Litigating the Freeway Revolt: Keith v. Volpe

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Few government activities have as many environmental ramifications as the construction of freeways. It is thus not surprising that the largest number of impact statements filed under NEPA since 1970 have issued from the Department of Transportation, and that highway cases predominate amongst the reported judicial decisions construing NEPA. Highway opponents have recently broadened their attacks by including allegations under state environmental protection statutes, the Federal-Aid Highway Act, and the Uniform Relocation Act. The court in Keith v. Volpe was the first to confront each of these issues in a freeway suit. This Note analyzes the lengthy court opinion in that case. After explicating the significant issues raised under the governing statutes, the author examines the standards used by the court to resolve each conflict with a view towards assessing their viability in future freeway litigation.

The recent case of Keith v. Volpe is among the first of what promises to be a continuing line of California highway cases applying state and national environmental policy acts and federal highway and relocation assistance statutes. The suit was brought to halt work on the proposed Century Freeway in Los Angeles County. The plaintiffs charged state and federal highway officials with failure to comply with the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), the Federal-Aid Highway Act, and the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Relocation Act). Plaintiffs also contended that public hearings held on the freeway issue were so defective that acquisition of property in the freeway corridor on the basis of such hearings violated the due process clauses of the fifth and fourteenth amendments. They further alleged that the housing market in Los Angeles was so strictly segregated and available replacement housing in such short supply that the displacement by the State of black residents living in the freeway corridor was equivalent to a violation of

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2. The plaintiffs were four couples who live in the path of the proposed freeway, the Environmental Defense Fund, the Sierra Club, the NAACP, an unincorporated association named "Freeway Fighters," and the city of Hawthorne.
3. The defendants were Secretary of Transportation John A. Volpe and named administrators of the California Division of Highways, the California Department of Public Works, and the Federal Highway Administration.
7. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601 et seq. (1970). Plaintiffs also contended that public hearings held on the freeway issue were so defective that acquisition of property in the freeway corridor on the basis of such hearings violated the due process clauses of the fifth and fourteenth amendments. They further alleged that the housing market in Los Angeles was so strictly segregated and available replacement housing in such short supply that the displacement by the State of black residents living in the freeway corridor was equivalent to a violation of...
court found for the plaintiffs on all issues, holding that the environmental impact statements required by NEPA and CEQA should have been submitted, that public hearings held pursuant to the Federal-Aid Highway Act were inadequate, and that relocation assurances submitted by the State did not comply with the Federal-Aid Highway Act and the Uniform Relocation Act.

Numerous highway suits prior to Keith had sought compliance with NEPA. However, the basis of the plaintiffs' attack in Keith was considerably broader. Their success augurs well for similar multi-faceted assaults on federal-aid highway projects. The decision is particularly valuable when analyzed in terms of techniques available to plaintiffs in future highway litigation as it discloses substantive problems and legal defenses likely to be encountered. After examining briefly the general context of highway controversies and the goals and procedures of the federal-aid highway program, this Note will analyze the four principal issues raised in Keith and discuss their implications for other highway cases.

I

PROFILE OF A CONTROVERSY

A. To Build Or Not To Build

The federal-aid highway system is undoubtedly the largest public works project ever devised by man. As originally conceived in 1944, the program was projected to include 40,000 miles of highways.8 In 1956 this total was boosted to 41,000 miles, at an estimated cost of $27 billion, and was scheduled for completion in 1972.9 At that time the scope of federal funding was broadened to ensure federal aid to secondary and other non-interstate road systems and for improvements on existing roadways.10 At present the estimated total mileage of the interstate highway system has increased to 42,500 miles,11 and estimated cost has risen to over $70 billion.12 The final completion date has retreated to 1977.

As envisioned in 1944, the federal-aid highway system was intended to provide long-distance roadways between state and metropolitan areas. The plan called for bypassing of cities and was not intended to serve commuters,
who are now the major source of freeway traffic. In 1956 the plan was altered to allow projects to be built in urban as well as rural areas. The lure of 90 percent federal funding proved irresistible to state highway administrators and special interest groups who believed that highways should benefit the cities in more immediate ways. The result has been the unending construction of beltways and arterials which encircle and sometimes strangle the urban areas they are intended to serve, and the routing of huge ribbons of concrete directly through densely settled city centers.

Urban freeways have had unquestionable benefits. Those benefits, however, have been enjoyed primarily by suburban commuters whose homes and neighborhoods generally have not been affected by freeways other than to be made more convenient with respect to commuters' offices in the city. Yet urban sprawl has become so pervasive that once-quiet suburbs are now being threatened by asphalt rollers and concrete mixers. Eight-lane highways—with their huge interchanges, entrance and exit ramps, median strips, and abutments—require immense amounts of land, a commodity increasingly precious in the suburbs as well as in the inner city. Freeways attract more automobiles, thus increasing traffic congestion, and in turn resulting in demands for more freeways. Parks, historic sites, and recreational areas disappear into concrete, while air and noise pollution and traffic accidents increase. Freeways simultaneously promote reliance on automobiles and discourage improvement or development of alternative means of mass transportation. In the cities themselves the daily commuter traffic further strains crowded streets and parking facilities and contributes to the already rapid deterioration of the urban environment.

Although freeways and the cars which are used on them cause widespread environmental damage, their social and economic effects are often more immediate and serious to individuals directly affected by them. Freeways bisect communities with huge walls of concrete, fragmenting closely knit neighborhoods and separating them both from each other and from schools, parks, libraries, and other community services. At the same time, these public services are themselves disrupted or destroyed, thereby increasing the burden on those remaining. Thousands of people are forced to leave their homes, often without provision for comparable housing in which to relocate. Individual and community economic and social losses are frequently severe. The elderly, the poor, and the members of minority populations, those who least use the freeway, are often its greatest victims.

14. Id.
particularly because they are the ones least capable of bearing or resisting the disruption forced upon them. The opposition to freeways has steadily mounted as both low-income and wealthy neighborhoods increasingly have confronted the problems inherent in highway building programs. Because controversies concerning the location, design, and very existence of freeways have become so frequent, the issues raised in Keith reflect problems facing in many communities throughout the nation.

B. The Century Freeway: Route, Cost, and Impact

The route of the proposed Century Freeway extends across seventeen miles of the southern portion of the Los Angeles basin. Originating in the west at the Los Angeles International Airport, it passes through the cities of El Segundo, Hawthorne, Inglewood, Lynwood, South Gate, Paramount, Downey, Norwalk, the Watts area of the city of Los Angeles, and the unincorporated community of Willowbrook. The freeway intersects with the San Gabriel River Freeway (I-605) at its eastern end and its proposed route includes intersections with three major interstate highways—the San Diego (I-405), Harbor (I-11), and Long Beach (I-7) Freeways.

The area which the Century Freeway traverses is, like most of the Los Angeles basin, densely settled. That surrounding the western end of the freeway is highly industrialized due to the presence of extensive aerospace


19. Ironically, the origin of the Century Freeway can be traced directly to the famous San Francisco “freeway revolt” of the late 1950's and early 1960's. When the city of San Francisco refused to allow completion of a downtown freeway already partially built and the start of another, the State of California was forced to reallocate the mileage to Southern California in order to avoid losing the huge federal subventions involved. Planning for the Century Freeway was then initiated. *See* Silen, *supra* note 15; Gunzburg, *Transportation Problems of the Megalopolitan*, 12 U.C.L.A. L. Rev. 800, 809 (1965).

20. 352 F. Supp. at 1329, 4 ERC at 1352.
industry and activity related to the airport. The areas surrounding the remaining length of the freeway are predominantly residential, ranging in nature from high quality single-family dwellings in the location of the proposed Century-Harbor Freeways interchange, to some of the most severely depressed areas of Los Angeles County, the communities of Watts and Willowbrook.21

Due to the high cost of acquiring right-of-way in such a densely populated urban area and because the intersections of the Century Freeway with three major interstate highways pose certain relatively complex technical problems,22 the Century Freeway will be expensive. Its total cost has been estimated at $501,800,000,23 or over $29.5 million per mile. Because the freeway has been designated part of the federal interstate system, 90 percent of its cost will be borne by the federal government. The California Division of Highways has responsibility for acquisition of the right-of-way and actual construction of the road.

