. Of course we can escape at night into another world, into the neat suburbs with their quasi-colonial homes or, by going even further out, we can pretend that we are country folk. The Federal Housing Administration might even insure our mortgages.⁷ But wherever we go, we shall be dependent upon cities.

There are many human environments in America, and almost all of them are urban. These environments are complex things, composed more of buildings than of land, their structure determined more by the nature of their inhabitants and by obscure social and economic interplays than by the natural forces which once controlled the destiny of the wilderness and prairies. It is true, of course, that our food still comes from the land and it may well be true that our preservation resides in wildness,⁸ but almost all of us live and work in cities and towns. Even those who are outside the ubiquitous urban environment are closely tied to it. The agricultural businessman produces for the consumption of the cities. The successful wheat farmer or sheep rancher quite likely now lives in town. In areas

⁴ While section 116(a) of the Housing Act of 1949, 42 U.S.C. § 1467(a) (1970), provides federal funds to demolish unsafe structures, funds appropriated by Congress have been frozen by the Office of Management and Budget. See N.Y. Times, Jan. 9, 1973, at 1, col. 1.

In the scheme of the present administration, these funds can be replaced, at the option of the municipality, with funds provided by the State and Local Fiscal Assistance Act of 1972, better known as Revenue Sharing. Pub. L. No. 92-512, 86 Stat. 919 (1972). While section 103 of that act requires local governments to use revenue sharing funds only for nine enumerated "priority expenditures," these include environmental protection and health. *Id.* §§ 103(a)(1)(B), 103(a)(1)(I). Demolition of unsafe structures arguably falls under one or both of these categories. For the regulations governing the administration of revenue sharing see 38 Fed. Reg. 9132 (1973).

⁵ See 42 U.S.C. §§ 1450 *et seq.* (1970).

⁶ See Demonstration Cities and Metropolitan Development Act of 1966 §§ 101-14, 42 U.S.C. §§ 3301-3313 (1970).

⁷ See National Housing Act of 1934 § 203, 12 U.S.C. § 1709 (1970).

⁸ Cf. *Conservation Soc'y v. Volpe*, 343 F. Supp. 761, 767-68 (D. Vt. 1972).

"[I]n Wildness is the preservation of the world." So says Thoreau; the Sierra Club has issued a beautiful book on this theme, bearing this title. "Every tree sends its fibers forth in search of the Wild," the Con-

where the land still seems wild, the inhabitants are as often as not dependent for their livelihood on tourists from the cities.⁹

The United States is an urban nation and rapidly becoming more urban with each passing year. In 1970, 73 percent of its population was "urban"

The value of all urban land is now about 50 percent greater than the value of all rural land, in spite of the tiny fraction of the land in urban use

Cities and metropolises play a dominant role in the economic, social and political life of the country also. If a man from Mars (or from some more hospitable planet in another solar system) were to approach the earth, he might well regard the cities as the ganglia and the highways as the nerves reaching into the rural mass of fleshy tissue. Whether one loves the cities or hates them, or merely observes their functioning, he cannot but be impressed today with their importance in the lives of the American people.¹⁰

Something has gone wrong with these cities in which we live. In the considered judgment of a subcommittee of the House of Representatives:

Approximately 70 percent of the American people now live in metropolitan areas; yet the quality of life for people in these areas continues to

cord philosopher continues; "[t]he cities import it at any price." Indeed, the people come to Vermont from the cities because they cannot "import it." Wildness may not be shipped; it stays where it is, broken only by the intrusion of man. "Men plow and sail for it," Thoreau says, adding, "[f]rom the forest and wilderness come the tonics and barks which brace mankind." To those of us who are so fortunate to live in Vermont and to have a little wildness surrounding us, it is probably not so difficult as it may be for others to conceive in terms of the preservation of all mankind of the importance of a little limestone hill rising abruptly from a valley floor, covered with basil and marjoram and creeping thyme, with columbine and yellow ragwort in dramatic abundance. The more so any of us find it difficult to conceive of the lasting, indeed the underlying importance of wetlands or bogs—perhaps because understandably we do not recognize, or we wish to forget, our own insignificant beginnings in what Judge Learned Hand called the "primordial ooze." *Id.*

⁹ We do not wish to deny the value of the extra-urban environment or the "underlying importance of wetlands or bogs," but we also do not choose to deny the importance of mankind and the actual environment in which we live. The opinion of Judge Oakes in *Conservation Society v. Volpe* continues:

We may agree with the authors of a newly published book that "[t]here is then no 'balance of nature' unless it includes man as part of the balance . . .," even while we "desire to conserve nature in many instances for unabashed aesthetic reasons and hold that these are basic, necessary and indeed do define the nature of man on a par with energetics, economics or any other reason; moreover we have Gorky's charge that aesthetics will be the ethics of the future." *Id.* at 768.

The tragedy—and the inspiration for this article—is that our cities are so unlivable, so unnatural, so unaesthetic. If we preserve the wildness of Vermont, that surely is no reason to destroy the humanity of our cities; both are essential parts of the balance.

¹⁰ M. CLAWSON, *AMERICA'S LAND AND ITS USES* 30 (1972).

deteriorate. In most metropolitan areas:

- air, water, and noise pollution present daily health hazards to millions of citizens,
- wide-spread physical decay and social alienation cast a pall of ugliness and despair on the spirits of the people,
- crime and fear of crime heighten already exacerbated community tensions,
- excessive reliance on the automobile chokes city streets . . .
- public facilities and services of all types are increasingly obsolescent, and recreational opportunities within the reach of our people are rapidly disappearing.¹¹

All we have said up to now may seem self-evident, but the recognition of self-evident matters is not always an easy task. It seems to us that many—perhaps most—lawyers, political scientists, and planners are tempted to ignore the realities of the human environment as it exists in this country. The reasons for this are probably complex. It is likely that one factor may be that the realities are not intelligently articulated often enough to a wide enough spectrum of society. More important, however, is a tendency to think of the environment as something relatively unimportant, seen only out of the corner of the eye. The outlying environment, the woods and lakes and seas are perhaps to be treasured on weekends, if one has the time and money; the immediate environment is invisible. If one cannot see the forest for the trees, one cannot see the city for the people.

Even more important is the fact that our cities and their neighborhoods are in what appears to be a constant state of crisis—there is a multitude of human problems which demand immediate solutions—bad schools, racial tensions, unemployment, crime, poverty, decaying buildings, rats, garbage, drug addiction, governmental corruption. Yet if one is to solve a problem one must try to understand it. In this time and in this country, understanding almost invariably becomes synonymous with simplification and quantification. A genuine concern with crime reduces itself to statistics in understandable form: so many larcenies involving more than \$50, so many arrests, so many convictions, so many man-days in the penitentiary. If we want to know how well we are doing at war, we measure the amount of territory taken or, more recently, we count bodies and "contested" hamlets. If we want to do something about housing, we define a substandard

¹¹ SUBCOMM. ON HOUSING, HOUSE COMM. ON BANKING AND CURRENCY, 92d Cong., 1st Sess., *HOUSING AND THE URBAN ENVIRONMENT, REPORT AND RECOMMENDATIONS OF THREE STUDY PANELS* 39 (Comm. Print 1972). The Subcommittee on Housing, as a result of these conclusions, recommended legislation which, if passed, would have significantly altered the role which the Department of Housing and Urban Development plays in regard to our environment. See The Housing Consolidation and Simplification Act of 1971, H.R. 9331, 92d Cong., 1st Sess. (1971); The Community Development Act of 1971, H.R. 8853, 92d Cong., 1st Sess. (1971).

unit and start counting the number of vacancies and projecting the number of construction starts.¹²

When confronted with crises, we hardly have time to stop to consider "presently unquantified environmental amenities and values"¹³ before we make our decision. If we are confronted with the problems of cities, we must choose one of the many problems and then strip it of all its complexities before we can begin to solve it. Thus we come to analyze our problem in terms of housing units, not homes, blighted areas, not neighborhoods. The human disappears; people are reduced to tiddlywinks strewn across a city grid. Housing units are built without regard to transportation facilities and school systems. Luxury buildings rise where once there were poor communities. The displaced poor and people of moderate incomes are poured into decaying neighborhoods. If all goes well, the statistics indicate success; so many new units were constructed, so many of those dislocated, relocated in standard dwellings. Almost inevitably there are unexpected side-effects, unexpected because they were deliberately ignored in the simplification. There will be crises among the dispossessed, in the schools to which they are sent, or in the transportation systems which they now must patronize. And the process starts again: simplify, quantify, and plunge ahead to new solutions—and new problems.¹⁴

Some of this is inevitable. When we removed ourselves from natural ecological systems into man-made economic ones, we freed ourselves to a large extent from the powers which governed our ancestors' existence. With our aqueducts we have less reason to fear the drought. The heat of summer and the cold of winter have been defeated by central heating and air-conditioning systems. A blizzard is now a temporary inconvenience, not the coming of death. But as we have freed ourselves from the forces of nature, we have subjected ourselves to new forces, forces of our own genesis, but hardly more

¹² See THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, REPORT: A DECENT HOME 7-11, 39-50 (1968). For an incisive criticism of the modern tendency of attempting to reduce all social problems into a form suitable for manipulation by a computer see H. LÜTHY, DIE MATHEMATISIERUNG DER SOZIALWISSENSCHAFTEN (1970); cf. Case, *The Enduring City* in ESSAYS IN URBAN LAND ECONOMICS 303 (1966).

¹³ National Environmental Policy Act of 1969 § 102(2) (B), 42 U.S.C. § 4332(2) (B) (1970).

¹⁴ For an extreme example of the consequences of "rationalizing" social problems, consider J. FORRESTER, URBAN DYNAMICS 12-106 (1969). The work seems to suggest that the appropriate solution to urban problems may be removal of those residents who are unemployed—without explanation of where they are to go or how they are to live. *Id.* at 119-29.

within our control than a lightning storm.¹⁵

In a sense, we Americans have chosen to make our cities what they are today. They are, after all, artifacts, and they could not have arisen without human decisions. More realistically, however, they are not the consequence of any deliberate choice, but rather the products of innumerable small decisions directed toward goals other than the creation of megapoles. The most important of these decisions are undoubtedly those made by individuals, both in the market place and in those more human environs untenanted by economic man; a decision to take a new job or to build a home or to plant a window box or to take out the garbage is typical of the multitude of small choices which ultimately determine what the human environment shall be.¹⁶

¹⁵ Cf. E. MURPHY, MAN AND HIS ENVIRONMENT: LAW 58-59 (1971).

In man's own personal life he prefers a medication that knocks out bacteria dangerous to him rather than a regimen that would give him the general health to overcome these bacteria. This is so even though it risks the destruction of beneficial bacteria absolutely essential to human life, or lethal allergic reactions, or loss of any chance at inherited immunities. However pleasant it may be to never contract smallpox, measles, whooping cough, diphtheria, mumps, or scarlet fever, modern man after several generations of this will be completely dependent upon his artificial protectors. A political break in the present organization of affairs, which would make impossible the carrying on of the present immunization programs, could precipitate disastrous epidemics. Yet this is the risk that has been undertaken and that remains the preferred solution. Assuredly, if man adopts such a regimen for his own body, he will tend to do no less for the totality of nature.

Such an approach, however, requires a wide scope of knowledge, itself approaching a total product. The more completely natural means of balance are departed from or the better artificial means work in postponing natural phenomena, the greater the pressure needed from the natural phenomena to overcome the artificial constraints on them and the greater the investment needed to keep up the constraint. Artificial devices become fragile with age; and catastrophe, should the constraints collapse under the high pressure of natural phenomena, must result.

¹⁶ Consider the following description of how decisions relating to technology are made, most of which in some way impinge upon man's environment:

As they consider the possibility of exploiting or opposing a technological opportunity or development, individuals, corporations, and public institutions attempt to project the gains and losses to themselves of alternative courses of action, and seek a course designed to maximize the gains while minimizing the losses. The difficulty is that self-interested analyses of this sort may ignore important implications of particular choices for sectors of society other than those represented in the initial decisions. In their pursuit of benefits for themselves or for the particular public they serve, those who make the relevant decisions may fail to exploit technological opportunities that, from a broader perspective, might clearly deserve exploitation. Likewise, as they seek to minimize costs to themselves, the same decisions-makers may pursue technological paths that, again from a broader perspective, ought to be redirected so as to reduce undesirable consequences for others. A wide variety of what economists call external costs and benefits thus falls "between the stools of innumerable individual decisions to develop individual techno-

Although the choices of innumerable individual and corporate decision-makers are the prime determinants of the nature of our urban environments, it is not possible to analyze these choices in terms of legal theory. The decisions which are made are, in their individuality and multifariousness, unconstrained by any but the broadest of legal propositions. The range of permissible choices is, of course, bounded, and perhaps expanded, by certain legal rules such as those relating to nuisance or contracts or landlord and tenant. But even if it were possible to assemble the entire body of the law, one could not possibly determine from that dusty corpus what choices men would actually make or what the long-range implications of those choices would be.¹⁷

While a high value is placed upon "relatively unrestrained decision-making by autonomous individuals and institutions"¹⁸ and our system is founded upon notions of private property and contract,¹⁹ govern-

logies for individual purposes without explicit attention to what all these decisions add up to for society as a whole and for people as human beings."

In part, this phenomenon is a corollary of the value our society has placed upon the relatively unrestrained decision-making by autonomous individuals and institutions. In part, the phenomenon follows from the "tyranny of small decisions"—incremental choices that, taken by themselves, may seem unworthy of notice but, taken together, may create problems of major proportions. And in part, it is a corollary of the inherent difficulty of predicting and evaluating certain kinds of external costs and benefits, which make themselves felt indirectly or at times and places far removed from the initial points of decision. Indeed, the very difficulty of foreseeing and quantifying such secondary consequences discourages their consideration in decision-making processes and encourages emphasis upon the much more readily predictable and quantifiable primary effects. NATIONAL ACADEMY OF SCIENCES, TECHNOLOGY: PROCESS OF ASSESSMENT AND CHOICE 9-10 (1969). See also M. CLAWSON, *supra* note 10, at 45-46.

Although the report of the National Academy was not prepared in connection with the National Environmental Policy Act of 1969, its authors recognized the fact that their study was pertinent to the then pending proposal to create a Council of Environmental Advisors which ultimately became the Council on Environmental Quality established by the National Environmental Policy Act §§ 201-07, 42 U.S.C. §§ 4341-47 (1970). See NATIONAL ACADEMY OF SCIENCES, *supra*, at 3.

¹⁷ We therefore abandon any attempt to fully explain how our human environment got that way, or where it is going, to the practitioners of those disciplines which are prepared to claim that their insights into statistics and model building allow them to predict the larger consequences of human desires and folly. We might be even better off to abandon such matters to the perceptions of novelists and poets who can "sing things as they are" without recourse to dehumanizing abstractions.

¹⁸ See NATIONAL ACADEMY OF SCIENCES, *supra* note 16, at 10.

¹⁹ Perhaps we should state our personal viewpoints so that our conclusions can be better evaluated. Like most, we believe that the only values which should be considered in political and legal decisions are those of individual human beings. In particular, we do not believe that the "state" or the "people" or the "general will" exist as organic or Platonic entities and consequently we do not

mental decisions are increasingly having a greater impact on what we see and do and how we live. Many of the decisions which seem to be private are so only on first impression. For example, the decision of a sports team to purchase a radio or television station, while conceived for economic reasons, is significantly influenced by the attitudes of the Federal Communications Commission, the Federal Trade Commission, and the Justice Department. Similarly, a steel foundry's decision to install a new smelting process may be prompted more by a desire to comply with governmentally imposed air pollution codes than by a desire to achieve a higher rate of return on invested capital. Less obvious, perhaps, are apparently private decisions, such as including more or less floor space per living unit or building high rise units rather than garden apartments, which are in fact made because of local zoning ordinances or regulations of the Federal Housing Administration. These represent but a few examples of omnipresent government and the effect of that omnipresence on the quality of our urban environment.

For our purposes, governmental actions can be said to take three forms. When dealing with governmental property, agencies often act like private, corporate decision-makers. Environmentally, the effects of this class of decisions are the same regardless of who makes them. The environment of Manhattan would be remarkably different without the World Trade Center or the new Federal Office Building, owned respectively by the New York Port Authority and the United States. Governmental agencies also directly regulate private decisions affecting the environment. This is, in fact, what we typically think of as the function of government. In general, this direct regulation can take two forms, either general proscriptions of conduct or the licensing of particular activities.²⁰ Zoning laws are an example of

believe that they can be a source of values. Furthermore, we are extremely skeptical of the ability of anyone to plan a society rationally. Thus, *ceteris paribus*, we would prefer to have decisions made by people themselves rather than have the decisions imposed upon them by even the most benign and representative government. On the other hand, we are acutely aware of the difficulties which arise from the "tyranny of small decisions" and the externalities that are almost inevitably associated with private choices. And if we do not believe in the "state" as a Platonic entity, neither do we believe in the "market" of the economists, nor their "efficiency." We would rather have a society in which welfare is, to use a lawyer's word, "equitably" distributed, than one which is at a Pareto optimum.

²⁰ Licensing statutes are relatively rare, but their environmental impact is conspicuous when the licensed activity has a direct impact upon the environment. For this reason the most significant "environmental" cases have tended to involve governmental licensing processes. See, e.g., *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971) (regulations of Atomic Energy Commission with respect to the application of the National Environ-

the first type of regulation; building and housing code regulations requiring building permits and certificates of occupancy are examples of the latter. Finally, governmental agencies, particularly federal ones, often attempt to induce other decision-makers to take particular actions by offering financial inducements. Examples of this type of governmental action can be seen in the various programs administered by the Department of Housing and Urban Development.

This threefold classification is admittedly imprecise, and there is obvious overlap between the various categories. Regardless of this overlap, the three categories represent distinct types of governmental decision-making—a differentiation that is very significant for our purposes. In this Article, we propose to examine the effects of governmental policies on the urban environment. An unavoidable adjunct of that examination is a consideration of the judicial response to the determination and effectuation of those policies, a response that varies depending on the category of decision-making involved. When a government deals with its own property, as is typically the case with matters falling in the first category, the decision-making process is likely to be extremely informal and the decision, traditionally, is not likely to be reviewed by the courts.²¹ On the other hand, when

mental Policy Act of 1969 to the licensing of nuclear power plants); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (licensing of pumped storage hydro-electric plant by the Federal Power Commission); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) (Corps of Engineers' program licensing discharges of wastes into tributaries of navigable waters); *cf. Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (petition to have the Secretary of Agriculture suspend the registration of DDT under the Federal Insecticide, Fungicide, and Rodenticide Act §§ 2-13, 7 U.S.C. §§ 135-135k (1970)). This emphasis by "environmental" plaintiffs upon projects which require governmental licenses while ignoring those which do not is unfortunate, because the environmental effects of both types of projects may be essentially the same either in kind or result. This problem is particularly apparent when utility companies have a choice between constructing nuclear or hydro-electric power plants on the one hand, both of which require licenses from federal agencies, and conventional fossil-fuel burning power plants on the other, which do not. The other major type of environmental litigation involves cases in our first category where the government itself is undertaking a project which allegedly will have significant environmental impact. See *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971) (underground nuclear test in the Aleutian Islands).

General laws and regulations often have a more indirect impact upon the environment than do governmental licenses, but their impact is clearly greater in many cases. Consider the laws relating to the ownership of real property or the federal tax laws. See, e.g., Guido, *The Impact of the Tax Reform Act of 1969 on the Supply of Adequate Housing*, 25 VAND. L. REV. 289, 291-92 (1971); Gurko, *Federal Income Taxes and Urban Sprawl*, 48 DENVER L.J. 329, 331 (1972).

²¹ See *Sierra Club v. Hickel*, 433 F.2d 24, 33-35 (9th Cir. 1970), *aff'd on other grounds sub. nom., Sierra Club v. Morton*, 405 U.S. 727 (1972).

a governmental agency establishes general rules to regulate conduct or when it grants licenses, it tends to follow formal procedures²² and courts will generally be more likely to review that agency's decision.²³ Finally, in the third category, when an agency offers financial inducements to other decision-makers, the agency's decision-making process, as in the first category, is likely to be extremely informal. But the agency's decision will generally be reviewed by the courts,²⁴ if only because such decisions are intended to influence the conduct of third persons.

While we propose to examine the effects of governmental policies upon the urban environment, it is impossible in a single article to discuss all varieties of governmental decisions and decision-makers which affect that environment. In both our first and second categories it is apparent that, in cumulative effect at least, the most important governmental decisions are those which are made by local governments and their agencies. At the same time, no single local government, or groups of local governments subject to the same legal rules, influences a major portion of the total urban environment in this country. Furthermore, it is next to impossible to analyze separately the effects of various local governments and their independent decisions on the quality of our urban environment. Finally, the recent development of new legal rules designed to protect the environment has been primarily a product of Congress²⁵ and the federal courts. Thus it would seem appropriate that we limit our discussion to the federal sector, and since we are primarily concerned with the urban environment, to that federal agency which has, among federal agencies, the primary responsibility for urban development, the Department of Housing and Urban Development (HUD).²⁶

²² The process of legislation by Congress is, of course, the prime example of such formal procedures. Both rule-making and licensing by federal agencies are subject to the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1970). For an excellent discussion of the problems which can arise when the procedures mandated by the National Environmental Policy Act are applied to agency licensing proceedings see Murphy, *The National Environmental Policy Act and the Licensing Process: Environmental Magna Carta or Agency Coup de Grace?* 72 COLUM. L. REV. 963 (1972).

²³ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967).

²⁴ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 409-13 (1971). But *cf. San Francisco Tomorrow v. Romney*, 342 F. Supp. 77 (N.D. Cal. 1972), *rev'd*, 472 F.2d 1021 (9th Cir. 1973).

²⁵ See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq.

²⁶ We do not mean to assert that HUD necessarily has more influence on the urban environment than do other federal agencies. Although we know of no surveys of the actual impact of the various federal agencies upon the urban environment, we would not be surprised if the Internal Revenue Service or the Department of Transportation did in fact have greater impact than HUD. See Guido, *supra* note 20; Gurko, *supra* note 20.

Now seems to be an appropriate time for such a discussion, since a revolutionary change is taking place in the decision-making processes of all federal administrative agencies. The passage of the National Environmental Policy Act, and the vigorous enforcement of its provisions by the courts, compels the agencies to consider factors too often disregarded in the past. Perhaps because so few people have noticed that cities are the major human environment or perhaps because those most directly affected by HUD's programs, the urban poor, have not yet jumped on the "environmental bandwagon," HUD has, to date, been relatively immune from attack under NEPA. Yet we have little doubt that, if used properly by litigants and applied judiciously by courts, that Act will inevitably produce significant modifications of HUD's decisions and the manner in which its programs are administered. It may be many years before one can be certain that NEPA will have changed our urban environment for the better, or changed it at all. It is possible now, however, to describe the changes which are taking place in the decision-making procedures of federal agencies generally, and HUD in particular, as a result of NEPA, to point out the difficulties which HUD will undoubtedly have in conforming its present programs to the requirements of NEPA, to warn of the risks which these changes entail for those who are the beneficiaries of HUD's programs, and to suggest the good which may result from increased administrative concern for the values which individuals perceive as important in their environment.

Before embarking on this task, however, it is important first to discuss those factors which may have contributed to HUD's inability to make our cities attractive places to live, notwithstanding its statutory obligation to do so, and the roles of Congress and the federal courts in insuring that agencies such as HUD are as responsive to the environment as they are to the narrow dictates of their own enabling legislation.

II. SYSTEMIC PROBLEMS

In the description of our local environment, we attempted to present some notion of the influence which the various programs administered by HUD have had upon the urban environment.²⁷ That HUD has had a major impact on our cities, large and small, is hardly surprising because, since 1934, it and its predecessors have been charged with improving living conditions within urban areas.²⁸ That many believe that HUD has failed to carry out this charge²⁹ is perhaps also not sur-

²⁷ See notes 1-7 *supra* and accompanying text.

²⁸ See authorities cited note 30 *infra*.

²⁹ See HOUSING AND THE URBAN ENVIRONMENT, *supra* note 11. Many believe that HUD has failed totally, that its efforts to remove urban blight, or at least the

prising. But why has the Department of Housing and Urban Development, an agency specifically charged with securing "a suitable living environment for every American family"³⁰ been so subject to criticism by those concerned with the urban environment?³¹

A. Conflicting Congressional Policies

Certainly part of the problem is that Congress has vacillated on the priority which it attaches to improvement of the urban environment. Congressional concern over problems which were later to fall within the purview of the Department of Housing and Urban Development

visible manifestations thereof, have done more to depreciate the quality of our urban environment than to enhance it. The literature purporting to document this proposition is vast. See, e.g., C. ABRAMS, *THE CITY IS THE FRONTIER* 29-39 (1965); M. ANDERSON, *THE FEDERAL BULLDOZER* 52-106 (1964); G. STERNLEIB, *THE TENEMENT LANDLORD* 1-19, 164-70 (1966); Note, *The Federal Courts and Urban Renewal*, 69 COLUM. L. REV. 472, 487-91 (1969). Of course, urban renewal has not been without its supporters. See, e.g., R. WEAVER, *DILEMMAS OF URBAN AMERICA* 113-17 (1965); Slayton, *The Operation and Achievements of the Urban Renewal Programs in URBAN RENEWAL, THE RECORD AND THE CONTROVERSY* 189 (J. Wilson ed. 1966). It is not our purpose to resolve this controversy. Suffice it to say that the problems are far more complex than they were conceived to be in 1949 and, even if HUD functioned as it ought to have under all circumstances, it did not possess, nor does it presently possess, all the tools necessary to implement its congressional directive. Our purpose in this Article is not to assess the degree of success or failure HUD has achieved with the tools available to it, but rather to evaluate the changes in HUD's decision-making processes which ought to result from compliance with the National Environmental Policy Act. Whether these changes ultimately will improve or degrade the environment of our cities is a question which only the future can answer.