It has been estimated that 9,000 families, including 21,000 individuals, will be displaced by the freeway. A significant percentage are non-white and an even larger number have relatively low incomes. Approximately 3,900 single-family dwellings and 3,000 multiple-unit dwellings, including some 118 units of public housing, will be acquired and demolished for the freeway right-of-way. The Division of Highways intends ultimately to acquire 6,073 parcels of land. Right-of-way acquisition was begun in January of 1970, and by April of 1972 the Division had purchased 3,388 parcels (55.8 percent of the total) at a cost of $88,651,000. By May 3, 1972 approximately 2,840 residences in the freeway corridor had been vacated. The Division intended that actual construction of the freeway would begin in late 1972, with estimated completion by the middle of 1977.24

The Century Freeway will have an extremely disruptive effect on many of the communities through which it passes. In several, the freeway will divide smaller residential areas from the larger community, severing them from public service districts and splitting school attendance areas.25 The freeway will have obvious environmental effects. Noise levels will increase in adjacent residential areas; this problem will be particularly acute for several elementary schools which will remain next to the freeway.26 The air pollution which already blights Southern California27 will inevitably be

22. In addition to the requirements of the four major interchanges, proposed plans for the interchange of the Century Freeway and the Imperial Highway call for a four-story, 2½-mile bridge over the latter. Id. at 15.
23. 352 F. Supp. at 1329, 4 ERC at 1352.
24. Id.
25. Memorandum for Plaintiffs, supra note 21, at 14.
26. Id.
27. Testimony received by the court indicated that while automobile emissions are responsible for approximately 50% of the air pollution in the nation, they cause 60 to 70% of the air pollution in the Los Angeles basin. According to the Los Angeles
increased by the large numbers of vehicles expected to use the freeway, and will be significantly more concentrated in those areas near the freeway. Street closures, the addition of frontage roads, and the location of on-off ramps will drastically alter traffic patterns in most of the nearby communities. Development resulting from the freeway is expected to increase traffic on certain local road systems so substantially that their capabilities will be severely overloaded.28

C. A Note On Federal-Aid Highway Procedure

Crucial to a discussion of any federal-aid highway project, and particularly of the Century Freeway, is an appreciation of certain aspects of the procedure by which such highways are planned and built. The process in its entirety is extremely complex; many persons both inside and outside the Federal Highway Administration (FHWA) and state highway departments have difficulty understanding it. It is governed in its major aspects by two statutes, the Federal-Aid Highway Act and the Uniform Relocation Act, supplemented by a myriad of FHWA regulations which often are ambiguous, incomplete, and outdated.29

Only three stages of the process are directly relevant to an understanding of the issues raised in Keith and related cases: the “location,” “design,” and “right-of-way” stages. During the location stage, a state highway department prepares proposals on alternate routes for the proposed project. Public “corridor” hearings are held to consider the alternate

Air Pollution Control District, automobile emissions cause 90% of the air pollution in Southern California. 352 F. Supp. at 1334 n.11, 4 ERC at 1356 n.11. For information on air pollution in the Los Angeles basin and on statutes and ambient air quality standards governing air pollution control in California, see Los Angeles Water & Power v. Los Angeles Air Pollution Control Dist., 1 ERC 1580 (L.A. County Super. Ct. 1970). The seriousness of the problem was underscored by the recent announcement of the Environmental Protection Agency that it plans to study the possible implementation of gasoline rationing in the basin to reduce consumption by 86%. San Francisco Chronicle, Dec. 6, 1972, at 1, col. 4.

28. Memorandum for Plaintiffs, supra note 21, at 15. In view of the many problems associated with the proposed freeway, several communities along the freeway corridor have vigorously opposed the present route since its adoption. The city of Downey passed a resolution against the building of any new freeways within the city limits and lobbied in favor of a bill before the 1970 state legislature which would have required the Century Freeway to terminate at the Long Beach Freeway. Id. The city of Hawthorne has consistently refused to sign a street-closure agreement with the Division of Highways. See CAL. STS. & H'WAYS CODE § 100.2 (West 1969). In February 1971, a Los Angeles superior court granted Hawthorne a temporary restraining order and preliminary injunction forbidding the state from acquiring any land within the city for the freeway until a street-closure agreement is signed. Memorandum for Plaintiffs, supra, at 15.

29. For a thorough analysis of federal-aid highway procedures, see Peterson & Kennan, The Federal-Aid Highway Program: Administrative Procedure and Judicial Interpretation, 2 ELR 50001 (1972). See also Silen, supra note 15. It has been ruled that FHWA policies and procedures have the force and effect of law [Peterson & Kennan, supra, at 50002 n.6], despite the Department of Transportation’s claims to the contrary. 23 C.F.R. § 1.32(a) (1972).
routes. The state then selects a general route and submits it to the FHWA for approval. After the route has been approved, the state prepares proposals on alternate freeway designs, which are then considered in a second set of public hearings called “design” hearings. The state then submits specific designs for approval, together with assurances that it has complied with certain statutes and regulations concerning relocation housing assistance. With one major exception, the state may not purchase any right-of-way until the project design has been approved by the FHWA. Once design approval has been granted, the right-of-way stage begins, during which the state acquires all the necessary land in the freeway corridor.

From conception to completion the building of a highway may occupy well over a decade. In the early stages, planning must necessarily be somewhat imprecise in order to take into account the variables and obstacles which must be accommodated as the project progresses. It is because highway planning must be inherently flexible that the application of regulatory statutes to the process has proven to be both difficult and controversial.

II

THE ISSUES AND THEIR RESOLUTION

Because the planning of the Century Freeway has spanned almost eight years, the three stages outlined above have specific relevance to an analysis of Keith. The major issues raised by the plaintiffs concerned environmental problems created by the freeway, the sufficiency of the corridor and design public hearings, and the adequacy of state relocation housing assistance programs and payments. NEPA and CEQA, on which plaintiffs relied, were not enacted until much of the planning of the freeway had been completed and approved by the Secretary of Transportation. The statutes governing public hearings and state relocation housing assurances were amended subsequent to state completion of relevant planning stages. Thus, among the significant questions which the court had to resolve were the sufficiency of state compliance with existing statutes and regulations and the “retroactive” application of certain statutory and administrative requirements to all or part of the long planning process involved in the Century Freeway project.

A. Applicability of Federal and State Environmental Policy Acts

1. National Environmental Policy Act (NEPA)

The federal defendants in Keith conceded that the Century Freeway was a major federal action significantly affecting the quality of the human

32. Id. ¶ 10e (permits property owner suffering “hardship” due to possible con-
environment. They claimed, however, that they were not required to prepare an environmental impact statement (EIS) under section 102(2)(C) of NEPA because the Act was not applicable to federal projects in such an advanced state of completion on the date that NEPA took effect. It was on the issue of retroactive application of the statute that the discussion of NEPA centered.

In November of 1970 the FHWA announced Interim Guidelines for the application of the section 102(2)(C) procedure to federal highways. The Guidelines designated the date on which a given freeway had received design approval from the Secretary of Transportation as the determinative factor governing applicability of NEPA. A freeway which had received design approval after February 1, 1971 (13 months after the effective date of NEPA) would be subject to the Act's requirements. If design approval had been received prior to that date, compliance was not necessarily required. However, where a project in the latter category still involved the acquisition of substantial amounts of real estate, state highway authorities, in consultation with the FHWA division engineer, had to reassess the project to determine whether it had been "developed in such a manner as to minimize adverse environmental consequences." The division engineer could request an EIS, but in the absence of such a request none was required.

The state defendants had divided the Century Freeway into eight segments for the purpose of holding public hearings and preparing design proposals to be submitted to the Secretary for approval. Three of the segments received design approval prior to January 1, 1970, the date that NEPA became effective. The remaining segments were approved between January 1, 1970, and February 1, 1971. The state authorities thus were required by the FHWA guidelines only to reassess the project. That reassessment, dated March 15, 1971, concluded that the Century Freeway had in

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33. Section 102(2)(C) of NEPA provides that for every federal action "significantly affecting the quality of the human environment," the responsible federal official must prepare a detailed statement on:

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.


34. FHWA Interim Guidelines for the Implementation of § 102(2)(C) of the National Environmental Protection Act of 1969, ¶ 4 (Nov. 24, 1970).

35. Id.

36. Id.

37. 352 F. Supp. at 1332 n.6, 4 ERC at 1354 n.6.
fact been "developed in such a manner as to give detailed consideration to the potential impact upon the quality of the human environment."\textsuperscript{38} The FHWA division engineer concurred with those conclusions in April and did not request an EIS.

The defendants interpreted NEPA as indicating clearly that Congress had never intended that federal agencies would achieve overnight compliance with the Act. In their view, NEPA contained a built-in "grace" period during which federal agencies were to develop procedures which would make environmental considerations part of the agency decision-making process,\textsuperscript{39} and directed federal agencies to develop those procedures in consultation with the Council on Environmental Quality (CEQ).\textsuperscript{40} CEQ guidelines on NEPA were not issued until May 1970,\textsuperscript{41} and not finalized until April 1971.\textsuperscript{42} With reference to federal actions arising from projects initiated prior to January 1, 1970, they state that such projects are subject to the section 102(2)(C) procedure "to the maximum extent practicable."\textsuperscript{43} Noting their compliance with the FHWA guidelines and the conclusion that sufficient consideration had been given to environmental effects, the defendants contended that work on the Century Freeway had progressed to such an extent that present application of NEPA would be both impracticable and unnecessary.

Not surprisingly, the plaintiffs strongly attacked defendants' reliance on the limiting language of "practicability," arguing that the legislative history of NEPA\textsuperscript{44} and its subsequent interpretation by the courts\textsuperscript{45} rendered

\textsuperscript{38} Id. at 1332, 4 ERC at 1354.
\textsuperscript{39} Section 103 of the Act gave federal agencies until July 1, 1971, to review their statutory authority, procedures, policies, and regulations so as to bring them into conformity with the provisions of NEPA. 42 U.S.C. § 4333 (1970).
\textsuperscript{40} 42 U.S.C. § 4332(1)(B) (1970). The CEQ was itself a creation of NEPA. Id. § 4342.
\textsuperscript{43} Id. ¶ 11. This language echoes section 101 of NEPA which makes it the continuing policy and responsibility of the federal government "to use all practicable means" to carry out the policies expressed in that section. 42 U.S.C. § 4331(a) (1970).
\textsuperscript{44} The Senate and House Conferences on NEPA expressed their understanding that [t]he purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in... [section 102(2)(C)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible... Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies... shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance. CONF. COMM. REP. NO. 765, 91st Cong., 1st Sess. 9-10 (1969) (emphasis supplied); see 115 CONG. REC. 39,702-03 (1969).
\textsuperscript{45} In Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 2 ERC
compliance "to the fullest extent possible" mandatory. Since only one-half of the right-of-way had been acquired for the Century Freeway and construction had not yet begun, opportunity still existed for environmental factors to be taken into account. Plaintiffs further contended that FHWA regulations could not validly postpone application of NEPA for 13 months nor vest in the FHWA division engineer unfettered discretion not to require an impact statement.

a. Retroactive Application of NEPA

The first problem confronting the court was, therefore, whether NEPA could, or should be applied “retroactively.” The task of reconciling the somewhat inconsistent language of NEPA and the CEQ Guidelines was not facilitated by the host of highway cases which had decided the question in varying ways and with equally varied justifications. The dissimilarity of the courts’ approaches can be attributed primarily to three factors: (1) the absence of legislative history or clear statutory language in NEPA indicating congressional attitude toward projects on-going at the time NEPA took effect; (2) the multi-stage highway procedure which has allowed courts to select a particular stage as an arbitrary cut-off point for NEPA's application; and (3) the factual situations actually before the courts, where often construction of the highway had already begun before the case could be decided.

A number of courts have selected the design phase as the most important stage in the highway procedure; i.e., all evaluations of environmental, economic, and social factors should be fully considered at that point. In these cases, the date on which a highway received design approval becomes determinative. If it occurred before January 1, 1970, NEPA would not be applicable because Congress did not intend the statute to be retroactive.46 However, if design approval occurred after January 1, 1970, or had not

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yet occurred by the time of trial,\textsuperscript{48} then an EIS would be required. Other courts have selected the final approval of the entire project and the release of federal funds for construction,\textsuperscript{49} the submission of bids,\textsuperscript{50} the awards of contracts for construction,\textsuperscript{51} or the beginning of construction\textsuperscript{52} as the crucial point in applying NEPA. Finally, some courts have attempted to avoid selecting a certain "critical" event and have instead based their decision on the extent of federal action or approval still to be granted at the time the Act took effect. Thus, even if both location and design approval had been received well before January 1, 1970, as long as substantial action (such as federal approval of most of the specific construction projects) was yet to occur then an impact statement should be drafted.\textsuperscript{53}

The temptation to pick a definite event after which NEPA will not be applied to projects already initiated is understandable. Certainly it would facilitate administrative decisions and the resolution of court controversies. However, as one court has pointed out,\textsuperscript{54} neither Congress nor the CEQ selected such an arbitrary date, and the attempt by courts to do so has clouded the real justifications for their decisions. Congress probably did not intend that NEPA would apply without exception to all projects begun

\textsuperscript{48} Lathan v. Volpe, 455 F.2d 1111, 3 ERC 1362 (9th Cir. 1971).
\textsuperscript{49} Monroe County Conservation Council v. Volpe, — F.2d —, 4 ERC 1886 (2d Cir. 1972) (final federal approval not granted at time of decision); Scherr v. Volpe, 466 F.2d 1027, 4 ERC 1435 (7th Cir. 1972) (final federal approval of project in January 1971); Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013, 2 ERC 1871 (5th Cir. 1971) (Secretary authorized funding of two segments of freeway in August 1970). In each case it was held that an EIS was required since final federal approval had not been obtained.
\textsuperscript{52} Ragland v. Mueller, 460 F.2d 1198, 4 ERC 1198 (5th Cir. 1972) (NEPA held inapplicable to construction begun before 1970 where 16 miles were completely built and right-of-way had been acquired for the remaining four miles of the project).
\textsuperscript{53} In Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 3 ERC 1327 (N.D. Ga. 1971), design approval had occurred in 1968 and 1969. The court declined to rule that the Secretary's authorization of construction funding was a further critical approval which would determine NEPA's applicability. However, despite the fact that the substantive approvals of design and location occurred before 1970, since the project was an ongoing one on which "substantial actions are yet to be taken," the court held that NEPA was applicable regardless of the date of "critical" federal approval. It added that even the existence of executed contracts and the performance of prior contracts would not grant a project immunity from thorough compliance with section 102. \textit{Id.} at 145, 3 ERC at 1337. In Northside Tenants' Rights Coalition v. Volpe, 346 F. Supp. 244, 4 ERC 1376 (E.D. Wis. 1972), 99\% of the proposed right-of-way had been acquired and cleared, and $20 million spent of an estimated total cost of $61 million. Despite the fact that both location and design approval had been received before NEPA was enacted, the court held that an EIS should have been issued for the highway since actual construction had not yet begun and the "vast bulk" of specific construction contracts had yet to be approved. \textit{Id.} at 247, 4 ERC at 1379.
before January 1, 1970. A more reasonable interpretation is that Congress intended that federal agencies would apply NEPA to such on-going projects unless they were so far completed that meaningful application of the Act would be impossible. Necessarily this would involve a balancing of factors—the stage of completion, the cost of reassessing the project and of rebuilding or replanning it to conform to environmental findings, and the potential damage to the environment if the project were continued without compliance. Furthermore, under this reading of NEPA, if any purpose of the Act could be served by preparation of an impact statement, then the statement should be drafted. If the agency refused or failed to file a statement without adequate justification, it should be prepared to have a court undertake the task of evaluating these elements with the intent to apply NEPA fully wherever possible.

Few courts have openly utilized this approach, although most seem to have gone through a silent balancing of the relevant facts in the cases before them. In almost all instances where NEPA was found inapplicable to highway projects initiated before January 1, 1970, construction had begun by the time the court decided the controversy. Although this point is rarely emphasized in the opinions, it is evident that the courts implicitly had decided that the stage of completion of the project was such that preparation of an impact statement would be little more than a futile gesture. Several other opinions have been more honest, acknowledging that from a policy viewpoint NEPA should apply, but detailing the facts which persuaded the court that the project was too far underway to make full compliance meaningful and effective. But even these cases have insisted that in all future actions on the project (including the actual construction), every effort must be made to comply with the goals of NEPA.