³⁰ Housing Act of 1949, 42 U.S.C. § 1441 (1970). Similar declarations of policy are set forth in every major piece of federal housing legislation since enacted. See, e.g., Demonstration Cities and Metropolitan Development Act of 1966 § 101, 42 U.S.C. § 3301 (1970). Indeed, programs administered by HUD, more than those administered by any other federal agency, have been specifically designed to improve the environment. These programs, in addition to general slum clearance under the 1949 Act and the so-called Model Cities Act cited above, include grants to assist comprehensive areawide development planning, 42 U.S.C. §§ 3335-39 (1970), grants for rehabilitation of substandard dwellings, 42 U.S.C. § 1466 (1970), demolition of unsafe structures, 42 U.S.C. § 1467 (1970), concentrated code enforcement, 42 U.S.C. § 1468 (1970) and grants for the preservation of open space land, for historic preservation and for urban beautification, 42 U.S.C. § 1500-1500d-1 (1970).

³¹ As of July 24, 1972, HUD was, or had been, a defendant in 24 separate law suits claiming noncompliance with the National Environmental Policy Act of 1969. Letter from Irving P. Margulies, HUD Associate General Counsel for Equal Opportunity, Litigation, and Administration to Mr. Timothy Atkeson, Council on Environmental Quality General Counsel, July 24, 1972. This represented somewhat more than 10 percent of all litigation filed pursuant to NEPA up to that point. See COUNCIL ON ENVIRONMENTAL QUALITY, *THIRD ANNUAL REPORT* 248-49 (1972).

was first manifested in 1892 by a resolution to appropriate \$20,000 so that the Secretary of Labor could investigate the slums in highly populated cities,³² and until the 1930's, congressional concern for the cities was primarily directed to meeting a shortage of available housing units.³³

The first major federal housing legislation was the National Housing Act of 1934,³⁴ which established the Federal Housing Administration (FHA) and invested it with power to insure loans made by private lending institutions for up to 80 percent of the cost of constructing new housing units. While it is clear that the 1934 Act was promulgated in part as a congressional attempt to improve living conditions, this was a long-range objective at best. The Act's immediate purpose was to stimulate a sagging home building industry.³⁵ With the Housing Act of 1937,³⁶ which provided federal financial assistance for the construction of low-rent public housing, Congress sought to "assist the several States . . . to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . ."³⁷ Similarly, the Housing Act of 1949³⁸ declared congressional concern for "the general welfare and security of the Nation and the health and living standards of its people," a concern which was manifested by an attempt to "require housing production and community development . . . the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization . . . of the goal of a decent home and a suitable living environment for every American family . . ."³⁹

Thus, up to 1949, Congress had expressed three sweeping goals for its housing legislation: stimulation of the economy, production of additional units of standard housing, and provision of a suitable living environment for all. There is a conflict between these goals, at least in the sense that, with the limited funds available, it was impossible to accomplish them all at once. For example, the goal of the 1937 Act to stimulate the economy through a subsidy to the construction indus-

³² Pub. Res. 22, 27 Stat. 399 (1892).

³³ SUBCOMM. ON HOUSING AND URBAN AFFAIRS, SENATE COMM. ON BANKING AND CURRENCY, 90th Cong., 2d Sess., CONGRESS AND AMERICAN HOUSING 1-2 (Comm. Print 1968).

³⁴ 12 U.S.C. §§ 1701 et seq. (1970).

³⁵ CONGRESS AND AMERICAN HOUSING, *supra* note 33, at 9; H.R. REP. NO. 1922, 73d Cong., 2d Sess. 1 (1934). See generally, Bartke, *The Federal Housing Administration: Its History and Operations*, 13 WAYNE ST. L. REV. 651-56 (1967).

³⁶ 42 U.S.C. §§ 1401 et seq. (1970).

³⁷ *Id.* § 1401.

³⁸ *Id.* §§ 1441 et seq. (1970).

³⁹ *Id.* § 1441.

try resulted in a high priority being given to developing the maximum number of units at the lowest per unit cost; project design was a secondary consideration.⁴⁰ The effect upon the "decency" of the homes and the "suitability" of the living environment of those housed was predictable. When one realizes that the municipal authorities responsible for the actual construction of public housing had the additional goal of eliminating slums, it is hardly surprising that they elected to erect their ill-designed units in the areas with the fewest environmental amenities.⁴¹ Furthermore, the 1949 Act was passed on what has now been shown to be the rather naive assumption that all one had to do to obliterate the results of slum conditions⁴² was to eradicate the slums themselves.⁴³ Yet even if the theory had been valid, federal appropriations were, and are now, inadequate to do a good job. Rather than eliminating slums, renewal programs have, at least arguably, worsened them by reducing the incentive for private rehabilitation

⁴⁰ Ledbetter, *Public Housing—A Social Experiment Seeks Acceptance*, 32 LAW & CONTEMP. PROB. 490, 497-501 (1967). Professor Friedman, however, has suggested that the environmentally objectionable features of today's public housing, i.e., high density and crowded living space units located in depressed areas, only became characteristic after World War II when the "submerged middle class" of the depression was no longer submerged and it became clear that public housing was to be utilized, in the main, by the permanent poor of our society. It thus became politically more palatable to confine public housing to the central cities. See Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642, 649-54 (1966).

⁴¹ The problem is not that state enabling statutes limit local housing authorities in their site selection process. See, e.g., *Riggin v. Dockweiler*, 15 Cal. 2d 651, 653, 104 P.2d 367 (1940); *St. Stephen's Club v. Youngstown Metro. Housing Auth.*, 160 Ohio St. 194, 200, 115 N.E.2d 385, 389 (1953); *Chapman v. Huntington Housing Auth.*, 121 W. Va. 319, 334, 3 S.E.2d 502, 509 (1939). Rather, the problem appears to be community opposition to placement of public housing outside blighted areas. See, e.g., *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969); *Gautreaux v. Chicago Housing Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 401 U.S. 953 (1971); *El Cortez Heights Residents and Property Owners Ass'n v. Tucson Housing Auth.*, 10 Ariz. App. 132, 457 P.2d 294 (1969).

⁴² The suggested results of slum conditions have ranged from a greater possibility of communicable diseases to increasing the probabilities of juvenile and adult crime to the general problems of a decline in the moral fabric of those residing therein. See S. GREER, *URBAN RENEWAL AND AMERICAN CITIES* 141-48 (1965); G. MYRDAL, *AN AMERICAN DILEMMA* 1290 n.36 (1st Ed. 1944); McDougal & Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42, 47-48 (1942); cf. A. SCHOOR, *SLUMS AND SOCIAL INSECURITY* (1963).

⁴³ Frieden, *Housing and National Urban Goals: Old Politics and New Realities in METROPOLITAN ENIGMA/INQUIRIES INTO THE NATURE AND DIMENSIONS OF AMERICA'S "URBAN CRISIS"* 148, 149 (J. Wilson ed. 1968); G. STERNLEIB, *supra* note 29, at 5; cf. C. ABRAMS, *supra* note 29, at 79.

and maintenance in urban renewal areas,⁴⁴ thus leading to "renewal blight."⁴⁵

In response to the problems associated with slum removal, Congress has not, in general, reconsidered its traditional approaches or attempted to attack the causes and consequences of urban decay with a comprehensive plan for developing or redeveloping a decent urban environment throughout the country. Instead, Congress has shifted the responsibility to local public agencies by requiring them to provide housing for low and moderate income families on urban renewal land.⁴⁶ This is not to suggest that housing for low and moderate income families is not needed; clearly it is.⁴⁷ What we suggest is that Congress did not learn from its experience with the public housing program. An ordering of priorities which emphasizes an increase in the amount of bricks and mortar in areas which by definition are blighted may have little to do with the quality of the environment in which the residents of that housing live.⁴⁸

The major exception to the congressional priority for bricks and mortar is the Demonstration Cities and Metropolitan Development Act of 1966.⁴⁹ This Act encourages cities to adopt a comprehensive plan including expanding educational, recreational, and cultural facilities, job opportunities, and a host of other factors which, along with housing, contribute to the quality of human existence. Yet appropriations for planning under the Act for fiscal 1973 will approximate only 15

⁴⁴ G. STERNLEIB, *supra* note 29, at 167-70.

⁴⁵ See *Foster v. City of Detroit*, 254 F. Supp. 655, 660 (E.D. Mich. 1966); 44 J. URBAN L. 151, 152 (1966); cf. Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 525 (1959).

⁴⁶ 42 U.S.C. §§ 1455(f) (requiring a majority of housing in renewal areas to be for low- and moderate-income families and that 20 percent of those units be for low-income persons), 1455(h) (requiring that for each unit of housing demolished pursuant to an urban renewal project, a unit of standard housing be constructed in the renewal area).

⁴⁷ REPORT, *supra* note 12, at 7-9; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS: BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 143-51, 180-81 (1968). It should be noted, however, that "low and moderate income" housing generally is not available to the truly poor who may be dislocated by urban renewal programs.

⁴⁸ Often cited as an example of a purely housing-provisions priority is the unfortunate "environmental" result of FHA and VA encouragement of suburban tract developments in the years immediately after World War II in order to overcome the severe housing shortages which existed during that period. See, e.g., R. CONNERY & R. LEACH, *THE FEDERAL GOVERNMENT AND METROPOLITAN AREAS* 14-20 (1960); C. HARR, *FEDERAL CREDIT AND PRIVATE HOUSING* 209 (1960). On the general proposition that improved housing is only one part of what is necessary for "slum removal" see S. GREER, *supra* note 42, at 136-54.

⁴⁹ 42 U.S.C. §§ 3301-74 (1970).

percent of the appropriations devoted to ordinary housing production and renewal programs.⁵⁰

B. Administrative Complications

Disparate expressions of congressional policy have not been the only problems facing HUD. It is characteristic of all programs administered by the Department that it cannot take the initiative. Although a private home buyer or a private developer can apply to FHA for mortgage insurance, or a city or a public housing authority can apply to HUD for grants to finance urban redevelopment or public housing programs, ultimately, HUD can only accept or reject the applications, even if convinced that another program in another place would come closer to affording every American a decent environment in which to live. This lack of initiative is, of course, not unique to HUD,⁵¹ but it does go a long way toward excusing HUD's failure to have restored a decent urban environment. Furthermore, since HUD already has a plethora of goals with no authority to initiate any projects, it is not surprising that it has failed to propose any broad-scale solutions to the problems within its jurisdiction.⁵²

A further stumbling block has been the deference, or at least lip service, paid to the primary responsibilities of state and local governments that is characteristic of much federal legislation.⁵³ The programs administered by HUD appear to be addressed to such peculiarly

⁵⁰ See H.R. 15093, 92d Cong., 1st Sess. (1972), enacted as Act of Aug. 14, 1972, Pub. L. No. 92-383, 86 Stat. 540 (1972).

⁵¹ Consider, for example, the powers of the Federal Power Commission under the Federal Power Act, which are limited to licensing hydro-electric power plants proposed by others on the condition that "the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways" 16 U.S.C. § 803(a) (1970).

⁵² HUD has instituted a program "Operation Breakthrough" to encourage private developers to adopt new methods of housing production. See DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *OPERATION BREAKTHROUGH—QUESTIONS AND ANSWERS* (1971). However, this program has shown little evidence of success. See generally Finger, *Operation Breakthrough's Approach to Building Codes, Zoning, and Site Design*, 39 GEO. WASH. L. REV. 764 (1971); Stegman, *National Housing and Land-Use Conflicts*, 49 J. URBAN L. 629, 642-66 (1972); Note, *Factory-Built Housing: Statutory Solutions*, 38 U. CHI. L. REV. 788, 791-92 (1971).

⁵³ See Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371(b) (1970). This section states:

(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development. (2) The primary responsibility for implementing this policy rests with state and local governments. . . . (emphasis added).

local problems—housing and community development⁵⁴—that there is even more of a tendency than usual to defer to the most parochial of authorities. This natural deference to local municipalities and their agencies, however, ignores the important fact that many of the most difficult problems relating to the urban environment are beyond solution by any local government. This is so for several reasons. In the first place, municipalities—particularly those with the most severe problems—tend to be poor and must resort for the funds needed to cope with their problems to their major potential source of income, property taxes, which is likely to exacerbate the problems which they already have.⁵⁵ Second, the rise of the megapolis and urban sprawl have tended to cause urban problems to transcend traditional political boundaries: New York's greatest problem may well be Westchester County; Newark's greatest problem may be New York City. Third, even if a community has ample funds and even if its urban problems appear purely local, it may be too small to undertake efficient long range planning. Finally, it would seem that in many cases the solution to what appears to be purely local urban problems may have external consequences which ultimately will undermine the effectiveness of the solution.⁵⁶

⁵⁴ See S. REP. NO. 84, 81st Cong., 1st Sess. 16 (1949). In commenting on the administration of low-rent public housing programs, the Committee made the following observations:

The public housing program is administered in localities by local housing authorities which develop, own, and operate low-rent projects. . . . Although these local housing authorities have . . . enjoyed close and satisfactory relationships with the governing bodies of their localities, your committee has . . . believed it advisable to insert . . . provisions which will assure that the operations . . . have the general approval and support of their respective local governments.

The prime responsibility for the provision of low-rent housing is thus in the hands of the various localities. *Id.*

⁵⁵ See J. LOWE, *CITIES IN A RACE WITH TIME* 567-70 (1967); G. STERNLEIB, *supra* note 29, at 203-23.

⁵⁶ For example, an increase in the supply of standard housing units in a city may, in the long run, have the demographic effect of inducing migration to the city from rural areas so that ultimately the city's housing problems become more acute, possibly without a corresponding amelioration of the rigors of rural life. Professor M. D. McCarthy, of Case Western Reserve University, in conversations with the Authors, has described a proposed demographic model which demonstrates how an action intended to improve the quality of life in one region may be self-defeating in the absence of barriers against immigration. In the above example, if the influx to the city does not result in an improvement in conditions in the rural areas, then there can be no net benefit to the country as a whole from the new housing units. Furthermore, even if benefits do accrue to rural regions outside the city, it is unlikely that a decision-maker who is responsible for the city, the major for example, would be willing to undertake the construction of the new housing units even if most of their capital cost is under-

HUD and the programs it administers have, of course, not been without benefit. For HUD to survive, it must be able to show concrete evidence of its accomplishments to those who hold the purse strings. Environmental improvement does not easily fit this requirement. It is almost impossible, in all but the most general terms, to evaluate the impact which various programs administered by HUD have had on that undefined, and for practical purposes undefinable, web of obscure interrelations which we have been calling the "human environment." To be certain that HUD has actually made the world of its clients better—or worse—it would be necessary not only to make interpersonal comparisons of utility but also to arrive at an aggregate of all the happinesses and unhappinesses, the satisfactions and dissatisfactions, which have resulted from its activities. Such an aggregation is generally considered to be impossible.⁵⁷ On the other hand, it is possible to count the number of housing units which have been built, and the acres of urban renewal land which have been bulldozed. It might well be concluded—we just cannot know—that HUD has actually increased the total amount of happiness, especially if we include in our aggregation the real estate developers and the employees of HUD who may, after all, be the primary beneficiaries of HUD's largesse.

Furthermore, since the quality of any environment is ultimately a matter about which tastes may differ, it may be that HUD has, by its lights, actually improved the human environment. A housing project which might be considered an abomination by some may well be considered a thing of beauty by the bureaucrats who are responsible for its existence. In this regard, *Road Review League v. Boyd*⁵⁸ is instruc-

written by the federal government. Cf. J. FORRESTER, *supra* note 14, at 65-79. "Construction of housing in any price class through externally imposed programs seems detrimental to the stagnant city." *Id.* at 79.

⁵⁷ See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 9 (1951). In general, the only way that welfare economists have found to avoid this problem is to glorify Pareto optimality—a state where one cannot make one person better off without making another worse off. But any system of evaluation which is based on Pareto optimality cannot deal with the advantages or disadvantages of a redistribution of welfare. The consequence of this is that welfare economists cannot say (no matter what they may believe in their hearts) that society is better off unless there is an actual increase in goods. This limitation in economic analysis may help in explaining why HUD has put almost all of its emphasis on bricks and mortar; only if it increases the total number of goods available to society can it persuade the economic community that it has made the world better than it found it. If the exhortation to supply a decent urban environment entails (or can be accomplished by means which result in) a redistribution of welfare, HUD's success or failure at carrying out such a program cannot be evaluated (in the present state of economic art).

⁵⁸ 270 F. Supp. 650 (S.D.N.Y. 1967). The case held: (1) that environmental organizations have standing as persons "aggrieved" under the Administrative Procedure Act, 5 U.S.C. § 702 (1970), to challenge the location of a federally

tive. After noting that the Federal Highway Administrator "feels differently about highways than the citizens of Bedford do," Judge McLean went on to say:

[The Administrator] expressed the opinion that highways "enhance the area through which they pass," and that "those who want to preserve, enhance, and increase our natural and recreation resources will take pride in this facility." I have no doubt that he is sincere in this belief. I can well appreciate, however, that people whose property and interests are affected by these great six-lane roads not only dissent from these opinions, but consider them so bizarre as to be almost irrational. But this attitude on the part of highway officials toward highways in general does not necessarily make their selection of a particular route arbitrary or capricious.⁵⁹

Even if we cannot say from some absolutist viewpoint that HUD has failed, we can say that there is a consensus that it has not done a satisfactory job of carrying out its environmental mandate. The existence of this consensus is a fact, and it is the sort of fact with which lawyers and politicians are primarily concerned. Whatever the quality of the urban environment may be, the discontent that many feel is sure to generate legal and political problems.

III. THE ATTEMPT TO CREATE RESPONSIVE DECISION-MAKING PROCESSES

The discontent is not, of course, directed primarily at HUD or any governmental body, but during the past few years it has become clear that there is a widely shared belief that our governmental system has ignored too many human needs. The call has gone out for a "restructuring of our priorities" and many voices which have been unheard in the past are clamoring for attention. The political consequence of this discontent and clamor has been an increased demand that the new priorities and the new voices be considered by those in the government whose decisions affect the quality of our lives. Since there is clearly no consensus as to exactly what substantive policies our governments should adopt, or what activities they should foster,⁶⁰ the push has been for changes in the process by which governmental decisions should be made.

At its highest levels, the federal government has at least been willing to pay lip service to the new priorities. The President has made many speeches and reports stressing his concern with environmental prob-

funded highway, *id.* at 660-61, and (2) that the decision of the Federal Highway Administrator fixing the location of the highway was not "arbitrary." *Id.* at 663.

⁵⁹ *Id.* at 661-62.

⁶⁰ Nor can we expect such a consensus. See note 57 *supra* and accompanying text.

lems⁶¹ and has reorganized the executive branch to place the major responsibility for environmental protection within one agency.⁶² Congress finally has passed what may be effective legislation against the pollution of both air⁶³ and water,⁶⁴ and has made numerous declarations that appropriate consideration be given to environmental concerns.⁶⁵ Even the courts, despite their supposed insensitivity to political opinion, have trumpeted their concern for environmental protection and the quality of life.⁶⁶

At the lowest levels of the federal government, where policy is actually implemented, however, there has been considerable resistance to the new dogma that decisions which inevitably will affect the human environment should only be made after consideration of their environmental consequences.⁶⁷ With the growth of governmental activities it has become almost impossible for those who establish our national policies to police the activities of the subordinate officers who

⁶¹ See President's Message to Congress, August 7, 1972, in 8 PRES. DOC. 1216 (1972); President's Message to Congress, Feb. 8, 1971, in 7 PRES. DOC. 187 (1971).

⁶² President's Message to Congress, July 9, 1970, in 6 PRES. DOC. 908, 908-09 (1970).

⁶³ See Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1705 (1970), amending 42 U.S.C. §§ 1857 *et seq.* (1970).

⁶⁴ See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972).

⁶⁵ The outstanding example is, of course, the National Environmental Policy Act of 1969. 42 U.S.C. §§ 4321 *et seq.* (1970).

⁶⁶ See, e.g., *Udall v. FPC*, 387 U.S. 428, 437-40 (1967); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (1970). *But cf. Sierra Club v. Morton*, 405 U.S. 727 (1972).

⁶⁷ This resistance is evidenced by the large number of cases, starting with *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), in which the courts have held that various agencies have failed, contrary to their statutory duties, to take environmental considerations into account. Even now, four years after the enactment of the National Environmental Policy Act, HUD seems somewhat more concerned with the speed of processing their applications than with making a realistic attempt to reassess their programs in light of their environmental impact. See Letter from Samuel C. Jackson to Russell E. Train, reprinted in *Joint Hearings Before the Committee on Public Works and the Committee on Interior and Insular Affairs, United States Senate*, 92d Cong., 2d Sess. 595 (1972).

In fairness, however, it should also be mentioned that federal agencies have not always been unwilling to consider the environmental consequences of their decisions. See *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (approving a decision of the Corps of Engineers made prior to the National Environmental Policy Act denying a permit to fill navigable waters on environmental grounds despite the plaintiff's contention that the Corps was only authorized to consider issues relating to navigation). *Namekagon Hydro Co.*, 12 F.P.C. 203 (1953), *aff'd*, 216 F.2d 509 (7th Cir. 1954) (holding that the Federal Power Commission has authority to deny, on its own motion, a license for an hydro-electric plant because of undersirable environmental consequences).

are charged with implementing them. The problem is not solely one of size, since, as has already been suggested, the policies themselves are often conflicting. Worse yet, the duty of implementing the various policies is divided among numerous federal agencies, some within the executive branch and some with independent status. This results in each agency being responsible for only one or two aspects of an economic or social problem. For example, the Securities Act of 1933⁶⁸ does not empower the SEC to determine whether or not the entry of the issuer into the marketplace will result in a violation of the anti-trust laws.⁶⁹ Similarly, the Interstate Commerce Commission in setting railroad rates does not consider the effect of its decision on the amount of funds which the Department of Transportation must request from Congress to construct additional interstate highways.⁷⁰ In fact, the only congressional attempt to delegate "virtually unfettered" economic regulatory authority to a single agency was unanimously struck down by the Supreme Court.⁷¹ The result has been myopia in agency decision-making.⁷²

⁶⁸ 15 U.S.C. §§ 77a et seq. (1970).

⁶⁹ The SEC, however, in regulating the exchanges under the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a et seq. (1970), does take into account antitrust policy. See *Silver v. New York Stock Exchange*, 373 U.S. 341, 358-61 (1963); Rules of the New York Stock Exchange, 10 S.E.C. 270 292 (1941).

⁷⁰ It may be that in the future the courts will require the ICC in railroad rate proceedings to consider at least the environmental consequences of the effect of the rates upon the nation's highway system. See *Students Challenging Regulatory Agency Procedures v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *application for stay denied sub nom., Aberdeen & R. R.R. v. Students Challenging Regulatory Agency Procedures*, 93 S. Ct. 1 (1972) (holding that the ICC must consider, pursuant to the National Environmental Policy Act, the environmental consequences of a railroad rate increase to the extent that it applied to recyclable goods).

⁷¹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935). *Schechter* has, over the years, been severely limited, particularly with respect to the question of legislative standards governing delegation. See, e.g., *Yackus v. United States*, 321 U.S. 414, 424-25 (1944). But it is arguable, at least, that the Court would still review the scope, as opposed to the manner, of legislative delegation. See 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.06, at 100 (1958); cf. *United States v. Great Atlantic & Pacific Tea Co.*, 342 F. Supp. 272, 277-78 (D. Md. 1972); *United States v. Futura, Inc.*, 339 F. Supp. 162, 164-65 (N.D. Fla. 1972); *Amalgamated Meat Cutters & Butcher Workers v. Connally*, 337 F. Supp. 737, 744-49 (D.D.C. 1971), *appeal withdrawn*, Mar. 22, 1972; *United States v. Intone Corp.* 334 F. Supp. 905, 908 (N.D. Tex. 1971) (upholding the constitutionality of the Economic Stabilization Act of 1970, 12 U.S.C. §§ 1904-1909 (1970), as amended, Pub. L. No. 92-210, 85 Stat. 743 (1971)).

⁷² See Testimony of Roger C. Crampton, Chairman, Administrative Conference of the United States, *Joint Hearings*, *supra* note 67, at 390:

We all know that there is a tendency of each agency to become absorbed in its own mission, in its own special constituency, that tends to limit its perspective and its breadth of view.

Each of the three branches of the federal government has attempted, with the tools available to it, to make the myriad of administrative agencies more responsive to articulated environmental policies. The President, for example, has recognized that:

[A]lmost every part of government is concerned with the environment in some way, and affects it in some way. Yet each department also has its own primary mission—such as resource development, transportation, health, defense, urban growth or agriculture—which necessarily affects its own view of environmental questions . . .⁷³

and has, pursuant to his authority to reorganize the executive branch,⁷⁴ created the Environmental Protection Agency in which are consolidated the majority of the government's anti-pollution programs.⁷⁵ Congress and the courts, on the other hand, have been struggling to develop a cure for the shortsightedness of all those other agencies which, unlike the Environmental Protection Agency, do not have environmental protection as their primary mission. The keystone to this joint effort is the National Environmental Policy Act of 1969.⁷⁶

NEPA was modeled⁷⁷ after the Employment Act of 1946⁷⁸ which contains a general statement of policy similar in form to that contained in section 101(a) of NEPA⁷⁹ and which created the Council of

⁷³ President's Message to Congress, July 9, 1970, in 6 PRES. DOC. 908, 911 (1970).

⁷⁴ 5 U.S.C. §§ 901-13 (1970).

⁷⁵ Reorganization Plan No. 3 of 1970, 6 PRES. DOC. 917 (1970).

⁷⁶ 42 U.S.C. §§ 4321 et seq. (1970). It would be misleading to give Congress all the credit—or the blame—for the importance of NEPA. See Murphy, *supra* note 22, at 996 n.14 ("Considering the remarkable lack of attention given to the Act by Congress, one must wonder whether Congress had any idea of the potential impact of its action.")

No other declaration of national policy made by Congress has had the impact of NEPA. Agencies in the past have failed to implement policies mandated by Congress and have been punished for their failure by nothing more painful than the enactment of another declaration of policy. For example, consider the following declaration in the Housing and Urban Development Act of 1968, Pub. L. 90-448, 82 Stat. 476 (codified in scattered sections of 12 U.S.C.):

The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, of "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family." The Congress reaffirms this national housing goal . . . 82 Stat. at 476.