Arlington Coalition on Transportation v. Volpe is one of the few re-


56. In Civil Improvement Comm. v. Volpe, 4 ERC 1160 (W.D. N.C.), aff'd, 459 F.2d 957, 4 ERC 1163 (4th Cir. 1972), the court refused to enjoin the development of an interstate highway under NEPA when it was "unlikely" that the route would be changed by the results of environmental studies; construction contracts had been let and earthmoving had already begun. The court did insist, however, that every effort be made to fulfill NEPA's policies during actual construction so as to "minimize" environmental harm. In Brooks v. Volpe, 350 F. Supp. 287, 4 ERC 1532 (W.D. Wash. 1972), the defendants had made a showing of a good faith effort to comply with NEPA, and work on the three contracts let was 31% to 95% complete. The court found that halting work in progress could not undo previous environmental damage and would threaten severe erosion; in addition, significant economic harm in lost wages and jobs would result. But the court did prohibit the signing of any new contracts until an EIS had been filed: "It is not yet too late for highway planners to administratively choose another route, but if paving contracts are let and performed, selection of another route would be virtually impossible." Id. at 290, 4 ERC at 1535.

ported highway decisions prior to Keith in which the court clearly articulated its approach to the application of NEPA to highway projects initiated before 1970. In Arlington the freeway route had been selected in 1961 and approval for acquisition of right-of-way for the entire freeway corridor granted in 1965. By the time of the decision, 75.6 percent of all families and 85.6 percent of all businesses had been relocated and 84.4 percent of all necessary right-of-way had been acquired. Over $28,000,000 had been spent in right-of-way acquisition and the estimated cost of completing acquisition was only $5,000,000. With planning almost totally completed, only actual construction remained. The court recognized that

at some stage of progress the cost of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be “possible” to change the project in accordance with section 102. At some stage, federal action may be so “complete” that applying the Act could be considered a “retroactive” application not intended by Congress. The congressional command that the Act be complied with “to the fullest extent possible” means... that an ongoing project was intended to be subject to section 102 until it has reached that stage of completion, and that doubt about whether the critical stage has been reached must be resolved in favor of applicability.

The court acknowledged that it could not define for all cases the point of completion beyond which section 102 would not be applicable. But since Arlington I-66 had not received “P.S.&E.” approval, construction contracts had not been awarded, and actual construction had not begun, the court “knew” that this particular freeway had not yet reached that point.

The court rejected the argument that FHWA regulations and the date the freeway had received design approval were controlling, stating that the date

58. In Environmental Law Fund v. Volpe, 340 F. Supp. 1328, 3 ERC 1941 (N.D. Cal. 1972), the court proposed a “balancing” test but seemed to tie application of the test to the date of design approval. If design approval had not been received by January 1, 1970, an EIS must be prepared in all cases; otherwise the statement must be prepared if “practicable.” The court indicated four factors which should be weighed in determining practicability: (1) the participation of the local community in the planning of the project; (2) the extent to which the state considered environmental factors; (3) the likely harm to the environment if the project is constructed as planned; and (4) the cost to the state of halting construction pending preparation and evaluation of an impact statement. Id. at 1334, 3 ERC at 1945. Despite the court’s apparent reliance on design approval as a determinative factor, it indicated that it would be likely to depart from that standard in some cases, because it could envision situations where an EIS would be required even though design approval took place prior to January 1, 1970. Id. at 1337, 3 ERC at 1946.

59. 458 F.2d at 1331, 3 ERC at 2000.

60. After completion of route and design hearings, state authorities must submit to the FHWA “such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require.” 23 U.S.C. § 106(a) (1970). This is commonly termed “P.S. & E.” approval, and it must be obtained before the FHWA will enter into agreements providing federal funding for general construction and maintenance work.

of design approval alone does not accurately measure whether a freeway has reached the crucial stage. Determining the applicability of section 102(2)(C) by that standard alone would be "arbitrary and capricious agency action and an abuse of administrative discretion."

After enjoining all work on the freeway pending preparation of the impact statement, the court noted that the Secretary of Transportation could take into account previous investment in the proposed route of the freeway. The preliminary injunction was necessary to prevent any further investment of time, effort, or money, since such investment would make alteration or abandonment of the proposed route less justifiable and thus much less likely. If work continued while the statement was being prepared, at some point the EIS would become a "meaningless formality."

The court in Keith had little difficulty in finding the message of NEPA to be "loud and clear" in its requirement of compliance to the "fullest extent possible." Adopting the test set forth in Arlington, the court held that the Century Freeway had not reached the stage of completion where NEPA was inapplicable. The purpose of section 102(2)(C) is "to build into the agency decision-making process an appropriate and careful consideration of the environmental aspects of proposed action." That decision-making process can be considered still amenable to such input if planning has not yet been completed. Because design approval for five of the eight segments of the Century Freeway had not been granted when NEPA took effect on January 1, 1970, final planning for the project was clearly unfinished. The freeway "was still at that stage of its development in which 'a careful consideration of environmental aspects' would have been most 'appropriate'." The court noted further that if the planning stage had not been completed, it obviously was still "practicable" to file an EIS. Any attempt to make the application of NEPA more "flexible" by means of agency guidelines which postponed the effective date of the Act by 13 months would not be tolerated.

62. 458 F.2d at 1332, 3 ERC at 2001. The same attitude toward the selection of design approval as the determinative event was apparent in Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167, 4 ERC 1449 (S.D. Iowa 1972). The court recognized that the responsible administrative agency has discretion in determining the practicability of preparing an EIS, but emphasized that it should be exercised "with a goal of fulfilling rather than frustrating Congressional intent." It was not a proper exercise of discretion for the defendants to refuse to prepare an EIS solely because design approval had preceded the effective date of the Act. Id. at 1171-72, 4 ERC at 1452.

63. 458 F.2d at 1333, 3 ERC at 2002. See also note 72 infra.

64. 352 F. Supp. at 1332, 4 ERC at 1355.


66. Id. § 4332(2)(B).


68. The court noted that the FHWA Interim Guidelines [see note 34 supra] had been superseded by FHWA Policy and Procedure Memorandum 90-1 (Aug. 24, 1971) [hereinafter cited as PPM 90-1] (copy on file with the Ecology Law Quarterly). PPM 90-1 preserves the 13-month interval, making compliance with NEPA for a highway which received design approval between January 1, 1970,
b. The scope of the impact statement

Having decided that an impact statement must be prepared, the court took the somewhat unusual step of suggesting certain factors it felt must be included in the statement. In the eyes of the court, the most serious en-

and February 1, 1971, necessary “if, in the judgment of the FHWA division engineer, implementation of [NEPA] to the fullest extent possible requires preparation and processing of an environmental statement.” Id. ¶ 5b. While this language seems strict, it may be undermined by the requirement that the division engineer, before making his determination, must receive from the state highway department a written reassessment of the project. PPM 90-1 provides only that this reassessment “should consider if the highway plans were developed in such a manner as to minimize adverse environmental consequences,” [Id. ¶ 5c] without more specific requirements. In making his determination the FHWA division engineer

... should consider, in addition to the written reassessment prepared by the [state authorities] for each such highway section, the status of the design; right-of-way acquisition including demolition of improvements within the right-of-way; number of families already rehoused and those yet to be rehoused; construction scheduling; benefits to accrue from the proposed highway improvement; significant impacts; and measures to minimize any adverse impacts of the highway.

Id. ¶ 5b. While these standards seem more detailed than those applicable to the state authorities, the division engineer is clearly limited in his review to the very general information provided by the state. The court considered the language of PPM 90-1 to be ambiguous, noting that if the test “to the fullest extent possible” mentioned in ¶ 5b was the one required by the PPM, it would accord with the court's evaluation of the demands of NEPA. However, if the flexible language elsewhere in ¶ 5 permits the test to be less rigorous, PPM 90-1 would likely fail for the same reasons as did the Interim Guidelines. 352 F. Supp. at 1333-34 n.9, 4 ERC at 1355 n.9.

In addition to Arlington and Keith, only one other court seems to have dealt with the issue of whether the FHWA Guidelines or PPM 90-1 are valid in this respect. In Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 4 ERC 1329 (D. Conn. 1972), the court interpreted congressional intent to have been to make January 1, 1970, a blanket effective date for NEPA, and held that the FHWA 13-month postpone-ment of the effective date in PPM 90-1 could not be permitted. In Environmental Law Fund v. Volpe, 340 F. Supp. 1328, 3 ERC 1941 (N.D. Cal. 1972), the court noted the discrepancy between the January 1, 1970 date set by NEPA and the February 1, 1971 date set by PPM 90-1. Because the highway under examination in that case did not fall into that period, the court felt it “sufficient to point out that an inconsistency may exist for certain projects in how the regulations would approach the problem of requiring an EIS and how the court would approach the same problem for these projects.” Id. at 1333 n.12, 3 ERC at 1943 n.12 (emphasis in original). Given this existing authority, any future attempt by the FHWA to press this argument on a court should be disposed of with no difficulty.

69. The only other highway case in which the court similarly prescribed the contents of the EIS to be prepared was Lathan v. Volpe, 350 F. Supp. 262, 4 ERC 1487 (W.D. Wash. 1972). In Lathan the court was even more detailed in its requirements than was the court in Keith. It specifically condemned the lack of adequate findings on: the potential effects on land use and population distribution in the surrounding metropolitan area; the potential congestion on other roads; the extent of damage that would occur to homes located above tunnels dug for the highway; the costs and benefits of alternatives to the highway; methods to contain possible oil spills on a floating bridge section of the highway; and the effects of air and noise pollution on the residents of the highway corridor. Id. at 266, 4 ERC at 1490.

It is also possible that in the future the “citizen suit” provisions of the Clean Air Amendments of 1970 [42 U.S.C. § 1857h-2 (1970)] will be used by plaintiffs seeking
environmental effects likely to result from the Century Freeway would be increased air and noise pollution. Since the defendants had not examined these potential effects, they had not only failed to comply with CEQ Guidelines but had also cast suspicion on the conclusions of the environmental "reassessment" of the project done pursuant to the FHWA Guidelines. The court also indicated specific details which the defendants should consider in evaluating the freeway's impact on air quality; e.g., the effect of wind and weather conditions on the dispersal of pollutants, the effects of other sources of pollution, and heavier automobile traffic attracted into the Los Angeles basin by the freeway. It should be noted that Keith is unique among the highway cases in this regard, for no other court has delivered such detailed instructions regarding the issues which must be included in the impact statement as well as variables to be used in evaluating those issues. While these suggestions were perhaps intended by the court to be merely indicative of what it felt a proper evaluation should include, they may also presage increasing judicial willingness to intrude into the administrative fact-finding process leading to the preparation of environmental impact statements.

A final significant point stressed by the court was that section 102(2)(C) includes the requirement that an EIS consider "alternatives to the proposed action." This requirement is crucial, said the court, if the EIS is not to become an "academic exercise." The defendants must consider all possible alternatives to the proposed freeway, including changes in design, changes in route, different systems of transportation, and even complete abandonment of the project. This reevaluation of the project should be made only after rigorous examination of environmental impact studies. While the EIS need not ignore the money and work already invested in the freeway, these factors could not be allowed to prejudice the objectivity of the reevaluation.

to enjoin construction of a highway which would result in increased automobile emissions and degradation of air quality in the relevant control region. The enforcement of ambient air quality standards would be a particularly significant issue in a highway case arising in Southern California. See note 27 supra.

70. The defendants had argued that when NEPA was enacted little comparative data was available concerning the relative impact of freeways and secondary streets on air pollution, and that what little evidence did exist indicated that freeways might in fact reduce air pollution. 352 F. Supp. at 1334, 4 ERC at 1356. The court replied that the data originally available should have been carefully examined. The new evaluation ordered was to make use of the recent advances in air quality measurement. The court also suggested that the air quality standards promulgated by EPA pursuant to the Clean Air Amendments of 1970 [42 U.S.C. §§ 1857-58a (1970] and the designated measurement techniques for sampling specified pollutants contained therein would be helpful to the defendants. Id. at 1335, 4 ERC at 1356. See Schneiderman, Cohn & Paulson, Air Pollution and Urban Freeways: Making a Record on Hazards to Health and Property, 20 Catholic U. L. Rev. 5, 10 (1970).


72. 352 F. Supp. at 1336, 4 ERC at 1357. The court quoted from EDF v. Corps of Engineers, 325 F. Supp. 728, 2 ERC 1260 (E.D. Ark. 1971), aff'd, 721 F.2d 728 (8th Cir. 1972), on the weight to be given previous investment in ongoing
conviction that NEPA required the defendants fully to reevaluate the wisdom of proceeding with the Century Freeway in any form significantly affected the court's later resolution of the public hearings issue and the scope of relief granted.

c. The remaining dilemma

The approach taken by the courts in Arlington and Keith is an appealing one, and it will probably be followed in many future cases which confront the "retroactivity" issue. The test is sufficiently general that most of the diverse holdings of other cases can be reconciled with it and with each other—if one assumes that each court, on examining the facts before it, based its determination of NEPA's applicability on a comparison of the project's stage of completion with any possible benefits which the public would receive from application of the Act. However, the obvious dilemma left by Arlington and Keith is the question of how a court is to know when the costs of altering or abandoning in fact outweigh the benefits which would result from such action. Neither the courts nor the legislatures have yet devised a method for putting a dollar value on space to live, work, play, and breathe. The costs involved in constructing, moving, or abandoning a freeway can be compared only vaguely with such inchoate values. Inevitably, each court will be left in the position of the court in Arlington, which instinctively "knew" that the freeway had not reached that point but was unable to give precise reasons for this conviction.

projects subject to an environmental review. There the Gillham Dam project had been authorized in 1958 and was 63% complete by the time of the district court decision. NEPA was found applicable and the defendants were advised:

The Court is not suggesting that the status of the work should not be considered in determining whether to proceed with the project. It is suggesting that the degree of the completion of the work should not inhibit the objective and thorough evaluation of the environmental impact of the project as required by NEPA. [A]s the Court interprets NEPA, the Congress of the United States is intent upon requiring the agencies of the United States government, such as the defendants here, to objectively evaluate all of their projects, regardless of how much money has already been spent thereon and regardless of the degree of completion of the work. 325 F. Supp. at 746, 2 ERC at 1275. See also Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 142, 3 ERC 1327, 1334 (N.D. Ga. 1971).

73. See, e.g., Nat'l Audubon Soc'y v. Johnson, 317 F. Supp. 1330, 1 ERC 1709 (S.D. Tex. 1970). Plaintiff brought a diversity suit to halt dredging which threatened its wildlife sanctuary. The court found that the plaintiff could not fix a numerical value to the benefit to be derived from continued maintenance of the sanctuary nor could it plainly state the damages directly related to the dredging operations. Therefore, the plaintiff had failed to meet the jurisdictional amount requirement. Id. at 1335, 1 ERC at 1712.

74. Section 102(2) (B) of NEPA directs all federal agencies to

. . . identify and develop methods and procedures, in consultation with the . . . [CEQ] . . . , which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations . . . .

42 U.S.C. § 4332(2)(B) (1970). It is apparent, however, that most agencies understandably are having difficulty coming to grips with this task. See Hanly v. Kleindienst, — F.2d —, —, 4 ERC 1785, 1793 (2d Cir. 1972).
Resolution of the problem will be especially difficult where the freeway is in a relatively advanced stage of completion. Plaintiffs seeking to persuade a court to adopt the Arlington approach in applying NEPA will run the risk that the court will accept the Arlington formula but will disagree with the point at which that court "drew the line." The closer a freeway is to completion, the more the court will be likely to refuse to halt further work and the more crucial will be the plaintiffs' need for convincing and quantifiable evidence of prospective damage to be done by allowing construction to continue. But a court confronted by such evidence, by the strong public policies behind NEPA, and by the precedent of cases in which freeways have been halted even after construction had actually begun should be reluctant to assume that the "balance" tips in favor of the state in the absence of extremely strong justifications.