⁷⁷ See *Hearings on S.1075, S.237 and S.1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 80 (1969).

⁷⁸ 15 U.S.C. §§ 1021-25 (1970).

⁷⁹ 15 U.S.C. § 1021 (1970).

The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans,

Economic Advisors⁸⁰ which served as the model for the Council on Environmental Quality established by NEPA. In one very important respect, however, NEPA differs from other acts in which Congress has declared the nation's policy: it contains what have become known as the "action-forcing" provisions of section 102.⁸¹ The most important of these provisions, and perhaps the most important provision of NEPA, is section 102 (2) (C) which requires that:

[T]o the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action⁸²

Thus, unlike other enactments of national policy, NEPA requires that certain procedural steps must be followed by federal agencies to implement the substantive policies set forth in the Act.

It is extremely doubtful, however, that NEPA would have had the impact which it has had on the decision-making processes of the federal government if the courts had not already expanded the power of private citizens to compel federal agencies to comply with congressional policies and mandates. By the time of the adoption of NEPA, on January 1, 1970, the courts had weakened traditional barriers to standing⁸³ and reviewability⁸⁴—including the doctrine of sovereign immunity⁸⁵—to the point where almost any person with a legitimate

functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power. *Id.*

⁸⁰ 15 U.S.C. § 1023(a) (1970).

⁸¹ See Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 247 (1970). For an excellent discussion of the legislative history of NEPA, and particularly the genesis of Section 102 see *id.* at 247-58.

⁸² 42 U.S.C. § 4332(2) (C) (i) (1970).

⁸³ See, e.g., *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 926-31 (2d Cir. 1968); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1000-02 (D.C. Cir. 1966); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 615-16 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Shannon v. HUD*, 305 F. Supp. 205, 208-11 (E.D. Pa. 1969), *aff'd as to standing and vacated on other grounds*, 436 F.2d 809 (3d Cir. 1970); *cf. Flast v. Cohen*, 392 U.S. 83, 102-06 (1968). *But cf. Sierra Club v. Morton*, 405 U.S. 727, 733-41 (1972).

⁸⁴ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-48 (1967); *cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (decided after passage of NEPA).

⁸⁵ See *Powelson Civic Home Owners Ass'n v. HUD*, 284 F. Supp. 809, 834 (E.D.

grievance⁸⁶ could successfully bring an action to compel a federal agency to comply with the procedures and take into account the policies which Congress has mandated for that agency.⁸⁷ Furthermore, in both environmental and urban disputes the courts had already evidenced a willingness to require new procedures for the federal agencies to ensure their compliance with congressional mandates.⁸⁸ Thus, it may well have been that the "action-forcing" provisions of section 102 of NEPA were unnecessary; perhaps they even inhibited the judicial development of a rational and flexible system of administrative procedures designed to assure proper consideration of environmental decisions.

Be that as it may, the courts have generally been willing to enforce rigorously the action-forcing provisions of section 102 (2) (C).⁸⁹ Thus, although litigation involving NEPA has been concerned almost en-

Pa. 1968):

Where applicable, Section 10 [of the Administrative Procedure Act] implies a comprehensive waiver of sovereign immunity in all actions otherwise sustainable against federal officers or agencies.

⁸⁶ The Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972), held that in a case involving a claim of noneconomic injury, the "party seeking review must allege facts showing that he is himself adversely affected," but the Court insisted that this requirement "does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process." *Id.* at 740.

⁸⁷ This statement is at least true of persons who assert claims with respect to national policies relating either to environmental protection or housing. Of course, there are those frustrated environmentalists who would claim that our assertion in the text is much too sanguine. For an extreme example of this position see Large, *Is Anybody Listening? The Problem of Access in Environmental Litigation*, 1972 WIS. L. REV. 62. Professor Large's frustration over administrative and procedural hurdles in environmental cases leads him to a rather startling conclusion:

Violent tactics are contradictory to the spirit of the ecological movement, but as frustration increases and the legal system fails to respond, violence will occur. Indeed, the contrast in efforts to assist the urban poor before and after Watts indicates that a few factories may be blown up and a few executives kidnapped for ecological ransom before legislators, administrators, and judges begin to get the hint. *Id.* at 111.

Part of Professor Large's frustration relates to the unwillingness of administrative agencies to take environmental considerations into account. See *id.* at 71-79. Here he certainly has a point.

⁸⁸ See, e.g., *Udall v. FPC*, 387 U.S. 428, 434-50 (1967); *Shannon v. HUD*, 436 F.2d 809, 821-22 (3d Cir. 1970) (although *Shannon* was decided after the passage of NEPA, it arose before that Act's passage and was decided without regard to NEPA); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 620-25 (2d Cir. 1965).

⁸⁹ See *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

tirely with ensuring formal compliance with the provisions of section 102(2) (C),⁹⁰ the courts have consistently construed NEPA as being more than a mere reporting act. In *Calvert Cliffs' Coordinating Committee v. AEC*,⁹¹ the leading case interpreting NEPA, the District of Columbia Court of Appeals held that: "NEPA . . . makes environmental protection a part of the mandate of every federal agency and department" and that "[p]erhaps the greatest importance of NEPA is to require . . . agencies to consider environmental issues just as they consider other matters within their mandates."⁹² The court explained:

The sort of consideration of environmental values which NEPA compels is clarified in Section 102(2) (A) and (B). In general, all agencies must use a "systematic, interdisciplinary approach" to environmental planning and evaluation "in decisionmaking which may have an impact on man's environment." In order to include all possible environmental

⁹⁰ The ultimate questions before the courts have been whether an environmental impact statement is required for a particular project and if so, whether the impact statement provided, if any, meets the requirements of the Act. See, e.g., *Wilderness Soc'y v. Morton*, Civil No. 928-70 (D.D.C., Aug. 15, 1972) (holding that an environmental impact statement filed by the Department of Interior reasonably meets the requirements of NEPA); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 880 (D. Ore. 1971) (holding that an environmental impact statement is required before HUD could make loan to finance construction of 16-story high-rise college dormitory in a residential neighborhood with no other high-rise buildings). Section 101(c) of NEPA provides that:

[C]ongress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. 42 U.S.C. § 4331(c) (1970).

Despite this section, courts have uniformly rejected any claim that NEPA creates rights against anyone other than agencies of the United States or a right to any particular environment. See, e.g., *Bradford Township v. Illinois State Toll Highway Auth.*, 463 F.2d 537, 540 (7th Cir. 1972) ("the procedural requirements of the National Environmental Policy Act are applicable only to federal agencies. . . . Other than procedural requirements just mentioned, no judicially enforceable duties are created by . . . the National Environmental Policy Act . . ."); *Kitchen v. FCC*, Civil No. 71-1875 (D.C. Cir., June 12, 1972) (per curiam); *McQueary v. Laird*, 449 F.2d 608, 612 (10th Cir. 1971).

Hanks and Hanks have suggested that section 101(c) embodies congressional recognition of a legal right to a healthful environment. Hanks & Hanks, *supra* note 81, at 249-51. Since we are concerned with the impact of NEPA's procedural requirements upon the decision-making processes of HUD, the possibility that there may be some type of substantive constitutional right to a particular type of environment is beyond the scope of this article. For discussion of the possibility of such a constitutional right see Roberts, *The Right to a Decent Environment, E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

⁹¹ 449 F.2d 1109 (D.C. Cir. 1970).

⁹² *Id.* at 1112 (emphasis in original).

factors in the decisional equation, agencies must "identify and develop methods and procedures * * * which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." . . . To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance.

To ensure that the balancing analysis is carried out and given full effect, Section 102(2) (C) requires that responsible officials of all agencies prepare a "detailed statement" covering the impact of particular actions on the environment, the environmental costs which might be avoided, and alternative measures which might alter the cost-benefit equation. The apparent purpose of the "detailed statement" is to aid in the agencies' own decisionmaking process and to advise other interested agencies and the public of the environmental consequences of planned federal action. Beyond the "detailed statement," Section 102(2) (D) requires all agencies specifically to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." This requirement, like the "detailed statement" requirement, seeks to ensure that each agency decisionmaker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decisionmaking process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.⁹³

Thus, the District of Columbia Circuit has read NEPA as requiring that every federal agency and department give serious consideration

⁹³ *Id.* at 1113-14. *Calvert Cliffs'* involved the propriety of the regulations under which the AEC licenses atomic power plants, an area far removed from the concerns of HUD. The quoted language from *Calvert Cliffs'*, however, clearly is applicable to all federal agencies and departments, including HUD. Interestingly, it may be more easily applied, at least theoretically, to HUD than the AEC. The suggestion has been made that the *Calvert Cliffs'* interpretation of NEPA is especially inappropriate to the licensing activities of the AEC (and the FPC) both because of the current power shortage and because "[n]owhere is the disruptive effect more evident than in the application of NEPA to the licensing process." Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 COLUM. L. REV. 963, 965, 969 (1972). In a footnote Professor Murphy adds:

It may be that the effect of NEPA on operational programs will be very similar [to its effect on licensing programs]. However, my tentative judgment is that the requirement of a hearing and the availability of traditional judicial review in the case of licensing make it significantly different from operational programs. *Id.* at 965, n.12.

Notwithstanding Professor Murphy's lack of enthusiasm for NEPA, neither of his objections apply to HUD. Although there may be a severe housing shortage, NEPA certainly has not aggravated nor ought it to aggravate that situation. Although HUD's programs are presumably not what Professor Murphy calls "operational programs," they do not require adjudicatory hearings nor are they subject to "traditional" judicial review.

to the environmental consequences of its actions. Although the Supreme Court has not yet construed NEPA,⁹⁴ the *Calvert Cliffs'* interpretation of that Act has been generally accepted by other federal courts.⁹⁵ A differing interpretation at this late date seems highly unlikely, especially considering the "liberal" interpretation which the Supreme Court has given earlier legislation intended to protect the environment.⁹⁶ Certainly until the Supreme Court speaks, *Calvert Cliffs'* will remain a controlling decision, if only because actions against the majority of federal agencies (including HUD) can be brought in the District of Columbia.⁹⁷

⁹⁴ As of the date this Article went to press—Jan. 25, 1973. In *Named Indiv. Members v. Texas Highway Dep't*, 400 U.S. 968 (1970), an order denying certiorari before judgment, the Court had an opportunity to construe NEPA. See *id.* at 972 (Douglas, J., dissenting). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court cited NEPA as an example of legislation "designed to curb the accelerating destruction of our country's natural beauty." In *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971), on a motion for an injunction in aid of jurisdiction the Court again had the opportunity to apply NEPA, but denied the injunction. See *id.* at 917-20 (Douglas, J., dissenting). In *Aberdeen & R. R.R. v. Students Challenging Regulatory Agency Procedures*, 93 S. Ct. 1 (1972) (Burger Circuit Justice, 1972), Chief Justice Burger denied a stay of an injunction issued against the ICC pursuant to NEPA.

⁹⁵ See, e.g., *Scherr v. Volpe*, 466 F.2d 1027, 1032-35 (7th Cir. 1972); *Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Development Comm'n*, 464 F.2d 1358, 1365 (3d Cir. 1972) (dictum) ("[NEPA] mandates that all executive and administrative agencies give good faith, careful and informed consideration to environmental values during the course of their decision making processes."); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1330-32 (4th Cir. 1972); *Greene County Planning Board v. FPC*, 455 F.2d 412, 418-20 (2d Cir. 1972); *Lathan v. Volpe*, 455 F.2d 1111, 1120-21 (9th Cir. 1971).

⁹⁶ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-11 (1971); *Udall v. FPC*, 387 U.S. 428, 436-50 (1967).

⁹⁷ See 28 U.S.C. § 1391(e) (1970):

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

Subsections 3 and 4 authorize suit to be brought against HUD (or, more properly, against the Secretary of Housing and Urban Development) wherever the disputed project (or the plaintiff) is located. Subdivision 1, however, authorizes the action to be brought in the District of Columbia, the official residence of the heads of most federal agencies, including the Secretary of HUD. That there may be an exception to the application of this section to a few agencies such as the Tennessee Valley Authority, see *National Resources Defense Council v. TVA*, Docket No. 72-1119 (2d Cir., Mar. 27, 1972) is not germane to the issues considered in this article. It would appear that the only case in which an action

IV. THE IMPACT OF NEPA

A. In General

The mandate of NEPA and the liberalization of the federal rules of standing⁹⁸ and reviewability have had, in a remarkably short period of time, revolutionary impact on federal decision-makers and their relationship with private citizens.⁹⁹ However, the effects have been indirect, since, unlike the Clean Air Act¹⁰⁰ or the Federal Water Pollution Control Act,¹⁰¹ NEPA does not purport to regulate the environment directly. Rather, it regulates the regulators. The court in *Calvert Cliffs*, recognized this when it said that

The reviewing courts probably cannot reverse a substantive decision on its merits . . . unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.¹⁰²

Thus it has been said that NEPA creates "procedural" but not "substantive" rights.¹⁰³ This classification seems to be rather misleading,

based on an alleged failure of HUD to comply with NEPA could not be brought in the District of Columbia would be one in which local nonfederal defendants are necessary parties.

⁹⁸ For an excellent discussion of standing to litigate environmental issues see *Hanks & Hanks*, *supra* note 81, at 231-44. The authors conclude that "[c]itizen groups should have no difficulty in showing that the interests they assert are arguably within the zone of interests to be protected by the National Environmental Policy Act." *Id.* at 244.

⁹⁹ It is clear that NEPA's purpose is not only to affect directly agency decision-making. It is also designed to inform congressional and executive decision-makers of the impact which agencies have upon the environment. See *Committee to Stop Route 7 v. Volpe*, 346 F. Supp. 731, 738-39 (D. Conn. 1972); *S. Rep. No. 91-296*, 91st Cong., 1st Sess. 21 (1969). The informational purpose of NEPA has been interpreted to require consideration of alternatives which the agency has no power to implement. See *National Resources Defense Council v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972), *cf.* *Conservation Council v. Froehlke*, 340 F. Supp. 222, 225 (M.D.N.C. 1972).

¹⁰⁰ 42 U.S.C. §§ 1857 *et seq.* (1970), as amended, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

¹⁰¹ 33 U.S.C. §§ 1151 *et seq.* (1970), as amended, Pub. L. No. 92-500, 86 Stat. 816 (1972).

¹⁰² *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Conservation Council v. Froehlke*, 340 F. Supp. 222, 225 (M.D.N.C. 1972).

¹⁰³ See, e.g., *City of New York v. United States*, 344 F. Supp. 929, 940 (E.D.N.Y. 1972); *Environmental Defense Fund v. Corps of Engineers*, 342 F. Supp. 1211, 1216-17 (E.D. Ark. 1972); *Conservation Council v. Froehlke*, 340 F. Supp. 222, 225 (M.D.N.C. 1972). See also Note, 20 KANSAS L. REV. 501, 503-05 (1972), where, in discussing *Calvert Cliffs'* and the distinctions between the substantive and procedural provisions of NEPA, the author concludes:

[I]t would be wise for future litigants who allege a violation of the NEPA to base their cause of action [sic] upon a violation of section 102's procedural duties rather than section 101's substantive duties. *Id.* at 505.

however, not only because substance inevitably grows out of procedure and the two remain inextricably intertwined, but also because the duties imposed upon federal agencies by NEPA, and the ability of litigants to enforce those duties, will likely lead to change in the substance of federal agency decision-making.

The new standing doctrines, even as limited by *Sierra Club v. Morton*,¹⁰⁴ allow any person who has a sufficiently direct interest in an agency's decision to enforce the duties of environmental consideration and impact statement preparation and dissemination imposed upon federal agencies by NEPA. Accordingly, it would be hard to deny that any citizen more than marginally affected by an agency's actions has a right to enforce NEPA's mandates against the agency or its officers. However, the "rights" which private persons can now assert under NEPA (and other laws regulating the conduct of federal agencies) differ in many significant respects from the rights commonly enforced in private civil litigation. The "new" rights created by NEPA and the liberalized standing rules can be asserted only against officers and agencies of the federal government and they can be vindicated only by injunctive, declaratory, or mandatory relief. Furthermore, the plaintiff's burden of proof in an action asserting one of these new rights is not the burden imposed upon the ordinary plaintiff in litigation between two private parties; it is the burden of overcoming the traditional standard of judicial review of administrative discretion.¹⁰⁵ On the other hand, it does not seem an essential characteristic of these "new" rights that the plaintiff asserting them represent an interest which he shares with other members of the public.

By Congress' new insistence upon "broader standards: a more sweeping definition of the agency's task and a wider list of values that must be considered . . ."¹⁰⁶ and by the courts' reducing the barriers to effective citizen participation in the administrative process,¹⁰⁷ there is no longer any need to worry whether the "rights" to remove obstacles to agency responsiveness are substantive or procedural. These new rights are rights to compel administrative agencies to do something, usually, but not always,¹⁰⁸ something of a procedural nature

¹⁰⁴ 405 U.S. 727 (1971); see note 86 *supra*.

¹⁰⁵ The rules relating to "scope of review" are codified in Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1970). For a thoughtful example of the application of these rules to NEPA litigation see *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

¹⁰⁶ Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1261 (1966) (emphasis in the original).

¹⁰⁷ See, e.g., *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

¹⁰⁸ In *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.

at the administrative level.¹⁰⁹ They are enforced by the courts in much the same fashion as other substantive equitable rights are enforced. Furthermore, once we recognize these new rights, we no longer have to undertake a confusing search for some other "legal right," or "legally protected interest," that will support the plaintiff's standing. The fact that the plaintiff who asserts such a right to vindicate one of his interests has, or does not have, some other legally protected right to vindicate the same interest under different circumstances becomes refreshingly irrelevant.

The dictates embodied in NEPA are indisputably applicable to HUD,¹¹⁰ notwithstanding the relatively few attempts to apply the Act to that body. The very language of NEPA,¹¹¹ its legislative history,¹¹² the writings of commentators,¹¹³ and judicial opinions,¹¹⁴ all make clear that it is intended to protect that human environment which most of us inhabit—the urban environment—which is the primary responsibility of HUD.

1970), the right which the plaintiffs effectively asserted was the right to prevent the Secretaries of the Army and Transportation from granting licenses necessary to construct a highway. It is difficult to denominate this result as being procedural.

¹⁰⁹ See notes 81-83 *supra* and accompanying text.

¹¹⁰ Only one case filed pursuant to NEPA against HUD has questioned the plaintiff's standing to seek enforcement of the Act against HUD. See *San Francisco Tomorrow v. Romney*, 342 F. Supp. 77, 81 (N.D. Cal. 1972), *rev'd*, 472 F.2d 1021 (9th Cir. 1973).

In no instance to which we have been referred or which we have found has it been held that one with a mere non-pecuniary interest in the subject matter of a statute, or a general wish, desire or concern that a statute be enforced, has standing to sue thereunder. The Constitution tells us that the President "... shall take Care that the Laws be faithfully executed. . . ." (Article II, Sec. 3). The defendants herein, and not plaintiffs, are those the President has appointed to assist him in carrying out that high mandate. *Id.*

The plaintiffs were described as "a group of organizations alleging general concern for the condition of the environment and the welfare of society, and several individuals who claim residence in the vicinity of the projects involved." *Id.* at 79 (emphasis added); see *Coalition for the Environment, St. Louis Region v. Linclay Development Corp.*, 347 F. Supp. 634, 635 (E.D. Mo. 1972).

¹¹¹ See, e.g., NEPA § 101(a) where the Congress expresses its concern with "high density urbanization." 42 U.S.C. § 4331 (a) (1970).

¹¹² See Statement of Laurance S. Rockefeller, *Joint House-Senate Colloquium to Discuss a National Policy for the Environment, Hearing Before Senate Committee on Interior and Insular Affairs, and House Committee on Science and Astronautics*, 90th Cong., 2d Sess. 4-5 (1968).

¹¹³ See, e.g., *Hanks & Hanks*, *supra* note 81, at 261-62.

¹¹⁴ See, e.g., *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir.), *cert. denied*, 93 S. Ct. 313 (1972); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971); *Boston Waterfront Residents Ass'n. v. Romney*, 343 F. Supp. 89 (D. Mass. 1972).

B. NEPA and HUD

To understand HUD's reaction to the duties imposed upon it by NEPA, it is useful, by way of introduction, to examine HUD's response to those obligations imposed upon it by statutes other than NEPA. Illustrative are the statutory provisions dealing with urban renewal programs.¹¹⁵ These provisions, which are expressly directed to HUD, require that a local public agency which undertakes an urban renewal program shall have a "feasible method for the temporary relocation of individuals and families displaced from the urban renewal area"¹¹⁶ and that HUD shall receive "satisfactory assurance . . . that decent, safe, and sanitary dwellings . . . are available for the relocation of each such individual and family."¹¹⁷ Despite the clear statutory mandate that satisfactory relocation provisions *shall* be made, however, it has taken extensive litigation to compel HUD's compliance.¹¹⁸

Considering HUD's reluctance to obey those statutory provisions explicitly applicable to it, it is not surprising that litigation has been necessary to compel HUD to obey other congressional policies which are not directly related to its primary mission of encouraging the razing of slums and the construction of housing units. A revealing example is HUD's reaction to the Civil Rights Acts of 1964¹¹⁹ and 1968.¹²⁰

HUD has often seemed somewhat insensitive to the effects of its policies on the rights of minority groups, and initially, at least, the courts were unwilling to interfere with this apparent lack of concern. For example, in *Green Street Association v. Daley*,¹²¹ the plaintiffs alleged, *inter alia*, that the renewal project at issue was designed to remove blacks in order to preserve existing white-owned businesses

¹¹⁵ 42 U.S.C. §§ 1450-69c (1970).

¹¹⁶ *Id.* § 1455(c) (1).

¹¹⁷ *Id.* § 1455(c) (2). See also S. REP. NO. 84, 81st Cong., 1st Sess. 14 (1949).

¹¹⁸ Those cases dealing with the relocation provisions of section 1455(c) include *Johnson v. Redevelopment Agency of Oakland*, 317 F.2d 872 (9th Cir.), cert. denied, 375 U.S. 915 (1963); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Western Addition Community Organ. v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968), *injunction dissolved sub nom.*, *Western Addition Community Organ. v. Romney*, 320 Supp. 308 (N.D. Cal. 1969). Another aspect of the urban renewal program which has received judicial attention is the public hearing requirements of 42 U.S.C. § 1455(d) (1970). See *Harrison-Halstead Community Group v. Housing and Home Finance Agency*, 310 F.2d 99 (7th Cir. 1962), cert. denied, 373 U.S. 914 (1963); cf. *Wilson v. City of Long Branch*, 27 N.J. 260, 142 A.2d 837, cert. denied, 358 U.S. 873 (1958).

¹¹⁹ 42 U.S.C. §§ 20000a et seq. (1970).

¹²⁰ 42 U.S.C. §§ 3601 et seq. (1970).

¹²¹ 250 F. Supp. 139 (N.D. Ill. 1966), *aff'd*, 373 F.2d 1 (7th Cir.), cert. denied, 387 U.S. 932 (1967).

in a particular area. The court dismissed the action and in effect, exonerated the defendants, on the ground that the plaintiffs lacked standing to bring the action.¹²² Once the courts accepted the notion that those who are adversely affected by urban renewal clearance projects have standing to enjoin the illegal actions of those administering the projects,¹²³ however, they had little difficulty in concluding that HUD must consider the impact of its programs on minority group members' rights.¹²⁴ For example, in *Gautreaux v. Romney*,¹²⁵ HUD admitted knowledge of segregated site selection but argued that, given the proclivities of Chicago's City Council, it was a choice between complying with the Civil Rights Act or providing housing for the poor. Faced with this choice, they opted for the latter alternative. Stating that "good faith is no more of a defense to segregation in public housing than it is to segregation in public schools,"¹²⁶ the court had little trouble concluding that HUD had acted in a racially discriminatory manner and that the "dilemma" which the Department faced was no justification for its improper actions. Accordingly, the case was remanded for the determination of the proper equitable relief to be granted.¹²⁷

Another case arising under the Civil Rights Acts, *Shannon v. HUD*,¹²⁸ is especially illuminating for our purposes. One of the duties imposed upon federal agencies by section 102 of NEPA is to take affirmative steps to determine what effect their actions will have upon the environment.¹²⁹ There is no corresponding provision in the Civil Rights Acts, but in *Shannon*, the Third Circuit held that HUD had an affirmative duty to investigate whether its proposed actions would

¹²² *Id.* at 146.

¹²³ The leading case is *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

¹²⁴ *Gautreaux v. Romney*, 448 F.2d 731, 739-40 (7th Cir. 1971); *Garrett v. City of Hamtramck*, 335 F. Supp. 16, 26-27 (E.D. Mich. 1971); *Hicks v. Weaver*, 302 F. Supp. 619, 623 (E.D. La. 1969); cf. *Crow v. Brown*, 332 F. Supp. 382, 395 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

¹²⁵ 448 F.2d 731 (7th Cir. 1971).

¹²⁶ *Id.* at 738.

¹²⁷ *Id.* at 740-41; see *Gautreaux v. Chicago Housing Auth.*, 296 F. Supp. 907, 908-14 (N.D. Ill. 1969).

¹²⁸ 436 F.2d 809 (3d Cir. 1970). See also *Garrett v. City of Hamtramck*, 335 F. Supp. 16, 25 (E.D. Mich. 1971) (dictum):

Since urban renewal could exist without the federal government, the government must insure that a program is not directed primarily at 'Negro Removal' [T]o proceed with such activities by claiming innocence of what has been or is being done with federal funds cannot be tolerated.

See also *Banks v. Perk*, 341 F. Supp. 1175, 1182 (N.D. Ohio 1972).

¹²⁹ 42 U.S.C. § 4332(2) (C) (1970).

further (or at least not frustrate) other articulated governmental policies.¹³⁰

Shannon aids in understanding how the courts will apply NEPA's policies to HUD's programs, because it shows that at least one circuit court of appeals has been willing to develop remedies and procedures, absent NEPA, by which HUD can be compelled to respect national policies which fall outside its primary responsibilities.¹³¹ Furthermore, *Shannon* raises, in extreme form, the problem of the rights and interests of third parties who may be damaged by a judicial finding that HUD has failed to comply with the broad type of national policy which is incorporated in the Civil Rights Acts and in NEPA.¹³² Finally, it is quite possible, given an expansive definition of the "human environment," that HUD could have avoided its mistake in *Shannon* if it had followed procedures like those required by section 102(2)(C) of NEPA.