2. California Environmental Quality Act (CEQA)

Keith is the first case applying the California Environmental Quality Act of 1970 (CEQA)75 to a freeway project. As they had with the NEPA challenge, defendants claimed that CEQA was not applicable to projects as advanced as the Century Freeway at the time the Act took effect. Section 21102 of CEQA provides that the state may not authorize funds for any project which could significantly affect the environment unless the authorization is accompanied by an environmental impact report.76 Defendants argued that section 21102 contemplated applicability only to projects for which funds had not been authorized. Because the California Highway Commission approved the initial financing for the Century Freeway on October 23, 1967, and CEQA did not take effect until September 18, 1970, the Act could not be applied to the freeway. The court, however, did not consider the legislative intent underlying that section to have been to foreclose application of CEQA to projects which had received some funding prior to its effective date.77 The court emphasized, rather, that section 21102 "does not establish an exclusive deadline applicable even to projects the planning or financing of which began before CEQA's enactment."78

Section 21100 of CEQA contains requirements for environmental impact reports which are nearly identical to those in section 102(2)(C) of NEPA.79 Noting the "uncanny" resemblance between the state and national

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76. Id. § 21102.
77. 352 F. Supp. at 1337 n.16, 4 ERC at 1358 n.16.
78. Id.
79. All state agencies, boards, and commissions shall include in any report on any project they propose to carry out which could have a significant effect on the environment of the state, a detailed statement by the responsible state official setting forth the following:
   (a) The environmental impact of the proposed action.
   (b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.
environmental acts, the court felt it to be an "inescapable" conclusion that CEQA was deliberately modeled after NEPA. As a result, the test of applicability should be the same as that utilized for NEPA, i.e., compliance with CEQA is mandatory unless the highway has reached a stage of completion where the costs of altering or abandoning the project outweigh the possible benefits. Subsequent to the effective date of the Act, the state defendants had submitted for approval design proposals for two segments of the freeway and proposals for revision of a third segment. Since they were evidently still actively planning the Century Freeway project when CEQA took effect, the court ruled that they should have prepared a section 21000 environmental impact report.

This decision should have a significant future influence on both state highway planning and judicial review of highway programs. Although some question remains as to whether NEPA applies to a secondary road system partially funded by the federal government, the majority view is that the presence of federal moneys automatically subjects such projects to NEPA's requirements. Different segments of what will eventually be an integrated highway system have been deemed one "project" for purposes of determining NEPA's applicability, notwithstanding attempts by federal and state authorities to label specific segments "state" or "federal" in the planning process. NEPA has also been applied to state highways for

(c) Mitigation measures proposed to minimize the impact.
(d) Alternatives to the proposed action.
(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
(f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.


80. 352 F. Supp. at 1337, 4 ERC at 1358. The California Supreme Court reached the same conclusion in Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761, 4 ERC 1593 (1972).
81. 352 F. Supp. at 1332 n.6, 4 ERC at 1354 n.6.
82. Compare Pennsylvania Environmental Council v. Bartlett, 454 F.2d 613, 3 ERC 1421 (3d Cir. 1971) (expressing doubt as to whether a federal grant for such a project constituted a "major federal action") with Julis v. Cedar Rapids, — F. Supp. —, 4 ERC 1862 (N.D. Iowa 1972) (street widening project partially funded by FHWA deemed not to be a "major federal action").
83. See Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013, 2 ERC 1871 (5th Cir. 1971); Sierra Club v. Volpe, — F. Supp. —, 4 ERC 1804 (N.D. Cal. 1972). In Civic Improvement Comm. v. Volpe, 4 ERC 1160 (W.D. N.C. 1972), aff'd, 459 F.2d 957, 4 ERC 1163 (4th Cir. 1972), the court held that NEPA does not require an impact statement for a municipal street widening project which was neither financed nor controlled by the federal government. The court indicated that if such a project did in fact receive federal aid, it would be subject to NEPA. 4 ERC at 1161.
which it is merely possible that federal funds will be sought. With this background, several states have followed the example of California and the federal government and have enacted environmental protection statutes which require the filing of impact statements similar to those demanded under NEPA and CEQA. If courts give expansive scope to these state acts and continue to provide a broad interpretation of NEPA, the coverage of the state and national statutes in many instances will overlap. Therefore plaintiffs seeking to halt work on road-building projects involving federal funds in states having such laws should be guaranteed a second cause of action based on state law whenever NEPA is found applicable. Where a project involves no federal money and federal participation is otherwise low, a court may be reluctant to apply NEPA because it does not consider the project to qualify as a "major" federal action. But these projects, and most purely state highway and secondary road projects, should at the minimum be held subject to the appropriate state environmental protection statute.

along the San Francisco peninsula, state officials advised the FHWA that they intended to forego the right to federal aid on the 6.3 mile segment; the FHWA then withdrew all prior approval of the project. Pointing out that the disputed segment was an integral part of a larger project extending both north and south of Devils Slide, the court refused to declare that it was a purely state undertaking.

Waiver of federal aid by the State, acquiesced in by the federal agency, at the last minute for a project, which has otherwise been long treated as a federal aid project, should not be made a ground for disclaiming the federal nature of the project where it appears that the purpose is to avoid compliance with federal statutory environmental requirements.

— F. Supp. at —, 4 ERC at 1808. Work was enjoined pending completion of environmental impact studies under NEPA and CEQA, and the conduct of new hearings under the Federal-Aid Highway Act.

The court in La Raza Unida v. Volpe, 337 F. Supp. 221, 3 ERC 1307 (N.D. Cal. 1971) pointed out that many state highway projects when first initiated are not definitely intended to receive federal funds. Most states keep their "options" open by securing federal approval at appropriate stages so that at any time they may request federal funds. Although federal approval of the planning stages does not commit the federal government to funding the highway, the court decided that any state project which has received location approval should be a "federal-aid highway" for the purpose of applying federal statutes. The court felt that a state should not have the benefits which accompany an option to obtain federal funds without assuming the attendant obligations. Id. at 227, 3 ERC at 1310.

Arizona and Hawaii have adopted similar requirements through administrative procedures and executive orders. ENVIRONMENTAL QUALITY: THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 181 (1972).

But see State v. Burch, 501 P.2d 1239, 4 ERC 1718 (Wash. App. 1972) (Washington Environmental Quality Act does not apply to highway for which all required hearings completed prior to adoption of the state act).
B. The Requirement of Public Hearings

The plaintiffs' attack on the public hearings held for the Century Freeway and the court's resolution of this issue raise significant questions concerning the proper role and scope of the hearings in the highway decision-making process. Section 128(a) of the Federal-Aid Highway Act of 1958 directed state highway departments to supplement highway plans submitted for federal approval with a certification that the department had held public hearings which considered the "economic consequences" of highway projects. A 1968 amendment to that section broadened the scope of the hearings, requiring that they consider, and the state highway department evaluate, "the social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community."

The FHWA subsequently issued regulations implementing section 128(a) as it had been amended. To obtain a full presentation of views concerning alternative highway locations and design features in planning a federal-aid highway project, state highway authorities must hold separate "corridor" and "design" hearings. Corridor hearings are to be held prior to final route selection by the state highway department; their purpose is "to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a federal-aid highway." Design hearings must be held before the state chooses a specific design proposal; their purpose is also to guarantee public participation in the determination of the specific location and major design features of the highway. The regulations list 23 social, economic, and environmental factors relevant to the selection of routes and designs, to be discussed at each hearing. Regarding the conduct of the public hearings, the regulations require, inter alia, that pertinent state information and studies concerning location and design alternatives be made available to the public at each hearing.

The State had divided the Century Freeway into two segments for the

92. Id. ¶ 4.
93. Id. ¶ 4a (emphasis supplied).
94. Id. ¶ 4b.
95. PPM 20-8 was revised in September of 1972, and the original list of 23 relevant factors was condensed to seven: (1) regional and community growth; (2) conservation and preservation; (3) public facilities and service; (4) community cohesion; (5) displacement of people, businesses, and farms; (6) air, noise, and water pollution; and (7) aesthetic and other values. 37 Fed. Reg. 21430 (1972).
purpose of conducting corridor hearings, and had held two such hearings for each segment. All four were held prior to the 1968 amendment of section 128(a). The freeway was then divided into eight segments for the purpose of preparing design proposals. Design public hearings for seven of the eight segments were held after August 1968 and were subject to the amended version of section 128(a). The plaintiffs charged that the hearings had violated both the letter and spirit of section 128(a) and the regulations. They first alleged that the hearings had failed to consider such important factors as neighborhood character, disruption of school, church and social patterns, noise, and even the number of families to be displaced. Second, the splitting of the route into two segments for the purpose of holding location hearings allowed the western portion of the route to be approved by the state two years before hearings on the eastern portion were even scheduled. The eight separate design hearings effectively prevented citizens living in one segment from presenting views on adjacent sections even though the design of the latter would strongly influence design of the segment still under consideration. Finally, the plaintiffs argued that the goal of full opportunity for effective public participation was frustrated by the restrictive format of the hearings, the failure of the state to make available information on alternative designs, and the refusal by the state authorities to discuss the effect of highway design on specific parcels of property and small neighborhood areas.

1. New Hearings

The court refused to rule that the hearings were "totally inadequate" in their consideration of the relevant social, economic, and environmental questions, or that they had provided an inadequate public forum for the presentation of views on alternate locations and designs for the freeway.

97. The two corridor hearings for the western segment were held on June 5, 1963, and August 13, 1965. The two hearings for the eastern segment were held on March 30, 1967, and April 16, 1968. 352 F. Supp. at n.20, 4 ERC at 1359, n.20. The amendment to section 128(a) was effective August 23, 1968. 23 U.S.C. § 128(a) (1970).

98. See note 37 and accompanying text supra.


100. Memorandum for Plaintiffs, supra note 21, at 100.

101. Id.

102. Reply Memorandum for Plaintiffs, supra note 99, at 64.

103. Memorandum for Plaintiffs, supra note 21, at 67.

104. Reply Memorandum for Plaintiffs, supra note 99, at 69.

105. 352 F. Supp. at 1339, 4 ERC at 1360. At a later hearing on defendants' motion to amend the preliminary injunction, defendants apparently interpreted these statements to mean that the public hearings had constituted a completely adequate public forum within the meaning of PPM 20-8. The court explained that it merely had not been convinced by the plaintiffs' attacks on the format of the hearings—the way in which the presentations, intermissions, and question periods were scheduled, and the restrictions on the subject matter of the questions—that they were inadequate. While
However, it felt that the hearings and accompanying state reports were far from satisfactory. Both gave only minimal consideration to two potentially very important effects—air and noise pollution. To the court, this signal failure to examine adequately the most crucial environmental factors clearly demanded that further work on the Century Freeway be enjoined until the state certified that it had held new public design hearings focusing on these pollution problems.108

The corridor hearings posed a more difficult issue. All had been held before the amendment of section 128(a) and the issuance of the FHWA regulations,107 and all had complied with statutes and regulations in effect at the time. Nevertheless, the court ordered that new corridor hearings be held, justifying the decision on the basis of its interpretation of NEPA and CEQA. The environmental impact statements required by both statutes were deemed to presuppose a good-faith reevaluation, not just of the proposed route and design, but of the entire project, including consideration of alternate modes of transportation and even total abandonment of the project. The FHWA regulations provide that a major purpose of the corridor hearings is to reexamine the “need for” a project,108 on the principle that the public should participate in that reexamination. The court felt that it would be senseless to require the State again to seek the views and observations of the public on the design of the freeway, but to excuse it from consulting with the public on the broader issue of the very need for the freeway. The conclusion that new corridor hearings should be held was “compelled” by NEPA’s directive that compliance be made “to the fullest extent possible.”110

It is evident that the approach one takes in deciding whether new location hearings should be held in a case like Keith will depend on the view taken of the applicability of NEPA to the project. In Arlington,110 location hearings had been held five years before the first hearings in Keith, and the freeway was more nearly complete by the time of the suit. Yet the court required that new corridor hearings be held, applying the same test of balancing the costs and benefits which it had used to determine the applicability of NEPA.111 It is likely that many courts will be hostile to the procedural details criticized by the plaintiffs did not render the hearings inadequate, the hearings were nonetheless defective for other, more important reasons. 352 F. Supp. 1351, 1354, 4 ERC 1562, 1564-65.

106. In several other cases where design approval had occurred prior to the issuance of PPM 20-8 and authorities had complied with the location hearing requirement of the earlier version of section 128(a), courts have held that no new design hearing is required. Wildlife Preserves, Inc. v. Volpe, 443 F.2d 1273, 2 ERC 1642 (3d Cir. 1971); Elliot v. Volpe, 328 F. Supp. 831, 2 ERC 1498 (C.D. Mass. 1971).


109. 352 F. Supp. at 1340, 4 ERC at 1360.


111. Id. at 1336, 3 ERC at 2005. The Arlington approach was followed in Fayetteville Chamber of Commerce v. Volpe, 463 F.2d 402, 4 ERC 1503 (4th Cir. 1972),
idea of retroactively applying section 128(a) and the FHWA regulations to hearings which occurred a decade earlier. The Arlington test does have, however, the advantage of emphasizing the actual state of completion of the project at the time of suit, rather than the length of time which may have passed since the hearings were held. It ensures that such projects will be required to comply with statutory and administrative mandates wherever possible, while preventing wholesale disruption of projects nearly complete.

Recognition of the importance of public notice of the initial environmental impact statement, and of the opportunity to comment on it, strongly supports the approach taken in Arlington and Keith. Several cases have indicated that where the responsible agency fails to provide adequate notice or opportunity for comment on the EIS, it has not complied with NEPA. Present FHWA regulations state that a draft of the impact statement is to be made available to the public for review and comment prior to the public hearings. It is clear that to obtain effective public input on the final statement, the draft should be made available before the location hearings. The full range of environmental issues raised by the regulations and the impact statement cannot adequately be handled in design hearings if the existence and general route of the freeway have been predetermined in corridor hearings which did not consider those issues.

where the court held that a federal district court evaluating the compliance of a state's 1966 location hearing with section 128(a) must consider whether the project's stage of completion justifies retroactive application of the 1968 amendments requiring the hearings to consider environmental effects of the proposed highway.


113. PPM 90-1 presently provides that an additional location or design public hearing will not be required for the sole purpose of presenting and receiving comments on the draft environmental statement for those projects which were processed in accordance with procedures in effect at the time.

PPM 90-1, ¶ 6c(2) (Sept. 7, 1972) (amending PPM 90-1 (Aug. 24, 1971)). Although no court seems yet to have ruled on the validity of this paragraph, it should not be interpreted to discourage the holding of new hearings where, as in Keith, there is at least one other defect in prior hearings which could be remedied by new ones. At least one court has indicated that it might not look favorably on a strict application of paragraph 6c(2). In Daly v. Volpe, 350 F. Supp. 252, 4 ERC 1486 (W.D. Wash. 1972), the defendants had considered the impact of the freeway on the environment, but the impact statement was held to be defective due to inadequate opportunity for the public to comment on it. Because of the advanced status of the project and because alternative routes were clearly outlined at one of the location hearings, the court did not order new location hearings. However, the court did require that the agency: advertise the availability of the draft impact statement in the local newspaper; allow public inspection and copying of the statement; accept and consider written comments from the public; incorporate those comments into the final EIS; and comply with the other detailed procedural requirements contained in paragraphs 6c-j of PPM 90-1. Id. at 261, 4 ERC at 1487.
2. The State's Duties Regarding the Hearings

In its supplementary opinion the court felt it necessary to elaborate further on its view of the sufficiency of the design hearings. The federal defendants had emphasized that section 128(a) required only that the state hold a public hearing or that it have "afforded the opportunity for such hearings." The statutory requirement would thereby be met when the hearing was held, even if the public did not choose to utilize the opportunity to present views on particular subjects. Defendants contended that the purpose of the public hearings is to "learn the real public concerns and [the public's] views on such concerns." The transcripts of the public hearings held on the Century Freeway indicated that those residents attending were primarily worried about street closures, property values, relocation assistance, and "general environmental concerns." The lack of specific public interest in noise and air pollution was therefore asserted not to be a sufficient ground for invalidating the hearings.

Judge Pregerson gave the public hearings requirement a much more expansive interpretation by ruling that the FHWA regulations impose upon the state authorities the positive responsibility of providing all relevant information to people who attend the hearings. Since under federal regulations the state had to consider the effects of the Century Freeway design on air and noise pollution, data on these two subjects should have been part of the "pertinent information" about design alternatives which was made available at the hearings. The design hearings were inadequate, said the court, not because members of the public in attendance expressed little interest in problems of air and noise pollution, but because little information about these and other problems was made available to them.