Shannon involved the change of an urban renewal plan in Philadelphia from single-family to multi-family housing,¹³³ a change which

¹³⁰ 436 F.2d at 820-21.

¹³¹ See generally notes 89-90 *supra* and accompanying text. For a case, very different from *Shannon*, where another court of appeals reluctantly decided that the Atomic Energy Commission, in the days before NEPA established a national policy with respect to environmental matters, did not have to take environmental factors into account in licensing atomic power plants see *New Hampshire v. AEC*, 406 F.2d 170, 172-75 (1st Cir. 1969). The *New Hampshire* case is interesting because the Atomic Energy Act charged the AEC with protection of the "health and safety" of the public; the court, however, on the basis of legislative history and administrative practice, determined that these words referred only to radiological hazards. *Id.* at 175.

¹³² For a case in which a finding that section 102(2)(C) of NEPA had been violated led to an injunction forbidding HUD to make further disbursements pursuant to a loan agreement for a partially completed building see *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 880 (D. Ore. 1971). See notes 290-94 *infra* and accompanying text.

¹³³ In many respects *Shannon* resembles *Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency*, 310 F.2d 99 (7th Cir. 1962) *cert. denied*, 373 U.S. 914 (1963). In *Harrison-Halsted* an urban renewal area was changed from residential housing for moderate-income families to an in-city campus of the University of Illinois. The plaintiffs alleged that there was extensive discrimination in housing against Negroes and Mexican-Americans in Chicago and that the "[U]niversity site project [would] force these people out of the area. This loss in minority group housing is not being replaced elsewhere in the community." *Id.* at 103. Although the plaintiffs alleged clear economic injury from the change in the urban renewal plan, the court held that they lacked standing to sue in a federal court, saying, *inter alia*, that

questions arising from the taking of property by condemnation for state purposes, are ordinarily matters for determination by the state courts . . . [and that] [t]he legislature, through its lawfully created agencies, rather than "interested" citizens, is the guardian of the public needs to be served

allegedly would have had the effect of increasing the high concentration of low-income black residents within the urban renewal area. *Shannon* could have been decided on the ground that the local public agency responsible for the urban renewal plan had failed to hold a public hearing before making a major amendment to the plan,¹³⁴ but the court chose instead to confront the more substantial issue of

whether, when HUD approved a change from an urban renewal plan which contemplated substantial owner occupied dwellings to a plan which contemplated 221(d)(3) dwellings with rent supplement assistance, the procedures which it followed were in adequate compliance with the 1949 Housing Act and the 1964 and 1968 Civil Rights Acts.¹³⁵

The court then answered its own question in the negative, saying:

The defendants assert that HUD has broad discretion to choose between alternative methods of achieving the national housing objectives set forth in the several applicable statutes. They argue that this broad discretion permitted HUD in this case to make an unreviewable choice between alternative types of housing. We agree that broad discretion may be exercised. But that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing and in favor of fair housing. When an administrative decision is made without consideration of relevant factors it must be set aside. Here the agency concentrated on land use factors and made no investigation or determination of the social factors involved in the choice of type of housing which it approved. Whether such exclusive concentration on land use factors was originally permitted under the Housing Act of 1949, since 1964 such limited consideration has been prohibited.¹³⁶

by social legislation. *Id.* at 103-05.

The court also dismissed the action against the Housing and Home Finance Agency on the ground that the HHFA was a "nonsueable agency of the United States . . . who may not be sued in evasion of sovereign immunity." *Id.* at 106. Although the dismissal of the action against HHFA might be sustained in some circuits today on the grounds that the Administrator of the Agency was the proper party defendant, the tenor of the decision in *Harrison-Halsted* seems to come out of the dark ages, rather than a mere 10 years ago. To understand the application of NEPA to agencies like HUD, one must forget a great deal of old learning.

¹³⁴ 42 U.S.C. § 1455 (d) provides:

No land for any project to be assisted under this subchapter [relating to urban renewal] shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing.

This provision for public hearings applies to the local public agencies which are funded by HUD, not to HUD itself. Although information acquired at a public hearing of the type mandated by 42 U.S.C. § 1455(d) (1970) may be relevant to an environmental impact statement required by NEPA and although the public hearing may be the first notice to potential private plaintiffs that a project is under way, the public hearing requirements under the 1949 Housing Act are not subject to the federal Administrative Procedure Act and therefore do not raise the problem of complying with NEPA at the time of public hearings which confronts licensing agencies such as the AEC and FPC. See note 93 *supra*.

¹³⁵ 436 F.2d at 817.

¹³⁶ *Id.* at 819 (citations omitted).

Relying on this view of HUD's investigative duties, the court held that some "institutionalized method" of decision-making must be used whereby, in considering site or type selection, HUD has before it "the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts."¹³⁷

Thus, the court in *Shannon* ordered HUD to adopt procedures which would force it to consider information relevant to the policies of the 1964 and 1968 Civil Rights Acts, but refrained from determining whether HUD's decision to approve the amended plan was substantively incorrect. Exactly the same type of decision could be reached in a case where it is alleged that HUD has failed to consider information relevant to the policies set out in NEPA, with the one important difference that, while the *Shannon* court refused to mandate a particular decision-making process, section 102(2) (C) of NEPA does demand a particular "institutionalized method." Since the "social factors" and the "racial and socio-economic information" which HUD must consider under the holding in *Shannon* are clearly relevant to any weighing of the impact of HUD's projects upon the human environment, it would seem that the most efficient manner in which HUD could comply with the mandates of both NEPA and *Shannon* would be for it to combine its review of racial and other environmental factors into one procedure.¹³⁸

One other factor in *Shannon*, that of the consequences for third parties of the failure of HUD to fulfill its duties, deserves mention at this time, although we will consider it at greater length in Part V.¹³⁹ In *Shannon* the district court had dismissed the complaint on the merits.¹⁴⁰ By the time the court of appeals reversed the district court's decision, a private, nonprofit corporation had constructed the multi-family housing project to which the plaintiffs objected, the project being occupied by low-income tenants who were beneficiaries of rent supplement contracts with HUD pursuant to section 101 of the Housing and Urban Development Act of 1965.¹⁴¹ Furthermore, HUD had agreed to insure a mortgage for 100 percent of the cost of the project pursuant to the provisions of section 221(d) (3) of the Housing Act of 1961,¹⁴² although final closing had not yet occurred. Under these circumstances, HUD suggested that there was no longer any relief which could "feasibly be given." The court's response should

¹³⁷ *Id.* at 821.

¹³⁸ See notes 318-25 *infra* and accompanying text.

¹³⁹ See text accompanying notes 288-98 *infra*.

¹⁴⁰ 305 F. Supp. 205, 215-25 (E.D. Pa. 1969). The district court did find that the plaintiffs in *Shannon* had standing. *Id.* at 208-12.

¹⁴¹ 12 U.S.C. § 1701s (1970).

¹⁴² 12 U.S.C. § 1715(d) (3) (iii) (1970).

give pause to anyone who thinks that the application of NEPA to HUD is purely a matter of academic interest:

The completion of the project and the creation of intervening rights of third parties does indeed present a serious problem of equitable remedies. It does not, however, make the case moot in the Article III sense. Relief can be given in some form. For example, the court could order that the project mortgage not be guaranteed under § 221(d) (3) and that it be sold to a private profit-making owner. It could order that the project continue in non-profit ownership as a 221(d) (3) project, but that the rent supplement tenants be gradually phased out and replaced with market rental tenants.¹⁴³

If such remedies were to be applied in cases where HUD fails to comply with the provisions of NEPA, one might predict that one result would be a refusal of construction loan mortgage lenders to make FHA-insured loans. Another result might be to reduce greatly the eligible stock of housing for needy tenants who are qualified for rent supplement payments.

Shannon was decided nearly a year to the day after the effective date of the National Environmental Policy Act and nearly 6 months before the final date on which each agency was required to propose such measures as might be necessary to bring its policies into conformity with NEPA.¹⁴⁴ Since the *Shannon* case arose before the passage of NEPA, there was no occasion for the court to consider the interplay between its decision and the requirements of that Act. HUD's reaction to *Shannon*, however, was to adopt by regulation "Project Selection Criteria"¹⁴⁵ which deal not only with the effect of the project on minority concentration (the issue in *Shannon*) but also with the effect of the project on the physical environment and, conversely, the effect of the physical environment on the project.

The Project Selection Criteria, where applicable, do represent at least an attempt by HUD to conform to some of the policies adopted by Congress when it enacted NEPA. They establish both a priority system for determining which projects are to receive the limited amount of funds available and a process whereby projects which run counter to the policies expressed in the Criteria can be totally ex-

¹⁴³ 436 F.2d at 822.

¹⁴⁴ NEPA § 103, 42 U.S.C. § 4333 (1970), provides:

All agencies of the Federal Government shall . . . propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

¹⁴⁵ Proposed regulations were published twice for comment, see 36 Fed. Reg. 12032, 19316 (1971), and became final on February 7, 1972. See 37 Fed. Reg. 203 (1972). See generally, Maxwell, *HUD's Project Selection Criteria—A Cure for "Impermissible Color Blindness"?* 48 N. D. Law. 92 (1972). Mr. Maxwell, who is HUD's general counsel, does not mention the existence of environmental standards within the Project Selection Criteria.

cluded from consideration.¹⁴⁶ The regulations establishing the Project Selection Criteria will undoubtedly serve a valuable function by compelling HUD to reject any proposed project subject to the Criteria which is not up to standard. Furthermore, since it has generally been held that NEPA creates no substantive right to a decent environment,¹⁴⁷ the Criteria may in some cases afford a ground for attacking one of HUD's projects even though the procedural requirements of NEPA have been complied with. Now that it has promulgated the Project Selection Criteria, HUD not only has the duty of complying with the procedural dictates of the National Environmental Policy Act, but has created for itself a set of substantive guidelines which circumscribe its decision-making, compliance with which is reviewable by the courts.¹⁴⁸

These environmental criteria do not, however, satisfy HUD's obligation to comply with NEPA's policies. First, they fail to consider the effect of a particular action upon the *human* environment, except to the extent it is affected by the physical environment. Secondly, the criteria apply to only a limited number of HUD's various programs, namely new construction of five or more residential housing units (or in the case of public housing, 25 or more such units).¹⁴⁹ All renewal assistance, rehabilitation projects, Indian reservation housing, and FHA programs unrelated to providing housing for low- and moderate-income families are excluded.¹⁵⁰ Thus, HUD's compliance with NEPA cannot be judged by its adherence to the criteria adopted in response to *Shannon*, but rather must be judged by its compliance with the procedural provisions of section 102 of NEPA and HUD's regulations adopted pursuant to that section.¹⁵¹

¹⁴⁶ A poor rating on any one of eight criteria will exclude the project from consideration. 37 Fed. Reg. 203 (1972).

¹⁴⁷ See note 90 *supra* and accompanying text.

¹⁴⁸ *Scenic Hudson Preservation Conf. v. F.P.C.*, 354 F.2d 608, 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Western Addition Community Organization v. Weaver*, *supra* note 118.

¹⁴⁹ 37 Fed. Reg. 205 (1972).

¹⁵⁰ *Id.* These exclusions can be historically justified on the ground that the project selection criteria were promulgated as a direct response to the *Shannon* case and thus emphasize compliance with the Civil Rights Acts. Why the regulations do not also include housing for the elderly, section 220 renewal housing, section 221(d)(2) and 221(d)(4) market-rate interest programs, and section 203 unsubsidized house ownership, is a mystery, given the availability and, at least scattered use, of these programs in areas of high minority concentration. In any event, the environmental criterion, to the extent that it imposes environmental guidelines on substantive decision-making, is not likely to be of major importance in facilitating HUD's compliance with NEPA.

¹⁵¹ On the other hand, as we have suggested, it would seem possible for HUD to comply with *Shannon* by incorporating the relevant information relating to

V. APPLICABILITY OF THE ACT TO HUD'S MAJOR PROGRAMS

The requirement of NEPA section 102(2)(C) that agencies prepare an impact statement on all "major federal actions significantly affecting the quality of the human environment" may not be the only provision in NEPA which is "action-forcing,"¹⁵² but it certainly is the major one. Guidance for agency implementation of section 102(2)(C) has been provided by the Council on Environmental Quality (CEQ).¹⁵³ The CEQ guidelines "require"¹⁵⁴ all federal agencies to develop formal procedures for determining those actions which require an environmental impact statement and to institutionalize procedures by which the data necessary for the preparation of these statements can be obtained and evaluated.¹⁵⁵

HUD has prepared draft procedures in accordance with CEQ's guidelines,¹⁵⁶ but those procedures, while representing present HUD policy, are undergoing substantial revision.¹⁵⁷ Those at HUD respon-

minority concentration into its NEPA procedures projects. *Shannon* did not, after all, require any particular procedures.

¹⁵² See *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

¹⁵³ CEQ was created by NEPA §§ 201-07, 42 U.S.C. §§ 4341-47 (1970), and its staff, the Office of Environmental Quality, was created by the Environmental Quality Improvement Act of 1970 §§ 202-05, 42 U.S.C. §§ 4371-74 (1970). Both CEQ and the Office of Environmental Quality are in the Executive Office of the President.

¹⁵⁴ CEQ's guidelines were issued pursuant to Executive Order 11514, 3 C.F.R. 526 (1972 Supp.). As there is no congressional authority for CEQ to issue such guidelines, they do not have the force of law. *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 421 (2d Cir. 1972). The courts have, however, been willing to give the guidelines considerable weight in construing section 102(2)(C), particularly when the guidelines contradict agency practice. See *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1118, n.19 (D.C. Cir. 1971).

¹⁵⁵ See COUNCIL ON ENVIRONMENTAL QUALITY, STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT, 36 Fed. Reg. 7724-29 (1971); See also COUNCIL ON ENVIRONMENTAL QUALITY, PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS, PROPOSED GUIDELINES, 38 Fed. Reg. 10856-66 (1973).

¹⁵⁶ Department of Housing and Urban Development, Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality, 37 Fed. Reg. 22673 (1972) [hereinafter cited as Departmental Policies]. Interestingly enough, HUD's officers apparently did not know of CEQ's publication of these regulations in the *Federal Register*. Telephone conversation with Mr. James F. Miller, Director of Environmental and Land Use Planning Division, Department of Housing and Urban Development, Washington, D.C., October 25, 1972.

¹⁵⁷ Department of Housing and Urban Development, Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality, Circular 1390.1 (April 1972) [hereinafter cited as April Circular]. A subsequent circular, in Handbook form dated December 1972, has been issued. We have been informed that with minor changes regarding Historic Preservation and some of the so-called Thresholds plus the addition of the Flood Insurance

sible for environmental policy can give no definite date on which final regulations implementing the National Environmental Policy Act will be promulgated.¹⁵⁸ Since HUD's final procedures will still apply crude mechanical tests to the problem of determining the scope of environmental review or whether a project is to be deemed significant or major, the exact form which those final procedures take will not be of great significance.¹⁵⁹ For example, under the present procedures if HUD assists or insures the construction of a "mobile home court" containing 99 units the procedures do not require "special environmental clearance" or an environmental impact statement, whereas if the project contains 100 units a threshold is reached requiring "special environmental clearance"; this must be followed either by an impact statement or a statement indicating no significant environmental impact.¹⁶⁰ It is our contention that this type of mechanical approach will often cause HUD to fail to give its projects the type of careful environmental review which NEPA mandates.

Program, the December 1972 Circular is the same as the April Circular. The authors were unable to obtain a copy of the December document because it was "premature" to circulate it at that time. Telephone conversation with Mr. James F. Miller, Director, Environmental and Land Use Planning Division, Department of Housing and Urban Development, Washington, D.C., January 8, 1973. No impact statement was nor is to be filed with respect to these Final Regulations. *Id.*

¹⁵⁸ Apparently, HUD is, or was, prepared to adopt as its final procedures the April Circular as amended by the December 1972 Handbook. However, the sudden return of Undersecretary Jackson to the private practice of law, has made uncertain the date on which HUD's environmental procedures will be adopted. Telephone conversation with Mr. James F. Miller, *supra* note 157.

¹⁵⁹ Of course, if HUD clearly fails to follow the procedures mandated by its own regulations, anyone who objects to the project will have an easy time persuading a court that the project should be enjoined until the error is corrected. See *Silva v. Romney*, 342 F. Supp. 783 (D. Mass. 1972). Furthermore, it may be possible for those who object to HUD's regulations to challenge them before they are applied to a particular project; the *Calvert Cliffs'* case involved, after all, an attack on the AEC's rules, not their application to a particular project. But *Calvert Cliffs'* involved the AEC, which, unlike HUD, follows formal procedures. See *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1116-18 (D.C. Cir. 1971).

¹⁶⁰ April Circular at 14 Departmental Policies, at 22, 676. The case of mobile home courts is especially interesting since both documents specifically grant HUD's Regional Administrators "discretion" to use 50 units rather than 100 units as the threshold. Since no discretion is granted to vary the other thresholds, the negative implication is that a Regional Administrator is not authorized to prepare an impact statement for a project that does not cross one of the thresholds, even though he may believe that an impact statement should be prepared. It should be noted, however, that section 6(a)(2)(c) of the April Circular requires that if a project, which is below the threshold and thus initially requires only "Normal Environmental Clearance," involves significant adverse environmental impact, then "special environmental clearance" is required as

It cannot be stressed too strongly that NEPA will probably never be construed as requiring an agency to make a particular decision.¹⁶¹ Thus, in future litigation concerning the application of NEPA to HUD's programs, the major questions will undoubtedly be whether HUD considered all of the requisite environmental information and whether an environmental impact statement is required.¹⁶² Accordingly, it does not seem appropriate to engage in a more detailed analysis of HUD's tentative environmental procedures than that presented here. These procedures give some insight into HUD's internal decision-making processes, but in the last analysis, it is the judicial gloss on section 102 which will determine whether HUD's decisions comply with the mandates of NEPA. It seems more profitable to analyze some of the major programs administered by HUD and their probable effect upon the human environment.

Since HUD administers a myriad of distinct programs ranging from urban renewal and housing assistance to administering grants for

"a preliminary version of the analysis required in the Environmental Impact Statement."

¹⁶¹ See note 90 *supra* and accompanying text.

¹⁶² The two questions are not identical. There is substantial authority for the proposition that, if an agency determines that an environmental impact statement is not required, the courts should make sure that the agency considered all the relevant environmental factors in making that decision. Thus, in *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), *cert. denied*, 93 S. Ct. 313 (1972), the court of appeals, in reviewing the district court's failure to grant a preliminary injunction against the construction of a Federal Correction Center in Lower Manhattan, did not hold that the failure to prepare an impact statement was improper, but rather that the General Services Administration did not possess sufficient facts upon which to decide that question. *Id.* at 648-49; cf. *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972) (holding that the action involved would not significantly affect the environment and that the Navy's determination to that affect was not arbitrary or reached without adequate consideration of environmental factors). In the second decision in the *Hanly* case, *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) a majority of the panel held that:

[b]efore a preliminary or threshold determination is made, the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision. *Id.* at 836.

Obviously, there is the possibility that the public notice requirement of *Hanly II* would invalidate HUD's threshold determinations under either the Departmental Policies circular or the April Circular. See note 160 *supra*. *Hanly II*, however, presumes that the project is "major," while HUD's thresholds appear to be a mechanical test to determine whether the project is "major."

Although the question of the necessity of an impact statement and the extent to which environmental factors have actually been considered are different, one would expect both questions to be raised in a typical suit against HUD alleging a violation of NEPA.

water and sewer facilities¹⁶³ and insuring residential and business properties against flood damage,¹⁶⁴ it would be impossible to discuss all of these programs in the necessary detail. Therefore, we shall confine our analysis to the three broad categories of programs administered by HUD which we believe have the greatest impact on the urban environment: loans or grants-in-aid for urban renewal, mortgage insurance for residential housing, and public housing.¹⁶⁵

These programs are among those which then Secretary Romney recently announced are subject or are to be subject to a spending moratorium.¹⁶⁶ Since the full effect of the moratorium will not be felt for approximately 18 months,¹⁶⁷ and the suspension, at least on subsidized mortgage insurance and public housing programs, will be eventually lifted,¹⁶⁸ the application of NEPA to these programs is likely to plague HUD for a number of years to come.¹⁶⁹

¹⁶³ 42 U.S.C. § 3102 (1970).

¹⁶⁴ National Flood Insurance Act of 1968 §§ 1304-76, 42 U.S.C. §§ 4011-4127 (1970).

¹⁶⁵ We recognize that this type of categorization may result in some oversimplification. For example, it is becoming increasingly clear that unless the cost of land can be "written down" as is permitted in urban renewal or model city areas, it is difficult to obtain approval of housing for low- and moderate-income families in the "inner city" under the federal mortgage insurance programs. Similarly, an urban renewal plan may include provisions for the construction or substantial rehabilitation of residential housing pursuant to federal mortgage insurance programs. See 12 U.S.C. § 1715r (1970) (market rate insurance for housing in urban renewal areas).

¹⁶⁶ N.Y. Times, Jan. 9, 1973, at 1, col. 1. The suspension of the Urban Renewal program was delayed six months until July 1, 1973. *Id.*

¹⁶⁷ The spending moratorium applies only to new project applications and pending applications which have not been approved on January 8, 1973. *Id.* at 21, cols. 4-5.

¹⁶⁸ *Id.* at 1, col. 1. The alleged reason for the suspension is to determine if the programs "should be improved, replaced or terminated." *Id.* The latter two actions, however, will take new legislative action.

¹⁶⁹ The announcement does, however, raise an interesting question as to whether NEPA requires that an impact statement be filed before the suspensions can become effective. There is no indication that HUD has filed or intends to file an impact statement on the suspension, but it is undeniable that it is a major federal action having a significant and more or less immediate impact on the environment. Deputy Mayor Edward K. Hamilton of New York City and Edward J. Logue, President of the New York Urban Development Corp., both stated that the suspension of funds for subsidized housing for low- and moderate-income families would result in the construction of only luxury apartment units in New York City. *Id.* at 21, col. 1. Although the suspension itself is an action, one might argue that any environmental impact will result not from that action but rather from HUD's inability to act with respect to a given project. Even if one accepts that distinction (a distinction which seems to us philosophically more relevant to the law of crimes and torts), the courts have required impact statements for certain "negative" decisions. For instance, in *National Helium Corp.*

A. Loans and Grants-in-Aid for Urban Renewal

To analyze the interplay between federal urban renewal programs¹⁷⁰ and the requirements of NEPA, it is necessary to determine the nature of the decisions made by HUD in connection with such programs, at what point in the planning process those decisions are made, and the extent to which those decisions (or their consequences) can be considered both to be major and to have significant impact on the human environment.¹⁷¹

Any municipality desiring federal assistance for urban renewal

v. Morton, 455 F.2d 650 (10th Cir. 1971), the Tenth Circuit held that a decision by the Department of the Interior to discontinue purchasing helium required the filing of an environmental impact statement, and in *Students Challenging Regulatory Agency Procedures v. United States*, 346 F. Supp. 189 (D.D.C.), *application for stay pending appeal denied sub nom.*, *Aberdeen & R. R.R. v. Students Challenging Regulatory Agency Procedures*, 93 S.Ct. 1 (1972), the District Court for the District of Columbia held that the ICC must file an environmental impact statement before deciding not to suspend an increase in railroad rates that applied to recyclable goods. The court described the ICC's action in affirmative terms: "We hold that the Commission should be preliminarily enjoined from permitting the railroads to collect the surcharge until an adequate environmental impact statement has been issued." *Id.* at 192 (emphasis added). However, the court correctly described the ICC's power over railroad rates in the following manner:

The Interstate Commerce Act permits carriers to file changes in tariffs with the Commission on their own initiative. If the Commission takes no action on these tariffs, they go into effect as published, although subject to eventual refund. . . . *Id.* (emphasis added).

¹⁷⁰ There are two types of urban renewal programs. The first is the conventional urban renewal program originally enacted as Title I of the Housing Act of 1949, 42 U.S.C. §§ 1441-1468a (1970). The second, enacted as Title V of the Housing and Urban Development Act of 1968, 42 U.S.C. §§ 1469-1469c (1970), is the Neighborhood Development Program. The difference between the two is in the nature of their funding. A conventional renewal plan contemplates the execution of a grant-in-aid contract covering all phases of the program without regard to the length of time needed for planning and execution of the project. Neighborhood Development Programs are funded incrementally on an annual basis and contemplate a smaller scale, staged program in which the planning can be fully or substantially completed within one year and which must be completed within two years. HUD guidelines for the Neighborhood Development Program are contained in DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, NEIGHBORHOOD DEVELOPMENT PROGRAM HANDBOOK, RHA 7380.1 (1968).

¹⁷¹ In *Hanly I* the plaintiffs argued that if a federal action is found to be major, because of the dollar amount of federal expenditures, amount of planning required, and time for completion, then, a fortiori, it must significantly affect the environment. 460 F.2d at 644. The court rejected this argument, holding that the plaintiffs must satisfy both tests. *Id.* The court in *Hanly I* was not asked to decide whether an action with significant environmental impact must always be considered to be major. *Id.*

must first prepare a "workable program" which must be approved by HUD.¹⁷² The workable program must demonstrate that the municipality has an effective program for "dealing with the problems of urban slums and blight . . . and for the establishment and preservation of a well-planned community . . ." including an acceptable housing code and a municipality-wide means of effectively enforcing that code.¹⁷³ If the proposed workable program is approved, the municipality may then seek planning grants from HUD for preparation of an urban renewal plan.¹⁷⁴ This plan must include descriptions of the parcels to be acquired and their contemplated use after acquisition¹⁷⁵ and must detail the facilities available for relocating the families and businesses displaced by the implementation of the plan.¹⁷⁶ Accordingly, HUD's involvement with the urban renewal process involves three important decisions before any federally assisted urban renewal plan can be implemented: approval of the workable program, approval of the application for planning assistance, and, finally, approval of the

¹⁷² The workable program requirement was added by the Housing Act of 1954, 42 U.S.C. § 1451(c) (1970). The same requirement exists for grant-in-aid contracts under the Neighborhood Development Program. See *id.*, § 1469c(a) (1) (1970). For a general explanation of workable programs see Rhyne, *The Workable Program—A Challenge for Community Improvement*, 25 LAW & CONTEMP. PROB. 685 (1960); Comment, *The Concept and Objectives of Urban Renewal*, 37 S. CAL. L. REV. 55, 58-60 (1964). The Housing and Urban Development Act of 1965, 42 U.S.C. § 1451(e) (1970), gave the workable program requirement new importance by providing that no renewal grant contract can be entered into by HUD unless the workable program indicates a need for the project and the project relates to the objectives stated in the workable program.

¹⁷³ 42 U.S.C. § 1451(c) (1970).

¹⁷⁴ 42 U.S.C. § 1452(d) (1970) (conventional Neighborhood Renewal Plans); 42 U.S.C. § 1453(d) (Community Renewal Plans). The first section is not, by its terms at least, a grant but rather an advance of funds which must be repaid. If the renewal project is never funded, there is some evidence that HUD may not seek recovery of the advance. See Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 512 (1959). For a general description of the planning phase see Slayton, *The Operation and Achievements of the Urban Renewal Program*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY*, 197-99 (J. Wilson ed. 1966).

¹⁷⁵ DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *URBAN RENEWAL HANDBOOK*, RHA 7207.1, ch. 4, § 2 (1968).

¹⁷⁶ The provision of adequate relocation facilities is a precondition for the approval of an urban renewal plan. See note 117 *supra*. The nature and extent of relocation assistance has been codified by the Uniform Relocation Assistance and Real Properties Acquisition Policies Act of 1970, 84 Stat. 1894 (1970), 42 U.S.C. §§ 4601 *et seq.* (1970). See Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 769-81 (1971). It is doubtful that a failure to comply with the Uniform Relocation Act will result in an injunction against further implementation of the renewal plan. *Martinez v. HUD*, 347 F. Supp. 903, 904 (E.D. Pa. 1972).

urban renewal plan itself. For our purposes, the question thus becomes whether any of these preliminary decisions require HUD to consider the environmental consequences and whether any of these decisions can be considered a major federal action which has a significant impact on the human environment.

1. Workable Program Approval

Since the approval of a workable program is merely the statutory prerequisite for further decisions by HUD relating to approval of urban renewal programs and related activities,¹⁷⁷ such approval normally will have no immediate effect, environmental or otherwise. At the time a workable program is approved, a municipality will normally have no detailed urban renewal plan, and it will usually be difficult, if not impossible, to estimate the environmental consequences which will flow from the workable program's approval. In most cases, therefore, an environmental impact statement would not seem to be required, since the program approval decision appears to have little environmental impact and cannot reasonably be denominated a major federal action.

Because the substantive provisions of section 101 of NEPA and the provisions of section 102 other than 102(2)(C) are not conditioned upon major federal action or significant environmental impact,¹⁷⁸ however, and since the approval of a workable program is the first step in a series of federal decisions which ultimately may lead to a massive alteration of a particular urban environment, it is desirable that HUD should begin thinking about the ultimate environmental consequences in as great detail as possible as soon as it is called upon to approve or disapprove a workable program.

This appears to be the motive underlying the command in CEQ's guidelines which specifically provide that "as early as possible . . . Federal agencies will . . . assess in detail the potential environmental

¹⁷⁷ 42 U.S.C. § 1451(c) (1970). At one time Section 102(c) of the Housing Act of 1949 required approval of a workable program before a municipality could obtain federal funds for its public housing programs and before the FHA could insure a mortgage on a housing project for low and moderate income families pursuant to Section 221(d)(3) of the National Housing Act. Both of these requirements were deleted by Section 208 of the Housing and Urban Development Act of 1969, Pub. L. No. 91-152, 83 Stat. 387 (1969), amending 42 U.S.C. § 1452 (1970). At the present time, the only program other than urban renewal programs for which approval of a workable program is needed, is FHA mortgage insurance under Section 220 of the National Housing Act when the project is located within a pre-1954 urban renewal area. See 12 U.S.C. § 1715k(d)(1)(A) (1970).

¹⁷⁸ 42 U.S.C. §§ 4331-32 (1970).

impact. . . ."¹⁷⁹ Furthermore, it is at least possible in some cases that a decision approving a workable program may have environmental consequences apart from those which will ultimately result from an urban renewal plan. For example, the workable program may evidence a housing code which requires the demolition of structures which could otherwise be rehabilitated. In such a case, HUD might be able to improve the environment, that is the stock of housing in which people live, by refusing to approve the program.¹⁸⁰ Since the approval of a workable program is analogous to "licensing" or "permitting" inclusion of the objectionable provisions contained in the plan, HUD would probably have the power to disapprove a workable program with undesirable environmental consequences even though the program met all the statutory requirements of the 1949 Housing Act.¹⁸¹ In such circumstances, consideration of the environmental consequences of a decision to accept the program would seem to be imperative and a generous interpretation of NEPA might even demand that an environmental impact statement be prepared.

Even if one concludes that the approval of a workable program usually is not an appropriate point for the preparation of an impact statement or even an extensive consideration of the environmental impact of such approval, the question remains whether the disapproval of a workable program is subject to the same conclusions.¹⁸² Such an action would certainly appear to have a significant impact on the human environment, since it prevents a municipality from participating in the major federal program for the arrest and prevention of urban blight. On the other hand, the provisions of the Housing Act of 1949 relating to workable programs do not leave much room for the exercise of discretion,¹⁸³ and if the workable program clearly fails to meet the statutory requirements, then HUD can neither approve it nor grant any urban renewal assistance. Thus it appears that HUD cannot effectively take environmental considerations into account when it reviews a workable program which is clearly deficient.

Where a plan is not clearly unacceptable and the decision to disapprove may demand the exercise of discretion, however, the adverse environmental consequences of disapproval might justify the

¹⁷⁹ COUNCIL ON ENVIRONMENTAL QUALITY, STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT § 2, 36 Fed. Reg. 7724 (1971).

¹⁸⁰ The assumption is, of course, that the applicant would modify the housing code by removing the undesirable provisions in order to obtain HUD's approval.

¹⁸¹ See *Zabel v. Tabb*, 430 F.2d 199, 213-14 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

¹⁸² This question is similar to the one of whether an impact statement must be filed with respect to the recent moratorium. See note 169 *supra*.

¹⁸³ See 42 U.S.C. § 1451(c).

approval of a program which otherwise would be rejected. In such a borderline case, the argument for requiring not only consideration of environmental factors, but the actual preparation of an impact statement is much stronger. Furthermore, section 102(2)(C) of NEPA clearly is not intended only to make federal agencies include environmental considerations in their decision-making processes:

Congress contemplated that the Impact Statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant decisions, and would be available to enhance enlightenment of—and by—the public.¹⁸⁴

Thus, even though in some cases it would constitute an abuse of discretion for HUD to approve as workable a program which does not meet the 1949 Act's standards, that does not mean that HUD has no reason to prepare an impact statement before it disapproves such a plan. Congress may be extremely interested in learning the environmental effects of such a mandatory disapproval. After all, Congress has in the past exempted some programs administered by HUD from the workable program prerequisite.¹⁸⁵

It seems clear, then, that no hard and fast rule can be formulated to determine when, if ever, HUD should prepare an environmental impact statement before approving or disapproving a workable program.¹⁸⁶ Where a program otherwise satisfies the 1949 Act, it seems impossible, in the ordinary case, for HUD to consider its environmental impact with sufficient specificity and definitiveness to make possible the preparation of an impact statement. However, if the intent of NEPA is to be fully carried out, HUD can, and should, begin consideration of the environmental impact of the workable program even before the program is approved. Where a program does not clearly satisfy the 1949 Act, however, we are faced with a more diffi-

¹⁸⁴ *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972). The case held that the Department of the Interior must prepare an impact statement showing alternatives to leasing off-shore oil lands, including the alternative of modifying oil import quotas—an alternative far beyond Interior's jurisdiction. *Id.* at 834-38; cf. *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971):

The [impact] statement has significance in focusing environmental factors for informed appraisal by the President, who has broad concern even when not directly involved in the decision process, and in any event by Congress and the public.

See also note 99 *supra*.

¹⁸⁵ See note 177 *supra*.

¹⁸⁶ But see *Hanks & Hanks*, *supra* note 81, at 262 (1970):

Almost as clear a case is the environmental responsibility of the Secretary of HUD when he approves the "workable plan" of a local redevelopment agency.

cult question. Even though we would imagine that the approval of a workable program would not be a major action which, by itself, significantly affects the human environment in most cases, the disapproval of a workable program may often constitute a major action with significant environmental impact.¹⁸⁷ In the latter case, even if the disapproval is mandatory, we believe that, if only for the purpose of informing Congress of the environmental consequences of the workable program requirement, an impact statement should be prepared and filed with CEQ.

Preparation of such an impact statement will probably not place a severe burden on HUD's resources, since the disapproval of a workable program will tend to preserve the status quo. One would hope that HUD's local offices already possess sufficient information to describe the housing and slum conditions within their jurisdictions. If they do not, the requirement of preparing an impact statement would appear to be perfectly consistent with NEPA's policy of preventing federal agencies from grinding out decisions based on little or no information.¹⁸⁸

2. Planning Assistance Approval

Although a workable program may have environmental consequences in its own right without regard to any future developments, it is hard to see how the decision to grant a municipality money for planning, by itself, could have any significant impact on the environment. The denial of a planning grant reduces the possibility that a community will ultimately be able to secure federal funding for an urban renewal plan and thus clearly does have some environmental impact, but it is not as conclusive as the disapproval of a workable program. It seems, therefore, that neither the approval nor disapproval of a planning grant is likely to be deemed either a major action

¹⁸⁷ This conclusion assumes that the disapproval is based on a ground that cannot easily be cured by an amendment to the original submission.

¹⁸⁸ Notwithstanding this ideal, however, litigation is the only weapon that can compel HUD to consider the environmental consequences of its acts. Thus, a major question is who would be willing to bear the cost of litigation over HUD's failure to prepare an environmental impact statement in connection with its review of a workable program. The aggrieved municipality is not likely to sue since the only relief it can realistically expect is that HUD will have to prepare an impact statement—an action unlikely to cause HUD to approve a program already found to be deficient. In addition, even if a workable program contained provisions which some local citizens would consider objectionable, they are not likely to feel threatened at such an early stage in the planning process. In fact they probably will not know of the existence, much less the contents of the plan. Furthermore, if the objectionable features require federal action before they can be implemented, it seems probable that the aggravated citizens would delay commencing costly litigation until the later federal action is taken.

or one significantly affecting the environment.¹⁸⁹ Thus we conclude that no impact statement should be required at this stage.

This is not to say, however, that HUD need show no concern for the environmental impact of its activities at this point. CEQ's guidelines and the courts have stressed that an agency's environmental assessment should be made "as early as possible."¹⁹⁰ Thus, even if no impact statement needs to be prepared at the planning grant stage, HUD would be well advised to start collecting the information which it will need for an impact statement at that time. It appears that most, if not all, the delays in federal programs which have been caused by the courts' willingness to enforce NEPA have resulted not from the inherent impossibility of preparing an impact statement within the normal decision-making period, but rather from a bureaucratic disinclination to begin compliance with NEPA section 102(2)(C) until directed to do so by the courts.¹⁹¹

¹⁸⁹ Even if the action in question were major and one that significantly affected the environment, HUD might argue that a suit challenging it would be premature, at least until an actual planning grant has been made. However, recent cases belie this conclusion. See *Sierra Club v. Morton*, Civil No. 51464 (N.D. Cal., Sept. 12, 1972).

Defendants contend that plaintiffs have failed to state a claim under NEPA because there is no allegation that defendants have commenced construction or issued permits for the projects. Plaintiffs, however . . . contend that NEPA requires compliance . . . as soon as the Government agency has reached a decision to proceed with the project . . . We conclude that plaintiffs' complaint is sufficient to raise the issue of defendants' compliance with NEPA. *Id.* (citations omitted).

The rationale for concluding that approvals of advances and grants to assist local public agencies in planning their urban renewal programs are not major federal actions significantly affecting the human environment would also apply to planning assistance under the open space programs. See 42 U.S.C. § 1500b (1970). It would seem also to apply to regional and metropolitan planning programs pursuant to section 701 of the Housing Act of 1954, 40 U.S.C. § 461 (1970), and sections 201-09 of the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. §§ 3331-39 (1970). For a comprehensive description of these programs see Vestal, *Planning for Urban Areas: The Fight for Coherency*, 56 *IOWA L. REV.* 19, 36-38, 42-50 (1970).

¹⁹⁰ COUNCIL ON ENVIRONMENTAL QUALITY, STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT, 36 *FED. REG.* 1724 (1971); see note 154 *supra*.

¹⁹¹ See *Hanly v. Kleindienst*, 471 F.2d 823, 836 (2d Cir. 1972):

With the aid of hindsight we recognize, as does the dissent, that a further assessment, when added to the time and expense already incurred, will prolong the final determination far beyond the time that would have been required if the energies of the GSA had been directed initially toward the preparation of an impact statement.

But see Statement of Dr. James R. Schlesinger, Chairman of the AEC, *Joint Hearings*, *supra* note 70, at 88-96 (arguing that the requirement that an impact statement be prepared before atomic power plants are tested is causing delays in the construction of nuclear plants with consequent risk of major blackouts).

3. Approval of the Urban Renewal Plan

Unlike a workable program or an application for a planning advance or grant, an urban renewal plan is a detailed description showing exactly what the local public agency intends to do with each parcel of land. It must specify whether the parcel is to be acquired or rehabilitated and, if acquired, its proposed reuse. The plan must also specify that adequate provisions have been made to relocate those persons who will be displaced.¹⁹² In other words, the urban renewal plan contains sufficient information to allow HUD to pinpoint the areas in which one could expect environmental impacts to occur.¹⁹³

It seems clear, therefore, that HUD should always prepare an environmental impact statement before approving a plan, since its execution will inevitably have a significant effect upon the human environment. Notwithstanding an increased emphasis on rehabilitation rather than clearance,¹⁹⁴ and a higher priority for reusing urban renewal land for housing low- and moderate-income families than for high-rent housing or commercial units,¹⁹⁵ renewal has the undeniable effects of uprooting families and individuals from their present environment;¹⁹⁶ of reducing, if not eliminating, private incentives for preventing environmental degradation;¹⁹⁷ of destroying or substantially reducing any preexisting sense of community within the renewal area;¹⁹⁸ and, to the extent that those who have been dislocated resettle

¹⁹² See 42 U.S.C. § 1455(c) (2) (1970).

¹⁹³ We do not mean to suggest that an urban renewal plan is likely to contain enough information to allow its environmental impact to be evaluated without considering matters which are not contained in the plan. But the urban renewal plan is a specific enough description of the local public agency's plan that one can determine the additional information which must be obtained if its environmental impact is to be considered.

¹⁹⁴ See Note, *supra* note 29 at 479-80.

¹⁹⁵ See 42 U.S.C. § 1455(f) (1970); cf. M. ANDERSON, *supra* note 29, at 67, 92-93. A major incentive for using urban renewal land for housing low- and moderate-income families is the so-called "write-down" provision of 42 U.S.C. § 1457 (1970). This permits a local public agency to dispose of renewal land at "fair value" rather than market value if the purchaser agrees to use the property either for public housing or for housing for low- and moderate-income families. See DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, URBAN RENEWAL HANDBOOK, RHA 7214.1, ch. 3, § 3, at 1-4 (1968).

¹⁹⁶ For a discussion of the psychological effects upon those being dislocated see Hartman, *supra* note 176, at 798-01.

¹⁹⁷ G. STERNLEIB, *supra* note 29; Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 525-27 (1959). It is self-evident that once an area is slated for urban renewal, the owners of property within the area will have little or no incentive to maintain or improve structures which will ultimately either be bulldozed or rehabilitated at the government's expense. See notes 44-45 *supra* and accompanying text.

¹⁹⁸ C. ABRAMS, *supra* note 29, at 28-31; J. JACOBS, *THE DEATH AND LIFE OF GREAT*

in other neighborhoods, of significantly altering the complexion of the communities into which the displacees move.¹⁹⁹ While it is conceivable that a renewal project may have none of these effects, either because there is no land clearance contemplated or, if there is, because no significant displacement will result, the writers are unaware of any such project, and the history of renewal up to this time compels the conclusion that the physical, economic, social, and psychological dislocations are, and will continue to be, overwhelming.

One need not look to the past consequences of urban renewal plans to conclude that all such plans must have a significant impact on the human environment. The very purpose of the Housing Act of 1949, as strengthened by the Housing and Urban Development Act of 1968,²⁰⁰ is to secure a suitable living environment for every American family.²⁰¹ Given this purpose, HUD can hardly claim that an urban renewal plan will not have a significant impact upon the human environment unless it claims at the same time that the plan will not accomplish its purpose.

Funding an urban renewal project is clearly a major federal action; even the construction of a single building or the issuing of mortgage insurance thereon has been held to be major.²⁰² Of course, it is conceivable, particularly through the Neighborhood Development Program, that a local public agency might try to divide an urban renewal area into minor segments in an attempt to so fragment the project that the effect of any one segment on the environment is neither significant nor major. It is clear, however, that such attempts to subdivide a major action into several minor ones are doomed to failure, both because CEQ's guidelines require that the cumulative effects of several actions be considered in determining whether an environ-

AMERICAN CITIES 52-82 (1961) (discussing public housing).

¹⁹⁹ C. ABRAMS, *supra* note 29, at 137-45; S. GREER, *URBAN RENEWAL AND AMERICAN CITIES* 55-64 (1965); Comment, *The Concept and Objectives of Urban Renewal*, 37 S. CAL. L. REV. 55, 68 (1964); cf. E. BANFIELD, *THE UNHEAVENLY CITY* 36 (2nd ed. 1970); Hartman, *supra* note 176, at 792-93, 795-97.

²⁰⁰ 42 U.S.C. §§ 1441, 1441a (1970).

²⁰¹ See *id.*

²⁰² *Hanly v. Mitchell*, 460 F.2d 640, 643-644 (2d Cir.), cert. denied, 93 S. Ct. 313 (1972); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 879 (D. Ore. 1971). Cases declaring that urban renewal plans are major federal actions significantly affecting the environment include: *Boston Waterfront Residents Ass'n v. Romney*, 334 F. Supp. 89 (D. Mass. 1972); *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973).

²⁰³ COUNCIL ON ENVIRONMENTAL QUALITY, *STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT* § 5, 36 Fed. Reg. 7724 (1971). HUD apparently considers the cumulative effect of a single project. See Impact Statement filed on *Riviera Apartments* referred to in 37 Fed. Reg. 25,771 (1972).

mental impact statement is required²⁰³ and because the courts have consistently refused to be taken in by such transparent dodges.²⁰⁴

Despite the apparent necessity of an environmental impact statement in connection with urban renewal projects, HUD's present regulations do not require an impact statement as a matter of course with respect to such projects.²⁰⁵ This policy contrasts sharply with HUD's present policies toward its New Communities Programs²⁰⁶ and the FHA-administered land development mortgage insurance program,²⁰⁷ both of which contemplate the development of new communities rather than the rehabilitation of old ones. Although we do not agree, we can conceive of four reasons why HUD might believe that there is a significant distinction between its environmental responsibilities with respect to new developments and those with respect

²⁰⁴ See *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167, 1170 (S.D. Iowa 1972); cf. *Named Indiv. Members v. Texas Highway Department*, 446 F.2d 1013, 1023-24 (5th Cir. 1971). But cf. *Julius v. City of Cedar Rapids*, 349 F. Supp. 88, 89-90 (N.D. Iowa 1972).

²⁰⁵ See April Circular, *supra* note 157, at A-4, A-5; Departmental Policies, *supra* note 156, at 22,677. While the April 1972 Circular requires a "special environmental clearance statement" for all new renewal and neighborhood development proposals, this does not qualify as an impact statement within the meaning of section 102(2)(C) of the National Environmental Policy Act. *Silva v. Romney*, 342 F. Supp. 783, 785 (D. Mass. 1972); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 880 (D. Ore. 1971). The Departmental Policies circular does not even go this far, stating that special environmental clearance is only required where the plans change concentration of persons, or traffic, or the demand for public services in an area by 50 percent or more; where there will be land use conversions which are expected to produce noise or waste products beyond existing capacity to handle them; where the project will affect historic sites; or where the height of any structure is expected to be more than 100 feet above the height of any existing structure. Department Policies at 22,677 (1972).

²⁰⁶ Two enactments exist for the development of new communities. The first was enacted as Title IV of the Housing and Urban Development Act of 1968, 42 U.S.C. §§ 3901-14 (1970). The second is the Urban Growth and New Community Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1791 (1970) (codified in scattered sections of 12, 40, and 42 U.S.C.). See generally Boykin and Brincefield, *Federal New Communities Program: The Legislation, Processing and Documentation*, 4 URBAN LAW. 189 (1972); Harr, *New Financing for Planned Communities*, MORT. BANKER, Sept. 1968, at 9; Kegan & Rutzick, *Private Developers and the New Communities Act of 1968*, 57 GEO. L. REV. 1119 (1969).

²⁰⁷ 12 U.S.C. §§ 1749aa-49ll (1970). This provision, which is Title X of the National Housing Act of 1934, was added by Title II of the Housing and Urban Development Act of 1965. Pub. L. No. 89-117, 79 Stat. 461 (1965). It provides for the issuance of mortgage insurance on certain qualifying mortgages on land developments and "new communities" in order to:

encourage the maintenance of a diversified local homebuilding industry . . . and the inclusion of a proper balance of housing for families of moderate or low income. 12 U.S.C. §§ 1749dd (1970).

to urban renewal projects. In the first place, the very language of the 1949 and 1968 Acts presupposes that urban renewal has a beneficial, rather than a detrimental, effect on the environment.²⁰⁸ Secondly, both the land development and the new communities programs contemplate the development of previously undeveloped or underdeveloped land, a change in use which is likely to be objectionable to vocal middle-class environmental organizations such as the Sierra Club. Thirdly, one of the express purposes of the Urban Growth and New Communities Act of 1970²⁰⁹ is to encourage future land development which is consistent with present ecological values and which prevents "further deterioration of the Nation's physical and social environment." Finally, one might suspect that HUD has far more applications for urban renewal assistance than it does for its new communities programs and land development mortgage insurance, thus making the aggregate amount of paper work more burdensome with respect to the former program.

As to the first point, the fact that an action may have a beneficial impact on the environment does not serve as an excuse for not considering its environmental effects or preparing an impact statement. Section 102(2)(C) of NEPA refers to actions which "significantly affect" the environment; it is not limited to significant *adverse* effects. While it is arguable that the statutory requirement that alternatives to the proposed action be explored implies that an impact statement is required only when the action will have adverse environmental consequences, the few courts which have faced this argument have rejected it.²¹⁰ If one accepts the conclusion that the primary purpose of NEPA, including section 102(2)(C), is to compel agencies to consider the environmental consequences of their acts, then it seems obvious that there should be no exception for allegedly "beneficial"

²⁰⁸ See 42 U.S.C. §§ 1441, 1441(a) (1970).

²⁰⁹ Pub. L. No. 91-609, 84 Stat. 1791 (1970).

²¹⁰ *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 367 (E.D.N.C. 1972):

Any action that substantially affects, beneficially or detrimentally, the depth or cause of streams, plant life, wildlife habitats, fish and wildlife, and the soil and air "significantly affects the quality of the human environment." (emphasis added)

See also *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 887, 879-80 (D. Ore. 1971). But cf. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) (*semble*). It is important to note that in the *Grant* case the Soil Conservation Service had made fairly extensive environmental studies of the rechannelization project at issue; the environmental review was at least as extensive as that called for by HUD's April Circular for renewal projects. See note 205 *supra*. Even so, the project was enjoined pending preparation of an environmental impact statement.

actions. It is an old truism that the good is the enemy of the best. A "beneficial" action may preclude other actions which an environmental analysis would show to be far superior. Furthermore, since it would be a rare agency which would admit, even to itself, that its actions are not beneficial, acknowledging an exception to NEPA for beneficial actions would substantially diminish its scope. Finally, what is beneficial to one person may be detrimental to another; in fact, this will almost always be so.²¹¹ In such circumstances there is no basis for classifying an action as beneficial without a full consideration of the impact of the project upon those who disagree, and, a fortiori, no basis for ignoring the duty to prepare an impact statement simply because a proposed action may be beneficial.

Implicit in the second and third points is the concept that the urban environment is somehow less deserving of protection and improvement than is the more peripheral environment which is comparatively free from human contact. Admittedly, the environmental problems within a city are likely to differ substantially from those of the countryside, but this is no reason for HUD, of all agencies, to ignore the problems of the urban environment. The bulldozing of an urban neighborhood clearly has more impact on the human environment, if only in terms of the sheer number of people affected, than does the construction of a new town on some meadowland, and this is so even though the poverty and disorganization which afflict so many of our central cities make it less likely that those disturbed by urban renewal will contest HUD's disregard of their environmental interests in court. Once again, it should be pointed out that all of HUD's programs are subject to the mandate of NEPA. The fact that some programs specifically mandate certain types of environmental consideration is no excuse for avoiding NEPA's requirements in other areas.

4. *Actions Occurring After Approval of the Renewal Plan*

The renewal plan as finally approved does not mark the termination of federal involvement with the local urban renewal program. The urban renewal plan (particularly if it is conventional renewal and not a Neighborhood Development Program) will not remain static during the planning and execution stages; changing circumstances will undoubtedly call for amendments. Furthermore, many steps remain for HUD to perform after it has approved an original or an amended plan—in particular, it still has money to disburse. If HUD has failed to prepare a satisfactory impact statement at the time it approved the original or amended plan, these later steps can be significant.

²¹¹ See text accompanying notes 58-59 *supra*.

If no impact statement was prepared for an urban renewal plan which was approved after January 1, 1970 (the date on which NEPA became law), then HUD has not complied with NEPA and an impact statement obviously should be prepared as soon as possible before HUD takes any further action with respect to the project.²¹² If an urban renewal plan was approved before NEPA's effective date and the plan has not been completely executed, a more difficult problem arises, a problem which is certain to occur for some time.²¹³ It is our conclusion that in such a case no action, including disbursement of funds, can properly be taken by HUD with respect to the project until an environmental impact statement has been prepared and considered, unless the project is so far completed that the remaining federal actions will only have an insignificant impact on the environment. The argument can be made, of course, that the only major federal action was the original approval of the plan and that no subsequent federal action, except for approval of an amendment to the original plan which is important enough to be denominated major in its own right, can necessitate an impact statement. The major problem with this argument is that it runs counter to CEQ's guidelines and the majority of judicial decisions which have dealt with similar problems. Section 11 of the guidelines specifically provides that:

To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.²¹⁴

Most of the litigation which has dealt with similar arguments has occurred in cases where the Department of Transportation has given "design approval" to a highway before NEPA's effective date but construction has not begun or has not proceeded to completion until after that date. The courts have split on the question of whether an impact statement is required from the Department of Transportation

²¹² This statement assumes that we are correct in our contention that an impact statement is always a prerequisite to the approval of an urban renewal plan. If the original plan is not a major action or does not significantly affect the human environment, then an amendment to the plan should be subjected to the same type of review that is applied to an original plan and if it is major and its effect is significant then an environmental impact statement should be prepared for it.

²¹³ It has been estimated that the average time for completion of a conventional renewal plan is 12 years. M. ANDERSON, *supra* note 29, at 88.

²¹⁴ COUNCIL ON ENVIRONMENTAL QUALITY, STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT, 36 Fed. Reg. 7724, 7727 (1971).

after such design approval, but the better reasoned opinions have held that it is, as long as federal involvement with the project is not substantially completed.²¹⁵ Since the courts in such cases must make factual determinations as to the project's stage of completion and the extent of intervening equities, however, one cannot expect any hard and fast rule to develop.

The notion that project approval prior to the effective date of NEPA automatically immunizes the project from environmental review, even though there is still substantial federal involvement with the project, clearly violates the interpretation of that Act embodied in *Calvert Cliffs*.²¹⁶ One case involving HUD that arguably accepted the proposition that a project approved before January 1, 1970, does not require an impact statement even though most of the work remains to be done is *San Francisco Tomorrow v. Romney*,²¹⁷ which involved two urban renewal projects in the San Francisco Bay area, both of which had been approved long before the passage of NEPA.²¹⁸ The primary holding in the case was that the plaintiffs lacked standing,²¹⁹ but the court went on to say that, even if there were standing, an environmental impact statement was not required because "all relevant design and planning phases of the two projects had been determined prior to January 1, 1970, and it does not appear that any changes thereafter made or contemplated require impact statements. . . ."²²⁰ However, even the court in *San Francisco Tomorrow* concluded, after analyzing other cases involving projects initiated prior to January 1, 1970, that if subsequent to that date:

[T]here is any significant departure from the original design having ecological significance or if, subsequent thereto, a design feature of ecological significance left open in the original design is resolved or one previously provided for is significantly changed, an "impact statement" must be prepared. . . .²²¹

²¹⁵ See, e.g., *Conservation Soc'y v. Volpe*, 343 F. Supp. 761, 767 (D. Vt. 1972); *Morningside-Lennox Park Ass'n v. Volpe*, 334 F. Supp. 132, 144 (N.D. Ga. 1971). But see *Concerned Citizens of Marlboro v. Volpe*, 459 F.2d 332, 335 (3d Cir. 1972); *Elliott v. Volpe*, 328 F. Supp. 831, 834-37 (D. Mass. 1971).

²¹⁶ *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1127-29 (D.C. Cir. 1971).

²¹⁷ 342 F. Supp. 77, 82 (N.D. Calif. 1972). On appeal, the case was reversed on the standing issue and also on the determination that no impact statement was required as to the West Berkeley Project. *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973).

²¹⁸ One project, which had originally been approved and allotted over \$31,000,000 in 1966, was granted an additional \$17,000,000 by "amendatories" after the passage of NEPA; the other project was allocated funds on an annual basis. 342 F. Supp. at 81.

²¹⁹ See note 110 *supra*.

²²⁰ 342 F. Supp. at 82.

²²¹ *Id.*

Thus even under the District Court's restrictive rule in *San Francisco Tomorrow* many amended projects will require impact statements.²²²

Of course, if the project is substantially completed or if substantial resources have already been devoted to it, it may be too late for environmental review or an impact statement either because the environmental consequences of the project have already occurred, or because it may be too late to enjoin the project because of intervening equities.²²³ The latter problem is unlikely to arise in the case of an urban renewal project since, unlike a partially completed dam, highway, or power plant, it can almost always be altered without the necessity of undoing the portions already completed.²²⁴

When a proper environmental impact statement has been prepared for an urban renewal project, only amendments to the plan require further environmental review by HUD. Amendments to an urban renewal plan can be proposed for a variety of reasons, ranging from the need for additional moneys to permit land write-downs²²⁵ or a change from rehabilitation to acquisition and demolition, to a change in contemplated post-project use from park lands to multi-family housing. Some amendments quite clearly call for new environmental impact statements, but others would not seem to require even the most minimal amount of environmental review, if only because they will have no environmental consequences not already considered in the original impact statement. Thus, unlike approvals of urban rene-

²²² More typical of the courts' approach to ongoing pre-NEPA projects is *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972), which held that, with respect to a Soil Conservation Service project approved by Congress in 1966 and as to which "much planning and preparation" had occurred before NEPA's effective date, an impact statement was still required because "a construction contract remains to be let and construction upon the installation of the project has yet to begin." *Id.* at 365.

²²³ *Environmental Defense Fund, Inc. v. Armstrong*, Civil No. C-72-1057-CBR (N.D. Calif., Nov. 14, 1972); *Environmental Defense Fund, Inc. v. Froehle*, 348 F. Supp. 338, 353-58 (W.D. Mo. 1972); *Brooks v. Volpe*, 319 F. Supp. 90 (N.D. Wash. 1970). But see *Stop H-3 Ass'n v. Volpe*, 349 F. Supp. 1047 (D. Hawaii 1972).

²²⁴ There is one other situation, besides substantial completion of the project, in which HUD might not be required to file an impact statement or review the environmental consequences of an uncompleted urban renewal plan approved before January 1, 1970. If, as seems unlikely considering HUD's past procedures, HUD has actually reviewed the environmental consequences of the project in a manner substantially in accordance with NEPA's later requirements, then the courts might be willing to accept that pre-NEPA environmental review as the functional equivalent of an environmental impact statement. See, e.g., *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 418-25 (2d Cir. 1972); *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463, 473-82 (2d Cir. 1971), cert. denied, 92 S. Ct. 2453 (1972); *Sierra Club v. Hardin*, 325 F. Supp. 99, 124-27 (D. Alaska 1971).

²²⁵ For an explanation of the "write-down" procedures see note 195 *supra*.

wal plans, approvals of amendments to those plans cannot be subject to any definite rule as to the extent of the environmental review that is required by NEPA.

We know of no cases during NEPA's first three years which have been concerned with the necessity of filing a new impact statement because a project already subject to an impact statement has been modified, so it is impossible to point to any "rules" which might govern the decision to prepare a new statement. It is possible to suggest some general guidelines, however. An amendment which changes the original plan so extensively that the modifications are the equivalent of a new plan, such as an amendment increasing the area subject to the urban renewal plan, obviously requires a new impact statement. Even in such a case, however, HUD will be spared a considerable amount of effort because much of the data in the original impact statement would also be applicable to the new one. At the other extreme is an amendment which in no way changes the actual execution of the original plan, but merely involves an increase (or a decrease) in the amount of federal funds which are needed. Such changes would not affect the environment in any significant fashion²²⁶ and therefore no further environmental review would appear to be needed. Most amendments, however, will fall between these two extremes. One amendment may call, as was the case in *Shannon v. HUD*,²²⁷ for a change from new or rehabilitated single-family homes to new or rehabilitated multi-family housing for low- and moderate-income families. This will arguably work substantial changes in the existing or contemplated socio-economic composition of the neighborhood.²²⁸ Another amendment may propose a change from public housing to federally insured housing for low- and moderate-income families. Unlike the previous example, this arguably would not appreciably alter the environment in any manner inconsistent with the original plan.

It would seem possible in each case to go through the entire rigmarole of deciding whether or not the amendment itself is a major ac-

²²⁶ Of course, since HUD has limited appropriations available it could be argued that an additional impact statement is required because NEPA section 102(2)(C)(v) refers to "irreversible and irretrievable commitments of resources." 42 U.S.C. § 4332(c)(v) (1970). We do not believe, however, that the courts will construe "resources" as including federal appropriations; Congress was quite clearly concerned with consumption of natural and human resources, not with the product of the federal government's printing presses. We admit, however, that the commitment of funds to one project may deny them to another project; in such a case, it would seem that the impact statement which should be prepared in connection with the decision not to fund the other project should suffice.

²²⁷ 436 F.2d 809 (3d Cir. 1970).

²²⁸ In *Shannon*, HUD clearly did not consider the amendment major; the neighbors, however, did. *Id.* at 815.

tion with significant impact on the environment, but we do not see why such a time-consuming process is necessary, especially since it would raise the possibility of litigation in every case where there is an administrative determination that no impact statement is needed. What we suggest is that whenever an amendment is proposed to an urban renewal plan for which an environmental impact statement has been filed, the impact statement itself should be amended. Then HUD should evaluate the amendment to the plan on the basis of the amended impact statement.²²⁹ The fact that there is no reference to such a procedure in either NEPA or the CEQ's guidelines should not be an obstacle to such an approach,²³⁰ for the courts have indicated that they will accept reasonable, good-faith efforts to comply with NEPA.²³¹ Our solution is admittedly untried, but it would appear to minimize the amount of paper work necessary and still insure complete compliance with the Act.

Such a procedure would obviate the necessity of a preliminary determination as to the magnitude and environmental impact of the pro-

²²⁹ Of course, if it is found that no change is needed in the impact statement because the amendment will have no environmental consequences, a statement to that effect should be sufficient. HUD's April Circular apparently requires the more cumbersome procedure of determining whether the amendatory "significantly change(s) the nature, magnitude or extent of the environmental impact of the action" thus requiring the amendatory to be subjected to a separate environmental clearance procedure. See April Circular, *supra* note 157, at 10-11. CEQ's proposed guidelines suggest that all agencies should follow a procedure somewhat similar to that which we propose. See CEQ's PROPOSED GUIDELINES, *supra* note 155, at § 5(d). CEQ, however, does not suggest that impact statements be amended.

²³⁰ NEPA, itself, is drafted in very general language; "in spirit [it is] a constitution." Hanks & Hanks, *supra* note 81, at 245. The CEQ's guidelines give more detail as to how an impact statement should be prepared and what it should contain. For example, they call for the preparation of both draft and final environmental impact statements. Draft statements are required to be circulated to other agencies for their comments. COUNCIL ON ENVIRONMENTAL QUALITY, STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT § 3, 36 Fed. Reg. 7724 (1971). This two-part procedure may present a slight difficulty if HUD decides to use amended impact statements; it would seem unnecessary to circulate a draft amendment if the amendment itself discloses no substantial change in the environmental consequences of the project. The whole purpose of NEPA, however, is to compel those in the government with the authority to make decisions to actually think about what they are doing. It does not seem that it would be overly burdensome to require HUD's officials to decide whether an amendment is important enough to be circulated for comment; that is, after all, still a far easier job than determining whether approval of a change in the project is a major action with significant environmental effects.

²³¹ *National Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972).

posed change²³² and would assure that the necessary environmental information was available to the responsible officer at the time he reviews the proposed amendment to the plan.²³³ If the change contemplated by the amendment to the plan has major consequences, that fact would be self-evident from the amended impact statement. If the change is insignificant, that would also be evident. In either case the responsible officer will be able to make his decision, as required by *Calvert Cliffs*, in light of the relevant information pertaining to the environment.²³⁴

B. FHA Mortgage Insurance Programs

The Department of Housing and Urban Development, through the Federal Housing Administration, conducts some 18 distinct mortgage

²³² The "mini-impact statement" procedure mandated by the Second Circuit in *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), demonstrates how much time (both administrative and judicial) can be wasted in determining whether an impact statement need be prepared.

²³³ Of course, this assumes that the amendment to the impact statement takes into account all of the relevant environmental consequences. The amended impact statement approach does not assure that the officials who prepare the amendment will do their job properly, but the risk of such an improper amendment is no greater than the risk of a determination, based on insufficient information, that there will be no significant impact or, for that matter, that an original impact statement will not be sufficiently complete. Furthermore, since the amendment will be prepared in reference to the original impact statement, it would seem that the amendment will cover the various items discussed in the original statement; in most cases, the extremely difficult job (since it requires a type of imagination foreign to the traditional bureaucratic process) of determining where to look for possible impacts will have been done at the time the original statement was prepared.

²³⁴ Unfortunately, the proposal to use amended impact statements does not give any help in the case of a change in a pre-1970 project for which no impact statement has been prepared. In such a case the determination as to whether an impact statement should be prepared for the amendment must be made on the basis both of whether the original project requires preparation of a statement and whether the amendment itself is major and of significant impact. Since we have concluded that all urban renewal projects are major actions with significant environmental effects, it would seem that an environmental impact statement is needed for any amendment (no matter how trivial in its own right) if the amendment is essential for the completion of a major portion of the project. It is difficult to argue that all federal involvement was substantially completed before January 1, 1970, if a federal decision necessary to the project must be made after that date. Cf. *Jones v. Lynn* (Civil No. 73-1057) (1st Cir. Mar. 22, 1973) *rev'd* 354 F. Supp. 433 (D. Mass.); but see *San Francisco Tomorrow v. Romney*, 342 F. Supp. 77, 82 (N.D. Cal. 1972), *rev'd*, 472 F.2d 1021 (9th Cir. 1973). The question of whether an injunction will issue against further HUD action pending the filing of an impact statement may well be a separate question depending upon how the court views the equities and the good faith of the parties. See authorities cited note 223 *supra*.

insurance programs. These include mortgage insurance for owner-occupied dwellings,²³⁵ multi-family rental dwellings,²³⁶ cooperatives and condominiums,²³⁷ nursing homes and hospitals,²³⁸ and defense and military housing.²³⁹ Because we perceive it to have the greatest environmental effect of the various FHA programs, we shall direct our attention primarily to residential mortgage insurance. Hopefully, however, the principles formulated with respect to those programs can also be generally applied to insurance programs relating to nursing homes, hospitals, and defense and military housing.

1. Single-Family Dwellings

HUD's approval of an application for mortgage insurance on a single-family home will not always have a significant environmental impact. Quite often such an application will involve a single purchaser of a single used home. While it is possible, of course, to conjure up arguments suggesting some environmental impact in such a case, it still seems obvious that a single, isolated insurance transaction of this type cannot properly be called a "major" action. Furthermore, it would be unduly burdensome to compel FHA to prepare a full-scale environmental impact statement in connection with each single-family mortgage insurance application.

At the other extreme, however, is the case of a subdivision developer who proposes to clear several acres of undeveloped land in order to construct a hundred homes. At first blush it might appear that, absent the issuance of Title X land development insurance,²⁴⁰ FHA would

²³⁵ 12 U.S.C. §§ 1709 (conventional mortgage insurance), 1715k (mortgage insurance in urban renewal areas), 1715l(d)(2) (market-rate mortgage insurance for low- and moderate-income families), 1715z (subsidized mortgages for low- and moderate-income families—the so-called section 235 program), 1715z-8 (mortgage assistance payments for middle-income families) (1970). Each of these programs, except the section 235 program which limits insurance to one-family homes, is available for owner-occupied dwellings of up to four units. In addition, section 1715k (the so-called section 220 program) is also available for multi-family, non-owner-occupied structures.

²³⁶ 12 U.S.C. §§ 1713 (market insurance for rental housing), 1715l(d)(4) (market-rate insurance for low- and moderate-income families), 1715l(d)(3) (below-market interest rate insurance for low- and moderate-income families—the so-called section 221(d)(3) program), 1715v (mortgage insurance for the elderly), 1715z-1 (subsidized housing for low- and moderate-income families—the so-called section 236 program) (1970). This latter provision was intended eventually to supplant the section 221(d)(3) below market interest rate program. S. REP. NO. 1123, 90th Cong., 2d Sess. 187 (1968).

²³⁷ 12 U.S.C. §§ 1715e (cooperatives), 1715y (condominiums) (1970).

²³⁸ 12 U.S.C. §§ 1715w (nursing homes), 1715z-7 (nonprofit hospitals) (1970).

²³⁹ 12 U.S.C. §§ 1715m (supplement to section 1709 for servicemen), 1736-46a (war housing insurance), 1748-48i (armed services housing) (1970).

²⁴⁰ See note 207 *supra*.

have no connection with such a development until it insures a purchase money (or "take-out") mortgage. This does not happen until the completed home is sold by the developer to an individual purchaser. Thus, it might be argued that FHA's decision to insure such an individual mortgage has no greater impact on the environment than does that agency's decision to insure a single-family mortgage on a used dwelling—it is the action of the private developer which has the environmental impact. This action, for better or worse, is not covered by the National Environmental Policy Act. Yet it is an earlier and less visible decision of FHA, made many months before insuring the individual mortgage, which provides the impetus for the private developer's decision to build. While FHA does not insure the construction mortgage, the construction lender, before issuing his loan commitment, must be assured that permanent financing will be available when construction is completed. Consequently, a developer planning to construct homes within the price range which FHA will insure,²⁴¹ and contemplating that the eventual purchasers will need FHA insurance, will seek FHA approval of the site development plans as soon as they are prepared. If FHA finds the plans acceptable, it will issue a commitment to insure the take-out mortgage conditioned on compliance with the site plan and the acceptability of the future purchaser.²⁴² Thus, FHA is intimately involved in the whole development process and it is its commitment to insure which precipitates any environmental impact from the development.

In terms of the application of NEPA, the major question that must be asked is where the line should be drawn between single-family mortgage insurance transactions which have a significant impact on the environment and those which do not. HUD has attempted to solve this problem in a purely mechanical fashion. Its current regulations state:

Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this paragraph shall not apply to individual action on a single-family dwelling . . .²⁴³

The procedures then provide for special environmental clearance²⁴⁴ in

²⁴¹ Section 1709 establishes limits on the amount of mortgage insurance obtainable. See 12 U.S.C. § 1709(b) (2) (1970). Section 235 also contains unit-cost limitations but these depend solely on the number of persons to occupy the dwelling. See 12 U.S.C. § 1715z(i) (3) (B) (1970).

²⁴² See Storke & Sears, *Subdivision Financing*, 28 ROCKY MOUNT. L. REV. 549, 560-62 (1956).

²⁴³ April Circular, *supra* note 157, at 10 (emphasis added); see Departmental Policies, *supra* note 158, at 22,674.

²⁴⁴ See note 205 *supra*. HUD's environmental clearance procedures as established by its present regulations involve three separate types of clearance. The

the case of new construction or rehabilitation of single-family units if there are at least "50 contiguous or non-contiguous single-family units in the same area."²⁴⁵

It would seem that no such set of purely mechanical criteria can satisfy NEPA's requirements. In the first place, HUD's refusal to give any environmental consideration whatsoever to individual actions on single-family dwellings blatantly disregards the procedural requirements of NEPA section 102(2) other than the impact statement requirements of section 102(2)(C).²⁴⁶ More important, perhaps, is the fact that several individual decisions respecting single-family dwellings may in the aggregate constitute a major action with significant environmental effect,²⁴⁷ yet HUD's refusal to consider the environmental impact of any individual decisions relating to single-family dwellings means that it has no procedures which will allow it to assess the possibility that a series of such decisions may have a significant impact.

first is Normal Environmental Clearance, which "is essentially a consistency check with HUD environmental policies and standards." April Circular at 11; cf. Departmental Policies at 22,674. The second is Special Environmental Clearance, which "requires an environmental evaluation of greater detail and depth." April Circular at 11. The third is the Environmental Impact Statement which is, of course, the statement required by section 102(2)(C) of NEPA. 42 U.S.C. § 4332(2)(C). Normal Environmental Clearance may result in any of three actions: (a) rejection of the project because, even after appropriate modifications, there will be unavoidable environmental impacts which are considered unacceptable "based on HUD environmental policies and standards"; (b) continued processing of the project because there is no "significant adverse environmental impact"; or (c) subjecting the project to Special Environmental Clearance because "after appropriate modifications . . . there is actual or potential significant adverse environmental impact." April Circular at 13. Special Environmental Clearance may result in the same three actions, unless there remain "actual or potential significant adverse impacts," in which case an Environmental Impact Statement must be prepared. *Id.* at 14; see Departmental Policies at 22,676. It should be noted that no environmental clearance, not even normal clearance, is required for "individual action" on single-family dwellings. See authorities cited note 243 *supra*. HUD's regulations also state that:

Planning assistance projects . . . are also exempted from the procedural requirements, but in lieu thereof an environmental assessment of the final planning product shall be required as part of the proposed planning program. April Circular at 10; cf. notes 190-91 *supra* and accompanying text.

²⁴⁵ April Circular, at Appendix A-1. The Departmental Policies circular merely indicates a 50-unit subdivision. Departmental Policies at 22,677.

²⁴⁶ See *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

²⁴⁷ This fact is recognized, not only by section 5(b) of the CEQ's guidelines, COUNCIL ON ENVIRONMENTAL QUALITY, STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT § 5(b), 36 Fed. Reg. 7724 (1971), but also by HUD's environmental procedures: "Impacts of individual activities may be singularly limited but cumulatively considerable." April Circular at 12.

This snowballing effect is not limited to decisions about the construction of new housing, since even a decision to insure a mortgage upon a used single-family dwelling may in some instances be part of a series of individual decisions with so great an effect that an impact statement should be prepared. For instance, a neighborhood's racial make-up may rapidly be changing and the primary means by which the new residents are able to finance the purchase of homes in the area may be by FHA-insured mortgages. In such circumstances, the decisions to insure a series of individual mortgages on single-family homes may be a necessary, though not sufficient, cause of the ultimate environmental impact. Both NEPA and the Civil Rights Acts as interpreted by *Shannon*,²⁴⁸ require that FHA consider the environmental and socio-economic consequences of its actions in such a case. Yet neither HUD's regulations with respect to environmental quality nor its project selection criteria²⁴⁹ afford the procedure for such a consideration.

Furthermore, with respect to new construction, it is not impossible to posit cases where the approval of a take-out mortgage for even one single-family home could have significant impact on the environment and, if only because of its precedential value, would arguably be "major federal action." For example, if an application is made for mortgage insurance on a single-family home to be built on an in-holding in a national park or a wilderness area, it is arguable that NEPA would require an extensive environmental review and quite possibly the preparation of an environmental impact statement. Yet under the circumstances posited, HUD's regulations make no provision for a consideration of the environmental consequences which would flow from an approval of the application.

The basic problem is with the "threshold" concept.²⁵⁰ These thresholds seem at once to be arbitrary and ambiguous. For example, even if we limit ourselves to HUD's numbers game, three separate but contiguous 40-unit subdivisions will almost certainly have as much environmental impact as one 50-unit subdivision. Or, to take another example, the rehabilitation of 40 units in one area may have more of an impact than the rehabilitation of 60 units in another area. These examples also emphasize the ambiguities inherent in HUD's present regulations: the term "area" is not defined nor is it absolutely clear whether the threshold of "50 contiguous or non-contiguous single-

²⁴⁸ *Shannon v. HUD*, 436 F.2d 809, 820-23 (3d Cir. 1970).

²⁴⁹ See note 145 *supra*.

²⁵⁰ "Threshold" is defined as a criterion of size or environmental impact which requires special environmental clearance. April Circular at 4; Departmental Policies at 22,676.

family units"²⁵¹ refers to the number of units subject to rehabilitation in one "project," the total number of units subject to rehabilitation in the area however defined, or the aggregate number of FHA-insured units in the area.

The danger, of course, is that those in HUD actually responsible for day-to-day program administration will apply the threshold criteria in a restrictive and mechanical fashion. While it is true that many single-family projects may be subjected at least to normal environmental clearance, what we have seen of HUD's performance to date suggests that such review will be perfunctory and unimaginative.²⁵² In response to this problem, we suggest not that HUD prepare an impact statement each time it decides to insure an individual mortgage, but that it revamp its procedure for making the initial determination of when an impact statement is required so that such determinations depend not on mechanistic applications of "thresholds," but on some rational preliminary assessment of a project's potential environmental effects. It is readily apparent that reliance on a criterion which places major emphasis on the number of units, as opposed to the compatibility of those units with the surrounding environment, will inevitably produce decisions in violation of NEPA.²⁵³

This point is perhaps best made by reference to the decision of the Second Circuit in *Hanly v. Mitchell* holding that, though construction of an office building in the Wall Street area of New York may have no particular environmental effect, a Federal Correctional Center (a jail) in the same area might have serious environmental consequences requiring compliance with NEPA's procedures.²⁵⁴ Thus, the location of

²⁵¹ See note 245 *supra*.

²⁵² See *Silva v. Romney*, 342 F. Supp. 783 (D. Mass. 1972). Cf. REPORT OF COMPTROLLER GENERAL, ADEQUACY OF SELECTED ENVIRONMENTAL IMPACT STATEMENTS PREPARED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (1972).

²⁵³ As a theoretical matter, local land-use restrictions or zoning ordinances may insure such compatibility. However, compliance with local zoning ordinances would appear to have little bearing on the question of whether an impact statement is required at the federal level. In *Calvert Cliffs' the Atomic Energy Commission* argued that since the proposed project met the water quality standards established pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1171 (1970), it had no responsibility under NEPA to consider the effect of the project on water pollution. The court, however, concluded that NEPA's requirements are independent of other standards established pursuant to other regulations. *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1122-27 (D.C. Cir. 1971); cf. *Named Indiv. v. Texas Hwy. Dep't.*, 446 F.2d 1013, 1025-26 (5th Cir. 1971) (The term "parks of local significance" in section 4(f) of the Transportation Act of 1966 is to be determined according to federal and not local standards).

²⁵⁴ *Hanly v. Mitchell*, 460 F.2d 640, 646-47 (2d Cir.), cert. denied, 93 S. Ct. 313 (1972).

a single-family dwelling in or near an expanding industrial area might, for example, prevent further industrial development exactly where it is most suited, a consequence of environmental significance.²⁵⁵ On the other hand, the construction of a single-family home in a neighborhood of single-family homes is unlikely to have any appreciable environmental consequence.

One would think that it would be possible to phrase the criteria in a fashion that is more apt to induce a bit of thought on the part of those who must apply them. Besides providing for a count of the number of units involved, the initial environmental review should also involve more subjective—and more important—questions, such as: Will this transaction have significant consequences on the racial balance of the neighborhood? Does the proposed use conform to established uses in the neighborhood? Are the public services in the neighborhood already overburdened? Will the project in some fashion limit the future development of the neighborhood? One question should always be asked, a question not covered in HUD's general policies and guidelines and not specifically called for by HUD's procedures on environmental quality whether the project under consideration should be given a more detailed environmental evaluation?

A slightly different problem arises if either a new construction or a rehabilitation project is located in an urban renewal area. In such a case, it is possible that an impact statement may already have been prepared which encompasses, in general terms at least, the contemplated reuse.²⁵⁶ If so, and if it covers all the environmental matters which should be considered in connection with the application for insurance, there is probably no need to prepare a statement. It is likely, however, that the exact details of the new project were unknown at the time the urban renewal plan was approved and the environmental impact statement was prepared. Furthermore, it would be unusual if not unknown for an urban renewal plan to say more than that the land would be reused for construction or rehabilitation of single-family housing, coupled with a general statement that a certain percentage of the units would be for occupancy by low- and moderate-income families. Subsequent decisions might dictate the use

²⁵⁵ Unless a jurisdiction is willing to penalize the owners of homes who "come to the nuisance," application of ordinary private nuisance law might even compel closing of existing industrial plants which interfere with the use and enjoyment of newly built homes. See *Spur Industries, Inc. v. Del E. Webb Development Co.*, Civil No. 10410 (Ariz., March 17, 1972).

²⁵⁶ HUD's April Circular recognizes that "[A] single activity will often encompass several less comprehensive component activities each of which may have environmental impacts, e.g. an Urban Renewal Plan and its component redevelopment projects." April Circular at 12.

of the 235 program rather than conventional financing. This would mean not only an additional federal involvement not necessarily contemplated by the urban renewal plan, but also environmental and socio-economic effects similar to those involved in *Shannon*,²⁵⁷ also not contemplated by the original renewal plan.

HUD has confronted the problem which arises when a project such as urban renewal includes other federal projects by providing that "[e]nvironmental clearance procedures shall also apply to each component activity but only to the extent that environmental impacts have not received adequate detailed consideration in the procedures governing the main activity."²⁵⁸ This statement is not one to which we would take exception, at least where the "main activity" has been the subject of a sufficiently comprehensive environmental impact statement. In fact, HUD's provision for environmental review of component projects seems quite similar in effect to our suggestion that amendments to urban renewal plans should be accompanied by amended impact statements. Unfortunately, HUD apparently expects the environmental review of component projects to be made pursuant to the mechanical "thresholds" rather than by direct reference to the pre-existing impact statement. If HUD has determined that no impact statement was required for the urban renewal plan, then the danger of HUD's "threshold" approach becomes even greater. If neither the activity nor the component project reaches a threshold which requires special environmental clearance, the use of the threshold approach might preclude a decision that the cumulative impact of the main activity (the urban renewal plan) and the component project (housing construction or rehabilitation) is great enough to merit full-scale environmental review.²⁵⁹

When the project involves rehabilitation rather than initial construction of single-family dwellings, HUD has at least four alternatives. The dilapidated structure could be rehabilitated. It could be removed and replaced by new housing. It could be allowed to continue its deterioration without interference. Or, it could be demolished and not replaced. While it might be a truism that rehabilitation may tend to improve the environment, that does not necessarily mean that it is the most desirable of the alternatives available.²⁶⁰ The second alternative might in some cases be preferable

²⁵⁷ 436 F.2d 809 (3d Cir. 1970).

²⁵⁸ April Circular at 12.

²⁵⁹ HUD's April Circular states however that the provisions relating to environmental review of an activity, the components of which also have environmental effects, shall in no case "be interpreted to avoid a detailed examination of environmental impacts." *Id.*

²⁶⁰ See note 210 *supra* and accompanying text.

to rehabilitation. While rehabilitation is often thought of as a quick and inexpensive redevelopment tool, this is often not the case, since the costs can approach those of new construction,²⁶¹ making choice between the alternatives difficult. The third alternative may be preferable in some cases to either new construction or rehabilitation, since it is possible to view neighborhood deterioration as a natural and not undesirable form of economic growth. As a neighborhood becomes dysfunctional, it deteriorates. If normal development is not then checked, it rises again in some other form that is economically more functional.²⁶² Thus, at least in the long run, a neighborhood might be better off if left to its own devices. The fourth alternative may also be preferable to either rehabilitation or new construction. In some cases, a stagnant urban environment may not be improved by an injection of new or rehabilitated housing. What may be necessary to revive the area is cleared land available to new industries at reasonable prices. It has even been argued that the construction of new housing (and, presumably, also the rehabilitation of existing housing) in a stagnated city will inevitably increase the economic and environmental ills under which that city labors.²⁶³

It is clear that considerations of this nature cannot and should not be articulated in an impact statement each time FHA receives an application for mortgage insurance on a single-family home. To limit such consideration to projects of 50 or more units, however, makes little sense. HUD's present approach is contradicted by section 235 (j)

²⁶¹ REPORT, *supra* note 12, at 100-01, 107-10.

²⁶² Cf. E. BANFIELD, *supra* note 199, at 23-44.

²⁶³ J. FORRESTER, *supra* note 14, at 65-77. Professor Forrester's model of urban growth and decay shows, on the other hand, that (on the assumptions and constraints built into his model) the demolition and nonreplacement of slum housing or the discouragement of housing production will increase the economic viability of a stagnant city. Although one may question many of the assumptions which are built into Professor Forrester's model, and although we question the viewpoint which appears to treat economic activity in a city as the ultimate good, despite the effects on those who live in the city, see text accompanying note 14 *supra*, his work demonstrates that the means exist to analyze the impact of HUD's programs on the urban environment. In addition, Forrester's analysis raises many questions which should be faced in every environmental impact statement dealing with either urban renewal or the various low-cost housing programs administered by HUD and FHA. Perhaps the major benefit of Professor Forrester's computer runs is that, on the basis of some not unreasonable assumptions:

They demonstrate the counterintuitive nature of complex social systems by showing that intuitively sensible policies can affect adversely the very problems they are designed to alleviate. *Id.* at 70.

Such phenomena are, of course, a major argument for the type of broad-based and imaginative review of an action's potential consequences mandated by NEPA.

of the National Housing Act, which specifically provides that FHA shall only consider rehabilitation applications containing four or more units²⁶⁴ and then only if the neighborhood is stable or:

the rehabilitation . . . plus the mortgagor's related activities . . . together with the actions to be taken by public authorities, will be of such scope and quality as to give reasonable promise that a stable environment will be created. . . .²⁶⁵

HUD appears to lack an overall commitment to review programmatic decisions which transcend the environmental impact of a single application.²⁶⁶ While it recognizes in its circulars that it should review proposed policies and regulations to determine whether an impact statement is required,²⁶⁷ this approach to the evaluation of the environmental consequences of regulations and policies may waste one of the best opportunities which HUD has both to comply with NEPA's spirit and to ease the heavy burden which that Act imposes on HUD's regional officers responsible for making day-to-day programmatic decisions.²⁶⁸ Whether an impact statement is required for a particular proposed regulation or guidance document is of no interest to HUD's regional officers. What they need to know is the environmental consequences and risks associated with their individual actions. If a careful consideration is given to the consequences of HUD's policies and if an environmental impact statement, or some other document listing the probable environmental consequences and dangers of applying a particular policy,²⁶⁹ is prepared at the highest level, then HUD's agents in the field who have the duty to apply the policies in

²⁶⁴ 12 U.S.C. § 1715z (j) (2) (A) (ii) (1970).

²⁶⁵ 12 U.S.C. § 1715z (j) (3) (B) (1970).

²⁶⁶ In making this statement we recognize the alleged rationale for the funding suspension articulated by Secretary Romney. See note 168 *supra* and accompanying text.

²⁶⁷ See, e.g., April Circular, *supra* note 157, at 14-16:

Special Environmental Clearance for legislative proposals, proposed regulations, or guidance documents such as handbooks, circulars, standards, and project selection criteria, consists of determining whether or not an Environmental Impact Statement shall be required.

²⁶⁸ It is clear that environmental problems of a similar nature will occur with respect to differing projects. For example, there is the possibility that the economic consequences of providing housing for low- and moderate-income families in a decaying city will lead to a further deterioration in the quality of life within that city. See note 263 *supra*. Where this is true, an umbrella program environmental impact statement will probably suffice. See COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT 233-34 (1972).

²⁶⁹ We do not insist that HUD should be required to prepare an environmental impact statement for every regulation and guidance document which HUD issues, although we suspect that (especially in the case of regulations) it would be the better practice.

a multitude of individually insignificant actions (such as the insurance of a mortgage on a single-family home) will have guidance in assessing a recurring environmental impact which they otherwise would almost inevitably overlook.

2. Multi-Family Dwellings

Much of what we have said about single-family dwellings is equally applicable to multi-family dwellings, including our discussion of the criteria which HUD presently uses in scrutinizing the environmental impact of a project.²⁷⁰ But the problem of quantifying and considering the environmental consequences of a project is further complicated because most of us think that, somehow or other, multi-family structures are less desirable than single-family structures or at least that they have a greater potential for detrimental environmental impact.²⁷¹ This attitude is evident in local zoning ordinances which prohibit multi-family buildings in areas zoned for single-family homes while permitting single-family homes in areas zoned for apartment buildings.²⁷² Thus, environmental objections are more likely to be raised in connection with multi- than with single-family housing.

In addition, multi-family housing is more likely to raise the problem considered in *Shannon v. HUD*,²⁷³ an increase in the concentration of

²⁷⁰ If the project is 100 units or more, HUD will require special environmental clearance. April Circular at A-2; Departmental Policies at 22,677.

²⁷¹ [T]he coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun . . . until, finally, the residential character of the neighborhood . . . [is] utterly destroyed. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

To the extent that Mr. Justice Sutherland favored single- rather than multi-family development, he may be wrong. Few occurrences have had, in the aggregate, a greater and more disruptive effect on the human environment than the mushrooming of suburban single-family home developments which consume amazing quantities of land needed for ecological balance, make any rational transportation system impossible, consume and waste far more energy than would be used if their inhabitants lived in apartments, suck the economic life-blood out of the cities, and for many provide a most stultifying and frustrating environment in which to live. The growth of suburban, single-family homes can to some extent be credited to the FHA's conventional mortgage programs; it is a grisly example of the cumulative impact of many individually quite small decisions. See W. H. Whyte, *THE LAST LANDSCAPE* 199-208 (1968).

²⁷² D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 55, at 106-08 (1971); cf. E. SAARINEN, *THE CITY* 185-95 (1943) (detrimental environmental effects of excessive "vertical concentration").

²⁷³ 436 F.2d 809 (3d Cir. 1970); see note 128 *supra* and accompanying text. It might be thought that the exact problem involved in the *Shannon* case can no longer arise because HUD has now adopted "project selection criteria" which are intended to avoid the results of that decision. These criteria do not, however,

racial minorities within a particular area. This is particularly true when the multi-family structures are designed for occupancy by low- and moderate-income families.²⁷⁴ In general, individual multi-family projects are likely to entail greater socio-economic impacts than are individual single-family projects, because they impose greater demands (per unit of area) on the neighborhood and the public services which support it.

3. FHA Foreclosure Proceedings

Once HUD has made the decision to insure a mortgage, its concern for the environment should not necessarily cease, for just as the issuance of insurance may effect the environment, so too may the processes employed by HUD to protect its interests once the loan has been insured. There are, of course, different requirements for different FHA insurance programs which must be satisfied before the holder of a defaulted FHA-insured mortgage can collect the insurance. In the case of a mortgage of a multi-family dwelling the

prevent significant changes in the racial environment of a neighborhood as a consequence of HUD's action. A superior rating, the highest under the project selection criteria, is available for any project, even in an area of minority concentration, as long as the area is part of an official state or local development plan and comparable housing opportunities exist outside areas of minority concentration. Criterion 2(A)(2), 37 Fed. Reg. 206 (1972). Conceivably, however, if the state or local development plan is federally funded, an impact statement might have been prepared exploring the question of racial concentration. An "adequate" rating is still available if the project is located in an area of minority concentration in order to meet an overriding need for minority housing that cannot be met elsewhere in the housing market. Criterion 2(B)(3), 37 Fed. Reg. at 206.

²⁷⁴ The major low- and moderate-income multi-family housing programs are section 220 insurance in renewal areas, 12 U.S.C. § 1715k (1970), section 221(d)(3) below-market-rate insurance for low- and moderate-income families, 12 U.S.C. § 1715i(d)(3) (1970), and section 236 market-rate subsidized mortgage insurance for low- and moderate-income families, 12 U.S.C. § 1715z-1 (1970). The latter two are the most likely to increase minority concentration since they are subsidy programs directed primarily at lower-income families. The section 221(d)(3) program is subsidized either through below-market interest-rate mortgage or, more likely today, a rent supplement for up to 100 percent of the occupied units. The statutory rent supplement provision is found in 12 U.S.C. § 1701s (1970). Section 236 is subsidized through interest reduction payments which reduce the effective mortgage interest rate to one percent. It is possible under the 236 program to obtain an additional rent supplement subsidy for up to 40 percent of the units. 12 U.S.C. § 1701s(h)(1)(D) (1970). For explanation of the rent supplement program see Krier, *The Rent Supplement Program of 1965: Out of the Ghetto, Into the . . . ?*, 19 STAN. L. REV. 555 (1967); Smith, *The Implementation of the Rent Supplement Program—A Staff View*, 32 LAW & CONTEMP. PROB. 82 (1967); Welfeld, *Rent Supplements and the Subsidy Dilemma: The Equity of a Selection Subsidy System*, 32 LAW & CONTEMP. PROB. 465 (1967).

holder may either assign the mortgage to the Secretary of HUD or acquire the property and then convey it to the Secretary.²⁷⁵ In the case of a one- to four-family house, however, the holder of the mortgage is required to acquire the property himself, by foreclosure or otherwise, and then convey it to the Secretary.²⁷⁶ Admittedly, it might seem that foreclosing a mortgage would not be a major federal action significantly affecting the human environment, since it arguably entails no more than a change in ownership of an already existing structure. As a result of the recent FHA scandals in Brooklyn,²⁷⁷ however, a complaint has been filed in federal court in New York contending that FHA's application of its regulations with respect to foreclosures of insured mortgages on single-family homes violates the requirements of NEPA.²⁷⁸

Once title is conveyed or a mortgage assigned to HUD, it becomes apparent that any further action which HUD takes with respect to the property should be subject to environmental review.²⁷⁹ For example, if HUD proposes to vacate and abandon several buildings in a residential neighborhood, it clearly should review the environmental consequences of the proposal and, if they appear to be significant, should prepare an impact statement. The problem that has arisen in New York, however, concerns actions induced by HUD's regulations but which occur before HUD acquires the property.

HUD's regulations with respect to insured mortgages on one- to four-family houses require that before a mortgagee conveys property subject to a defaulted mortgage to HUD, the property must be vacant—otherwise the mortgagee cannot get his insurance proceeds.²⁸⁰ The

²⁷⁵ 24 C.F.R. § 207.258a (1972).

²⁷⁶ *Id.* at § 203.355 (1972).

²⁷⁷ See, e.g., N.Y. Times, Mar. 19, 1972, at 68, col. 3; N.Y. Times, March 24, 1972, at 35, col. 1; N.Y. Times, March 30, 1972, at 1, col. 8.

²⁷⁸ Brotherhood Blocks Ass'n v. Secretary of HUD, Civil No. 73C-76 (E.D.N.Y., filed Jan. 16, 1973).

²⁷⁹ This would be one case in which HUD would be acting in a more or less proprietary capacity, rather than merely attempting to induce actions by others. See notes 20-24 *supra* and accompanying text. Under these circumstances it might be more difficult than usual to obtain judicial review of HUD's failure to comply with NEPA. See *Sierra Club v. Hickel*, Civil No. 71-1940 (6th Cir., Sept. 22, 1972). But see *Students Challenging Regulatory Agency Procedures v. United States*, 346 F. Supp. 189, 197 (D.D.C.), petition for stay denied *sub nom.*, *Aberdeen & R. R.R. v. Students Challenging Regulatory Agency Procedures*, 93 S. Ct. 1 (1972).

In our view, NEPA implicitly confers authority on the federal courts to enjoin any federal action taken in violation of NEPA's procedural requirements, even if jurisdiction to review this action is otherwise lacking. (emphasis in original)

²⁸⁰ 24 C.F.R. § 203.381 (1972). The purpose of this regulation is to give HUD

effect of this regulation is that everytime there is a default under an insured mortgage on a one- to four-family house, the house is vacated.²⁸¹ While the party plaintiff in the summary eviction proceedings is the mortgagee, he is so only because of HUD's regulations. Thus, in terms of applying NEPA, the situation is arguably the same as if HUD, itself, had acquired the property and then vacated it.

While the environmental consequences of an empty house here and there may not seem overwhelming, the cumulative impact of many such vacant houses in one neighborhood can be immense. Not only does the forcible vacation of these homes have serious detrimental effects upon the tenants who are evicted,²⁸² but the entire neighborhood is affected as well. Vacant structures provide a haven for drug traffic and other criminal activities, pose a danger of fire, create an adverse psychological reaction in those who reside in the neighborhood, depress property values, and hasten the community's general decline.²⁸³

The environmental consequences of HUD's vacancy requirement pose an interesting test of NEPA, since it is hard to squeeze the problem within the "major action" requirement of section 102(2) (C). The vacancy regulation pre-existed NEPA and it is unlikely that its environmental consequences could have been predicted at the time it was adopted; yet the evidence indicates that HUD's regulation is a significant cause of the epidemic of vacant buildings in Brooklyn.²⁸⁴ A failure to reevaluate the vacation requirement, or at least to interpret the discretionary waiver²⁸⁵ to account for possible adverse environmental effects would seem to violate section 102.²⁸⁶

If one can draw a conclusion from this problem in Brooklyn, it is simply the impossibility of adopting a comprehensive set of rules which will specify exactly how and when environmental matters must be taken into account. Yet NEPA requires all agencies to be sensitive to the actual environmental consequences of their actions. It would

more freedom to deal with property which it acquires under defaulted mortgages. See *Manners v. HUD*, 333 F. Supp. 829, 832-33 (E.D.N.Y. 1971).

²⁸¹ While 24 C.F.R. § 203.381 (1972) permits FHA to waive the vacancy requirement, it has been alleged that this is rarely done. See *Plaintiffs' Complaint*, ¶¶ 12, 22, 27, 31, *Caramico v. Romney*, Civ. No. 72C-901 (E.D.N.Y., filed Sept. 8, 1972).

²⁸² See authority cited note 196 *supra*.

²⁸³ REPORT, *supra* note 11, at 15-16; G. STERNLEIB, *supra* note 29, at 94-95; Nachbaur, *Empty Houses: Abandoned Residential Buildings in the Inner City*, 17 HOWARD L.J. 3, 10-14 (1971); Note, *Building Abandonment in New York City*, 16 N.Y.L.F. 798, 803, 823-24 (1970).

²⁸⁴ N.Y. Times, Mar. 24, 1972, at 35, col. 1.

²⁸⁵ See note 281 *supra*.

²⁸⁶ *Lee v. Resor*, 348 F. Supp. 389, 397 (M.D. Fla. 1972). But see *Morris v. TVA*, 345 F. Supp. 321, 324 (N.D. Ala. 1972).

be illogical to require HUD to predict the future consequences of its actions, but allow it to ignore the proven evils of its continuing policies. The environmental impact statement mechanism created by section 102(2) (C) may not easily fit the types of problems raised by HUD's foreclosure policies, but that does not mean that HUD is not obligated to weigh the environmental consequences of its policies pursuant to the other provisions of section 102.²⁸⁷

4. Interests of Third Parties

As noted earlier, few of HUD's actions have a direct effect upon the environment. Its programs are designed, in the main, to persuade municipal governments and private decision-makers to take particular actions. This means that if HUD fails to conform one of its projects to the requirements of NEPA, other persons besides HUD are likely to pay—and pay in good, hard cash—for HUD's misjudgment. Thus, it would seem that the beneficiaries of HUD's programs have the strongest of reasons—from the most selfish of motives—to make sure that HUD complies with NEPA's mandate. Three decisions illustrate what may happen to third parties when HUD does not comply.

In *Shannon v. HUD*²⁸⁸ the court found that the failure to consider the socio-economic consequences of a multi-family housing project for low- and moderate-income families violated the Civil Rights Acts and suggested as a possible remedy "that the project mortgage not be guaranteed . . . and that [the project] be sold to a private profit-making owner."²⁸⁹ Since the project had been completed at the time of the *Shannon* decision, but the "take-out" mortgage had not yet finally been endorsed by FHA, it does not take much imagination to picture the mortgagee's reaction upon reading the remedies suggested by *Shannon*.

In *Goose Hollow Foothills League v. Romney*,²⁹⁰ the court enjoined HUD from disbursing the remaining funds due under a commitment to lend nearly \$3.2 million to finance a 221-unit, 16 story high-rise student housing project, until HUD prepared a satisfactory environmental impact statement.²⁹¹ At the time of the decision, the project was nearing 20 percent completion and HUD had already disbursed

²⁸⁷ See *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

²⁸⁸ 436 F.2d 809 (3rd Cir. 1970); see text accompanying notes 139-44 *supra*.

²⁸⁹ 436 F.2d at 822. The court also suggested that the project could "continue in non-profit ownership . . . but that the rent supplement tenants be gradually phased out and replaced with market rental tenants." *Id.*

²⁹⁰ 334 F. Supp. 877 (D. Ore. 1971).

²⁹¹ While the facts as stated by the court do not make it clear, it appears that the project was being constructed pursuant to a direct loan from HUD to a non-profit student housing cooperative to cover the cost of construction. See 12 U.S.C. §§ 1749(g), 1749c(b) (5) (1970).

nearly \$2 million. The court recognized that the party who would actually be damaged by the injunction was the property owner, not HUD: "It would be inequitable to punish [the property owner] severely for HUD's error in this, its first attempt in this district to administer the provisions of NEPA."²⁹² Nevertheless, it granted the relief sought.

If the only consequence of the injunction in *Goose Hollow* were a delay in continuing the project, the cost to the property owner might not be too burdensome.²⁹³ When HUD prepares an impact statement, if it does, the injunction may be dissolved. But there is always the risk that when HUD considers the propriety of the loan in light of the impact statement it will decide that it should not continue the project. In that event, the property owner will owe HUD \$2 million, at least in theory, and own a large hole in the ground. This might not be too bad, since it seems unlikely that the courts would allow HUD to collect the two million out of the owner's probably non-existent other assets and leave the owner with the hole, but it would mean that the owner would lose all the time, effort, and money which it invested in the project. Even worse, it is possible that the owner would be enjoined from completing the project on its own, on the theory that once a project has become a federal undertaking it remains subject to NEPA even after federal involvement has terminated.²⁹⁴

In *Silva v. Romney*,²⁹⁵ the district court enjoined HUD from taking any further action to aid the construction of a 138-unit section 236 project because HUD's "Special Environmental Clearance Worksheet" on the project was found to be an improper substitute for the NEPA impact statement.²⁹⁶ In a case like *Silva* where the project is financed by an FHA-insured mortgage loan, the risk of harm due to HUD's failure to comply with NEPA falls not on HUD, but primarily upon the private lenders financing the project. This type of risk can be

²⁹² 334 F. Supp. at 880 (emphasis added). The court initially stayed the injunction for 90 days, but when HUD had not prepared an impact statement by that time, the injunction was entered.

²⁹³ It should be noted that the cost of delay might have fallen on the contractor. The burdens which we describe as falling on the owner will often be shifted by contract to the building contractor. This means that the building contractor as well as the owner will often have an interest in making sure that HUD also follows NEPA.

²⁹⁴ Once the FHA has issued a commitment to insure, the private developer's actions may be subject to further review under NEPA on the theory that he has become a "partner" with HUD. *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973); cf. *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1329 (4th Cir. 1972).

²⁹⁵ 342 F. Supp. 783 (D. Mass. 1972).

²⁹⁶ *Id.* at 785.

demonstrated most easily by the case of a developer who has obtained a commitment from FHA to insure the individual take-out mortgages in connection with a single-family home subdivision, and who has received a construction loan from a lender who does not have an insured mortgage. If, during the construction period, FHA is enjoined from honoring its commitment to insure the take-out mortgages, the construction lender may find that his only security is a lien on some unmarketable houses. Even if advances of the construction loan are insured by FHA, as they were in *Silva*, the construction lender may still be damaged by an injunction. In many multi-family projects financed by FHA-insured loans, the construction lender will rely on the Federal National Mortgage Association ("Fannie Mae") to purchase the take-out mortgage after final endorsement by FHA. However, if the project is delayed by an injunction, Fannie Mae's commitment²⁹⁷ may expire, leaving the construction lender "holding the bag." Furthermore, since FHA's officers were presumably not authorized to insure the mortgage until they had complied with NEPA, even the earlier advances which FHA had purported to insure may in fact not be protected by federal insurance.²⁹⁸

Under these circumstances a cautious mortgage lender or property owner ought to satisfy himself that HUD has complied with NEPA before finally committing himself to a project financed by an FHA insured mortgage. The easiest way to assure compliance is to insist that an impact statement be prepared even in those cases where the requirement to do so is questionable.

C. Public Housing Programs

It does not seem necessary to discuss all of the intricacies of public housing financing or administration; that task has been done adequately by others.²⁹⁹ For our purposes, however, it is important to

²⁹⁷ See generally Bartke, *Fannie Mae and the Secondary Mortgage Market*, 66 NW. U.L. REV. 1, 49-50 (1971).

²⁹⁸ See D. SCHWARTZ AND S. JACOBY, *LITIGATION WITH THE FEDERAL GOVERNMENT* 139 (1970):

In contract-making by the Government, its directions as a principal to its agents are . . . statutes [e.g., NEPA] . . . and as such prevail over the contract In consequence, the principles of contract law and of authority and apparent authority applicable . . . to such contracts may be much different from those applicable to the contracts of wholly private persons. The most dramatic difference from private law is the unavailability—at least by that name—of the doctrine of apparent authority or estoppel.

²⁹⁹ For descriptions of the history, financing, and operation of public housing see R. FISHER, *TWENTY YEARS OF PUBLIC HOUSING* (1969); REPORT, *supra* note 13, at 55-56, 60-61; Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF.

emphasize that until 1969 HUD made no significant contribution to the cost of maintaining the projects;³⁰⁰ it merely amortized the costs of their construction. For this reason and because public housing tenants have low income it has been impossible for local housing authorities to meet rising maintenance costs with increased rents.³⁰¹ This has resulted in visibly deteriorated buildings³⁰² and attempts to exclude the lowest-income and least socially desirable members of

L. REV. 642 (1966); Genung, *Public Housing—Success or Failure*, 39 GEO. WASH. L. REV. 734 (1971); Leadbetter, *Public Housing—A Social Experiment Seeks Acceptance*, 32 LAW & CONTEMP. PROB. 490 (1967). Public Housing is administered in a variety of ways. The oldest and best known program operates as follows: a local housing authority selects a site, issues bonds to cover the site acquisition and construction costs, and then constructs, owns and manages the project. HUD, after initially approving the local housing authority's site and construction plans, enters into an "annual contributions contract" whereby it agrees to pay the amounts necessary to amortize the local housing authority's bonds over a 40-year period. 42 U.S.C. § 1410 (1970). LOW-RENT HOUSING MANUAL, RHA 7410.1, ch. 5.

Other types of public housing programs include the leased public housing program whereby the local public housing authority leases standard units in existing dwellings and then subleases those units to tenants qualifying for admission to public housing; pursuant to an annual contributions contract HUD then pays the difference between the fair-market rental value of the unit and the amount which the tenant can afford to pay. 42 U.S.C. § 1421b (1970). For an explanation of this program see Friedman & Krier, *A New Lease on Life: Section 23 Leasing and the Poor*, 116 U. PA. L. REV. 611 (1968); Palmer, *Section 23 Housing: Low-Rent Housing in Private Accommodations*, 48 J. URBAN L. 256 (1970). There are also a variety of "turnkey" programs. The first and most widely used program is the one where a contractor acquires the site and constructs the project and after completion conveys the project to the local housing authority. The financing is the same as in the conventional public housing program. See 24 C.F.R. § 275.6(b) (1972). See generally Burstein, *New Techniques in Public Housing*, 32 LAW & CONTEMP. PROB. 528, 536-38 (1967); Zimbalist, *The Function of the Private Builder, Manager and Owner in the Evolution of the Low-Rent Housing Program*, 2 URBAN LAW. 175, 175-81 (1970); Comment, *Turnkey Public Housing in Wisconsin*, 1969 WIS. L. REV. 231. Another turnkey program allows persons eligible to be tenants in public housing to acquire title to their homes under an agreement which resembles a land contract purchase agreement. See 37 Fed. Reg. 23,553-74 (1972) (proposed regulations governing the so-called "Turnkey III" program).

³⁰⁰ See 42 U.S.C. § 1402(1) (1970) discussed in note 303 *infra*.

³⁰¹ The Housing Act of 1961 authorized the payment of an additional \$120 per year subsidy for each unit occupied by an elderly family. 42 U.S.C. § 1410(a) (1970). This subsidy was extended by the Housing and Urban Development Act of 1968 to include units occupied by large families or families of unusually low income. 42 U.S.C. § 1410(a) (1970). Notwithstanding these efforts, a study of public housing in 23 cities between 1965 and 1968 has indicated that cost increases have exceeded rental increases by 25 percent. DeLEEUW, *OPERATING COSTS IN PUBLIC HOUSING: A FINANCIAL CRISIS* 13 (1969).

³⁰² See Genung, *supra* note 299, at 742-44, 747-48.

society from public housing.³⁰³ Furthermore, a disproportionate number of public housing occupants are from racial minorities.³⁰⁴

These features distinguish public housing from the housing programs administered by FHA. While it is true that FHA's 236 program is supposed to serve low- as well as moderate-income families, the emphasis of that program is quite clearly on those whose incomes exceed the maximum allowable for admission to public housing.³⁰⁵ Thus the owner of a 236 project has a better chance of charging sufficient rent to cover maintenance costs. Again, because a disproportionate number of persons residing in public housing are from minority groups, as are a disproportionate number of those on waiting

³⁰³ Mulvihill, *Problems in the Management of Public Housing*, 35 TEMPLE L. Q. 163, 179-82 (1962). The problem may have been exacerbated by HUD's response to the so-called Brooke Amendment which limits rentals to 25 percent of the tenants' income; the deficit in available maintenance revenues is to be made up by HUD through additional annual contributions. 42 U.S.C. § 1402(1). For a full explanation see Roisman, *The Right to Public Housing*, 39 GEO. WASH. L. REV. 691, 694-96 (1971). Under HUD's regulations, rather than automatically granting the offsetting of the maintenance deficit, it is apparently conditioned upon a showing that the maintenance costs cannot be made up elsewhere. See HUD CIRCULAR, RHM 7465.1 (March 16, 1970); HUD CIRCULAR, RHM 7465.10 (April 4, 1972). The local housing authority is thus put to the choice of scraping up the money somewhere else, renting only to those who can pay their pro-rata share of operating costs, reducing maintenance expenditures, defaulting on their bonds, or filing suit against HUD to release the operating funds. A number of housing authorities have chosen the latter course. See, e.g., *Asbury Park Housing Auth. v. Richardson*, 346 F. Supp. 1027 (D.N.J. 1972). See also *Barber v. White*, 41 U.S.L.W. 2301 (D. Conn., Nov. 28, 1972) (suit by welfare recipients alleging violation of rent limitation in § 1402(1)).

³⁰⁴ The percentage of black families in public housing has been increasing, although at a declining rate, since 1956. As of 1967, 50.5 percent of all public housing units were occupied by black families. Translated in terms of individuals, it is estimated that approximately 60 percent of the occupants of public housing are black; if Mexican-Americans and Puerto Ricans are added as minority groups, the percentage of minority members among public housing residents rises to nearly 67 percent. REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 114 (1968).

³⁰⁵ Under section 236, initial occupancy, except during the rent-up period, is limited to families whose incomes do not exceed 135 percent of the maximum permissible income for admission to public housing. 12 U.S.C. § 1715z-1(i) (2) (1970). In theory, this does not exclude those whose incomes qualify them for public housing. HUD now requires that those whose monthly incomes do not equal at least 35 percent of the basis rent are ineligible for occupancy. 37 Fed. Reg. 11,758 (1972). But cf. *Colon v. Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134, 138 (S.D.N.Y. 1968) (holding that sponsor of a section 221(d) (3) project violated the equal protection clause by refusing to admit welfare recipients). Thus, those persons who qualify for public housing are, as a practical matter, permitted in a section 236 project only if they are eligible for rent supplement payments pursuant to 12 U.S.C. § 1701s(c) (1970).

lists to enter public housing,³⁰⁶ public housing is more likely to increase minority concentration than is housing under the 236 program.³⁰⁷ Finally, unlike FHA's mortgage insurance programs, public housing was designed, at least in part, to serve the additional function of slum clearance³⁰⁸ and unlike the developer or sponsor of FHA-insured housing, the typical local public housing agency possesses the power of eminent domain.

In view of these facts, it seems probable that public housing projects may have different effects upon the human environment than do FHA-insured projects. Yet HUD applies the same mechanical "threshold" tests to public housing that it applies to FHA-insured projects.³⁰⁹ Of course, it does not necessarily follow from the differing financing and purposes of the two types of programs that the environmental consequences of one will differ from those of the other. But many writers have insisted that such a difference exists and have criticized

³⁰⁶ In Chicago, as of July 1968, 13,000 persons were on the waiting list for public housing. Of those, 90 percent, or 11,700, were black. *Gautreaux v. Chicago Housing Auth.*, 296 F. Supp. 907, 909-10 (N.D. Ill. 1969). Excluding the elderly, the experience in San Francisco is quite comparable. See Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63, 92-93 (1970).

³⁰⁷ Although the 236 program is not as likely to increase the concentration of minority residents within a neighborhood, it is more likely to increase the overall density of population within an area than is public housing. FHA has no published policy against constructing high-rise buildings to house families. Congress, however, generally prohibits them in the public housing laws, 42 U.S.C. § 1415(11) (1970).

³⁰⁸ C. ABRAMS, *supra* note 29, at 21-22; R. FISHER, *supra* note 299, at 217-19; L. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING* 111-12 (1968). In addition to historical purpose, section 10(a) of the Housing Act of 1937 requires that for each unit of public housing constructed pursuant to an annual contributions contract, the locality must promise to eliminate one unit of unsafe, unsanitary housing within five years, unless the site of the public housing is one which was cleared as a result of urban renewal. 42 U.S.C. § 1410(a) (1970). In addition, every unit of housing eliminated pursuant to an urban renewal plan must be replaced by a housing unit for a low-income family, *id.* § 1455(h) (1970), and at least 20 percent of the units constructed pursuant to an urban renewal plan must be for low-income families, *id.* § 1455(f) (1970). It is possible, of course, with rent supplements, to meet both of these requirements with FHA programs without reliance on public housing—provided that there is a private developer willing to build the housing. If there is no such developer, public housing is the only available alternative. Finally, the relation between public housing and slum clearance is evidenced by section 301 of the Housing Act of 1949, which provides for relocation payments to families displaced by the activities of local public housing authorities. *Id.* § 1415(8) (1970), as amended, Pub. L. No. 91-646, 84 Stat. 1903 (1970).

³⁰⁹ April Circular, *supra* note 157, at A-2. Departmental Policies, *supra* note 156, at 22,677.

public housing more often than all the FHA programs combined. These criticisms have included the destructive effects of public housing on the sense of community and pride which is necessary for the survival of a neighborhood,³¹⁰ the increase in crime and violence which the surrounding community can expect,³¹¹ the decrease in the value of adjacent properties,³¹² and ugliness and incompatibility of design.³¹³

As is so often the case when one examines allegations that some activity has damaged the environment, it is difficult to assess these criticisms. For example, Jane Jacobs, one of the more vocal critics, is equally critical of upper-income high-rise housing which suggests that some of the problems are not unique to public housing. One cannot help wondering how many of the criticisms are motivated by racial or clannish prejudices, with the articulated arguments being little more than rationalizations for darker thoughts.³¹⁴ Nevertheless, the extensive criticism of public housing is a fact and one that must be taken into account in assessing a project's environmental consequences. If the criticisms are generally believed valid, then, in response to a new public housing project, nearby residents will sell their homes at distress prices or will pay less for maintenance of their property, will remove their children from public schools, and will be afraid to walk the streets at night. The process may not be rational, but it is unarguably "real," and it certainly will not be recognized by one who blindly applies HUD's "threshold" tests.

The question, of course, is how HUD should evaluate the environmental consequences of a public housing project. One thing, at least, is clear; HUD's present procedures are not satisfactory. HUD requires "special environmental clearance" as a matter of course only for projects involving 100 units or more.³¹⁵ The "normal environmental clearance" procedure to which each project is subjected³¹⁶ may spot some of the more visible defects, such as architectural incompatibility or excessive demands on limited public services, but the procedure

³¹⁰ J. JACOBS, *supra* note 198, at 4.

³¹¹ J. LOWE, *CITIES IN A RACE WITH TIME* 255-56 (1967); cf. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 133-36, 257-63 (1968).

³¹² Genung, *supra* note 299, at 737; Note, *Segregation and the Suburbs: Low Income Housing, Zoning, and the Fourteenth Amendment*, 56 IOWA L. REV. 1298, 1303 (1971).

³¹³ Genung, *supra* note 299, at 742-44, 747-48.

³¹⁴ Consider the charge of Percy Sutton, Borough President of Manhattan, that there is "growing use of the rhetoric and symbols of the environmental movement by those who seek to confine minorities and poor people to the environment of the ghetto." N.Y. Times, Jan. 21, 1973, at 22, col. 4.

³¹⁵ April Circular at A-2; Departmental Policies at 22,677.

³¹⁶ April Circular at 11-13, A-9, A-12-14; Departmental Policies at 22,674.

is not capable of coping with more subtle problems. HUD should evaluate each public housing project in terms of the neighborhood in which it is placed, not in terms of its own size. Some urban environments could easily absorb a 200-unit public housing projects, while others might suffer severe social stresses from a 50-unit project.

Recent decisions to promote "scattered-site" public housing, public housing constructed outside areas of low income or high minority concentration, reveal the weakness of HUD's mechanical approach to NEPA. Because of its highly controversial nature,³¹⁷ the location of even a small scattered-site public housing project in a comfortable middle-class neighborhood is likely to change the human environment in a way which undoubtedly will have a large—if perhaps totally irrational—impact on the residents of that neighborhood. Such projects illustrate the fact that following NEPA's procedures does not automatically supply an agency with a determination of the "right" course of conduct. Furthermore, scattered-site projects are likely to emphasize the difference in value systems between those who are concerned with the problems of the urban poor and those more traditional environmentalists who are concerned with preserving the amenities of middle-class life.

The most important feature of NEPA's application to such projects, however, is the fact that the general environmental policies underlying NEPA may appear to conflict with provisions of the Civil Rights Acts and the fourteenth amendment. Location of public housing outside areas of minority concentration has been required by a series of judicial decisions, including *Gautreaux v. Chicago Housing Authority*.³¹⁸ Since *Gautreaux* involved a finding of deliberate, de jure

³¹⁷ HUD's present environmental review procedures do provide that an environmental impact statement "shall be completed for projects which are controversial with regard to whether or not HUD and other environmental standards are being met." Departmental Policies, at 22,675 (Appendix A). However, this provision has been weakened in the April Circular. See April Circular at 11 ("[m]ajor environmental controversy is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated."). Cf. COUNCIL ON ENVIRONMENTAL QUALITY, STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT § 5(b), 36 Fed. Reg. 7724 (1971).

³¹⁸ 296 F. Supp. 907 (N.D. Ill. 1969). The order and judgment entered in accordance with the opinion is found in 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 401 U.S. 953 (1971). *Gautreaux* has received substantial attention in the law reviews. See, e.g., Note, *Discriminatory Site Selection in Public Housing and Federal Judicial Response*, 64 Nw. U. L. Rev. 720 (1970); Comment, *Gautreaux v. Chicago Housing Authority: Equal Protection and Public Housing*, 118 U. PA. L. REV. 437 (1970); Note, *Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority*, 79 YALE L.J. 712 (1970). Despite all the fuss, the case has accomplished very little. A suit

segregation on the part of the housing authority, that case is analogous, in remedy at least, to those cases ordering busing to overcome the effects of past de jure school segregation.³¹⁹ In *Banks v. Perk*,³²⁰ the court went further and held that even absent a showing of de jure residential segregation, the Civil Rights Act of 1968 imposes an affirmative duty upon local housing authorities to exercise their powers in a way which will achieve community-wide residential integration. Indeed, said the *Banks* court, "the failure . . . to include any racial criteria in determining site selection violates the Fourteenth Amendment."³²¹

It would seem that the cumulative meaning of *Gautreaux*, *Banks*, and *Shannon* is that public housing may not be constructed in areas of racial minority concentration but rather must be built, if at all, in predominantly white neighborhoods. At the least, HUD must give serious consideration to racial distribution when it approves public housing projects. It is difficult to conceive a more delicate social and political task than the one the courts have assigned to HUD and the local public housing authorities. The application of NEPA to public housing projects may either assist HUD in accomplishing its task or may render impossible any attempt at reducing segregation through public housing. The end result depends on whether HUD is willing to comply with the courts' mandate under the fourteenth amendment and the Civil Rights Acts and with the policies of the National Environmental Policy Act.

If HUD desires to facilitate the national goal of integration implicit

against HUD was filed contemporaneously with the cited case. When the Chicago City Council refused to approve any sites pursuant to the order in *Gautreaux v. Chicago Housing Authority*, the plaintiffs pursued their secondary action to enjoin HUD from funding any more public housing in Chicago except in conformance with the order previously issued. An order dismissing this complaint was reversed. *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971). The district court then enjoined HUD not only from distributing public housing funds but also from distributing any further funds pursuant to a previously approved Model Cities application. *Gautreaux v. Romney*, 332 F. Supp. 366, 369-70 (N.D. Ill. 1971). The latter order in turn was reversed on appeal. *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972). The latest order requires the Chicago Housing Authority to bypass the city council altogether although a state statute requires council approval on individual sites. *Gautreaux v. Chicago Housing Auth.*, 342 F. Supp. 827, 829-32 (N.D. Ill. 1972). After nearly four years of exhausting and exhaustive litigation the city of Chicago still has no public housing unit under the 1969 order.

³¹⁹ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-31 (1971). See also *Garrett v. City of Hamtrack*, 335 F. Supp. 16, 27-28 (E.D. Mich. 1971) (order to build sufficient units to provide for blacks previously displaced by an urban renewal plan designed to remove blacks from the city).

³²⁰ 341 F. Supp. 1175 (N.D. Ohio 1972).

³²¹ *Id.* at 1182.

in the Civil Rights Acts, it will have to make careful interdisciplinary studies of the socio-economic effects of its various options, the considerations also mandated by NEPA.³²² It would be impossible for HUD or the local public housing authorities to carry out any consistent plan of locating public housing in order to reduce racial concentration, if the courts, at the behest of disgruntled private litigants, continue to second-guess HUD's determinations. The best way for HUD to establish that it has reached a decision which does not violate the fourteenth amendment or the Civil Rights Acts is to base that decision on a record showing the present racial distribution in the given community, the projected consequences of the proposed project, alternatives to the proposed project, and the projected consequences of the alternatives. In other words, if HUD is going to be able to support its decisions, it will need to prepare the equivalent of an environmental impact statement.

Merely because HUD is attempting to comply with the mandate of the Civil Rights Acts and the fourteenth amendment, however, does not mean that it can safely disregard other national environmental policies;³²³ there is always the option of not building any projects.

³²² See *Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138, 1148-49 (W.D. Tex. 1972).

³²³ For example, HUD should not approve a project which will have disastrous consequences upon air or water quality solely because it will tend to decrease racial segregation. In making this statement, we are aware that in any given case the purely "environmental" interests protected by NEPA may conflict with the courts' interpretation of the mandates of the Civil Rights Acts and the fourteenth amendment. For example, if one reads *Banks* as holding that no public housing whatsoever can be constructed in areas of racial concentration, it is easy to imagine a case where that rule would conflict with a determination that, from the point of view of land use, pollution, economics, and aesthetics, the best site for a public housing project would be in a black ghetto. In such a case, the project could not be built in the ghetto; but NEPA-type analysis would have had to be undertaken before the determination could have been made that the ghetto site was the best site available from the viewpoint of environmental consideration. Further analysis of alternatives will be needed to find the best site outside the ghetto. Unlike the decision in *Banks*, NEPA does not mandate particular choices; it requires informed decisions based on a study of the relevant facts.

Conflicts between NEPA's policies and the more specific mandates of particular statutes are common. Perhaps the most striking example can be seen in the Department of Transportation Act, 23 U.S.C. § 138 (1970), which provides that the Secretary of Transportation "shall not approve any program or project" that requires the use of any public park land "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. . . ." Obviously, the mandate of this section will often require a choice which may appear more environmentally destructive than running a road through a park. But if this provision may at times seem to forbid the best solution, that does not mean that NEPA's

Furthermore, HUD should prepare an environmental impact statement for every scattered-site housing project where controversy can be anticipated. Unless this is done, one can be quite certain that those who feel threatened by scattered-site housing can—and will—block such projects in the courts by alleging non-compliance with NEPA.³²⁴ The local public housing authority may even find that it must pay the costs of that litigation.³²⁵

VI. CONCLUSION

It is hard to get from a compilation of statutes to the more complicated world beyond; it may be an impossible journey in a law review article. "Between the idea and the reality . . . falls the Shadow." And yet, one can hardly doubt that HUD's activities do impinge upon all of our lives. Why then, considering the amount of NEPA litigation against such agencies as the Department of Transportation and the Corps of Engineers, have there been so few such actions against HUD? Several explanations are possible. Perhaps it is because HUD's projects do not generally impress people as having undesirable environmental effects; but this seems unlikely. More probable is that "environmental protection" has traditionally been an interest of the more affluent suburbanites who are largely unaffected by HUD's activities. The beneficiaries of HUD's programs, those who are not affluent, and who live in the decaying central cities have, for the most part, been unaware that NEPA also protects their interests. As it becomes clearer that NEPA protects human interests as well as streams and golden eagles, one can expect that those who are concerned with urban life, perhaps even the cities themselves,³²⁶ will take a more active role in insuring compliance with NEPA. NEPA may become the focal point for citizens suits against HUD in the 1970's as were the relocation provisions of the Housing Act of 1949 in the

procedures should not be applied to highways—if only to make sure that the highway location is not the worst of all possible choices.

³²⁴ See *Hanly v. Kleindienst*, 471 F.2d 823, 836 (2d Cir. 1972).

With the aid of hindsight we recognize . . . that a further [environmental] Assessment, when added to the time and expense already incurred, will prolong the final determination far beyond the time that would have been required if the energies [of the agency] had been directed initially toward the preparation of an impact statement.

³²⁵ See *La Raza Unida v. Volpe*, Civil No. C-71-1166-RFP (N.D. Cal., Oct. 19, 1972) (holding that the California Department of Transportation must pay litigation costs of successful environmental plaintiffs when the United States Department of Transportation failed to comply with the environmental protection provisions of the Department of Transportation Act). But see *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 425-27 (2d Cir. 1972).

³²⁶ Cf. *City of New York v. United States*, 344 F. Supp. 929 (E.D.N.Y. 1972).

1960's. In addition, as HUD and local public housing authorities begin to move their lower-income programs into more affluent urban and suburban communities, they will come into increasing conflict with those classes of people who have demonstrated their willingness to finance environmental litigation.

Although NEPA speaks in terms of fostering and promoting the general welfare,³²⁷ its goals are too broad to compel those who are subject to its provisions to reach any particular determination; it specifies how decisions are to be made, not what results are to be reached.³²⁸ Thus, despite NEPA's overriding concern with the human environment, it is the purest sort of lawyer's law—a body of procedures governing political decisions. This being the case, it is difficult to judge what effect NEPA will have upon the most important environment, "that portion that houses the people and supplies their material needs."³²⁹ If HUD sincerely attempts to comply with NEPA, its activities will probably be less haphazard (and possibly less frequent) than in the past. If HUD resists NEPA, as we have suggested they are doing by adopting mechanical "threshold" tests, we suspect that many of its more controversial (and possibly most socially desirable) programs will be frustrated by needless litigation.

Even though the courts have interpreted NEPA in accordance with a rule of reason,³³⁰ requiring only good-faith compliance,³³¹ the cost of implementation is high.³³² But this cost cannot fairly be charged

³²⁷ 42 U.S.C. § 4331(a) (1970).

³²⁸ See note 103 *supra* and accompanying text. It is slowly becoming recognized that terms like "general welfare" cannot serve as a guide to the appropriate resolution of environmental problems. See, e.g., E. MURPHY, GOVERNING NATURE 282 (1967):

The *New York Times* and *Barron's Weekly* can legitimately differ over the decision of the Federal Power Commission to permit the building of "the world's largest pumped storage hydroelectric project" upon Storm King Mountain. . . . It is indeed, the probability that both are right which makes this choice, like most relating to the use of renewable resources, such a vexing one.

Lazarus & Onak, The Regulators and the People, 57 VA. L. REV. 1069, 1077 (1971).

³²⁹ B. SIEGAN, LAND USE WITHOUT ZONING Introduction (1972).

³³⁰ See *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972):

The agency may limit its discussion of environmental impact to a brief statement, when that is the case, that the alternative course involves no effect on the environment, or that their [sic] effect, briefly described, is simply not significant. A rule of reason is implicit in this aspect of the law as it is in the requirement that the agency provide a statement concerning those opposing views that are responsible.

³³¹ *City of New York v. United States*, 344 F. Supp. 929, 940 (E.D.N.Y. 1972).

³³² See Murphy, *supra* note 93. The high price of applying NEPA to the agencies which regulate power production does not, of course, establish that

against any particular project or agency. Since its mandate relates to procedures, not to results, its greatest contribution may be ethical. There are innumerable private interests which are affected by HUD: the desire of the poorly housed for homes, the desire of the building trades for jobs, the desire of property owners for a fair return on their investments, the desire of a community's residents for an attractive neighborhood. If these interests are frustrated by the impersonal forces of the market place, no sense of human justice is outraged; but if they are frustrated by the bureaucracy, then the victims do have a right to complain if their interests have not been fairly considered.³³³ As we see it, NEPA's major contribution is that it supplies procedures which legitimize agency decisions. It supplies a means by which human desires can be given a fair trial in the bureaucratic processes of agencies like HUD which make so many decisions of such importance to our lives.

there is an equivalent cost when applied to HUD's programs; the ills of our cities are more chronic than critical.

³³³ See Reich, *supra* note 106, at 1245:

In the unplanned society, men who are situated differently can only blame the spin of the wheel or the inscrutable will of fate. But the more actively government plans, the more it becomes responsible for the consequences. And while we can tolerate many inequalities that are fashioned by the fates, it is far more difficult to accept inequalities that are the product of some official's deliberately taken decision in Washington.