Because the court's two opinions differ in their treatment of the design hearing problem, it is unclear whether the court intended that the state must have material on air and noise pollution available for inspection at the hearings, or whether the state must ensure that actual discussion of these two issues takes place. Presumably the court intended that the state do both. Such a requirement is not unreasonable if the state authorities are merely required to announce at the hearing that information about the environmental effects of the proposed freeway is available, and as part of an initial presentation, give a brief and objective summary of the state's research on the pollution problems and the conclusions drawn, even if the conclusions reflect negatively on the project.

Most persons attending will not realize that a major purpose of the

114. 352 F. Supp. at 1351, 4 ERC at 1562.
115. Federal Defendants' Memorandum In Support of Motion to Alter or Amend Preliminary Injunction at 1, 352 F. Supp. 1351, 4 ERC 1562 (C.D. Cal. 1972) [hereinafter cited as Memorandum for Defendants].
116. Id. at 2.
117. Id.
119. 352 F. Supp. at 1353, 4 ERC at 1565.
hearings is to encourage consideration of the highway's environmental effects and that such consideration must be a significant factor in the state's decision whether to continue with the project.\(^{120}\) What the public will know is that the freeway appears inevitable and that they may be forced to leave their homes. It is not expected that state authorities will be eager to initiate discussion of the deleterious effects of the freeway project. Absent a positive effort to acquaint the attending public with the information on pollution which the state has accumulated, discussion may concentrate on the more immediate relocation problems facing the residents; during a short public hearing the topic of air and noise pollution may never arise. Any "lack of interest" in these problems may simply reflect a lack of information or awareness about them on the part of the public. Once advised of the seriousness of the pollution problems and of the state's willingness to explore possible remedies and alternatives, discussion by residents at the hearings may well become more active.

Assuming that a procedure such as the one outlined above would reasonably satisfy the policies to be served by section 128(a) and the FHWA regulations, the court's requirement that the new design hearings "focus" on the likely effect of the Century Freeway on air and noise pollution may in fact jeopardize the goal of the hearings as intended by Congress. The court's evident concern with pollution as the most crucial environmental effect of the freeway may have led it to assume that the residents of the freeway corridor should have been similarly concerned about that specific problem, or would have been had more information been available to them. Such an assumption appears unjustifiable given the fact that the failure to discuss the pollution problem was not among the numerous allegations made by the plaintiffs in challenging the adequacy of the hearings.

Furthermore, it is not at all clear that Congress envisioned the public hearings as properly "focusing" on any particular issue, especially if that issue was one singled out by highway authorities or by a court as meriting primary attention, or was one in which the public showed little or no interest. Rather, it seems that the hearings were in fact designed by Congress to function as a "town hall" meeting in which anyone could freely express his view on whatever issues most concerned him.\(^{121}\) Therefore, if the court in Keith intended to require that the new design hearings concentrate on the problems of air and noise pollution, even in the face of demonstrated public

\(^{120}\) There is no provision in the regulations that the public be informed of this fact. The regulations do, however, provide that the advance public notices of the hearings announce that the relocation assistance program will be discussed at the hearings so that the residents can come prepared for that discussion. See PPM 20-8, ¶ 8a(5), 23 C.F.R. App. A (1972).

\(^{121}\) H.R. Rep. No. 91-1554, 91st Cong., 2d Sess. 6 (1970). In Monroe County Conservation Council v. Volpe, — F.2d —, 4 ERC 1886 (2d Cir. 1972), where new design hearings were also ordered, the court stated that "any hearing sufficient to satisfy the requirements of 23 U.S.C. § 128(a)" would be satisfactory, as that provision contained all relevant factors to be considered. Id. at —, 4 ERC at 1891. However, the court did not elaborate on an appropriate test of sufficiency.
unconcern, its holding on this point seems vulnerable as an unjustifiable restriction of the scope of the hearings.

C. Relocation

The plaintiffs in *Keith* charged that the California Division of Highways had failed to comply with statutes designed to aid persons displaced by federal-aid highway projects. These statutes are the expression of steadily increasing congressional concern about the problems of relocation, especially with respect to low-income groups. In 1968, and again in 1970, Congress enacted major legislation providing for public relocation assistance programs designed to "insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." In 1968 the Federal-Aid Highway Act established basic requirements governing relocation assistance, requirements which must be met by state authorities before the FHWA may fund any federal-aid highway project which will cause displacement of persons living in a highway corridor. Chapter V of the Federal-Aid Highway Act was superseded by the Uniform Relocation Act in 1970, which continued the same requirements but was more comprehensive than its predecessor in applying them to all federal and federal-aid projects which cause displacement.

Both statutes impose three basic duties on state highway authorities:

122. In 1966 Congress directed that a study be made of the relocation problem with special emphasis on the adequacy of relocation payments and assistance. Federal-Aid Highway Act of 1966, Pub. L. No. 89-574, § 12(a), 80 Stat. 766. The resulting report [*House Comm. on Public Works, 90th Cong., 1st Sess., Highway Relocation Assistance Study* (Comm. Print No. 9, 1967)] indicated that approximately 77% of the individuals and businesses to be displaced between 1967-70 would occupy low-cost housing for which replacement was difficult. *Id.* at 5-6. The committee report advocating passage of the Federal-Aid Highway Act of 1968 summarized the testimony received on relocation as follows:

> The most pressing ... problem ... in the committee's view is the inequitable treatment of persons or businesses displaced by highway construction. Accordingly, the committee has proposed legislation ... as reported, which will aid significantly in reducing the hardship of those who suffer private injury for the public benefit.

> The evidence showed ... that, because urban interstate highways often go through rundown, dilapidated, low-income, or so-called disadvantaged areas, those persons least able to afford dislocation are frequently the ones who are forced to move by our highway programs. ... [T]here is a definite need for procedures which provide for comparable replacement housing and property at the time such displacement occurs.

*S. REP. No. 1340, 90th Cong., 2d Sess.* 5-6 (1968). *See also Relocation Hearings, supra note 17.*


who must provide "satisfactory assurances" of compliance with each before FHWA funding will be granted. First, the state must assure that "fair and reasonable" relocation payments for moving expenses and "replacement housing" will be provided to persons who must relocate. These payments are intended to compensate homeowners and renters who are forced to move into higher-cost housing than that which they evacuated. Second, the state must operate a relocation assistance program which will determine the needs of displaced persons and businesses for relocation assistance and aid displacees in finding suitable replacement locations. Third, the state must assure the FHWA that "within a reasonable period of time prior to displacement" adequate replacement housing will be available.

The charges made by the plaintiffs in Keith fall into three categories. They contended that the state defendants had failed: (1) to provide adequate relocation payments and assistance programs; (2) to submit to the FHWA specific relocation assurances for the Century Freeway project; and (3) to insure before right-of-way acquisition began that sufficient suitable replacement housing would be available. The court discussed each issue separately and at length.

1. The Relocation Assistance Program

Plaintiffs alleged that the state's relocation program did not provide adequate information on available replacement housing, took no cognizance of special needs of groups such as the elderly or handicapped, and failed to grant displacees the full amount of the available supplemental payments.

128. The relocation payments must make up the difference between the amount paid by the state to a homeowner for his old home and the amount he needs to obtain comparable replacement housing. 23 U.S.C. § 506(a) (1970); 42 U.S.C. § 4623 (1970). In addition to moving expenses, the payments cover securing title to a new home, recording fees, and any increased interest payments necessary to finance comparable replacement housing. 23 U.S.C. §§ 505, 506(b), 507 (1970); 42 U.S.C. §§ 4622, 4623(a)(1)(C) (1970). A renter must be compensated for rental increases and may apply his payments to a downpayment on a house. 23 U.S.C. § 506(c) (1970); 42 U.S.C. § 4624 (1970). The Uniform Relocation Act increased maximum relocation payments to $15,000 for a homeowner, and $4,000 over a four-year period for a tenant. The displacee can only receive these payments if he moves into a "decent, safe and sanitary" dwelling within one year after being displaced. 42 U.S.C. § 4623 (a)(2) (1970). FHWA regulations prescribe strict standards for "decent, safe and sanitary" housing. FHWA Instructional Memorandum 80-1-71, ¶ 5, 23 C.F.R. App. A (1972) [hereinafter cited as IM 80-1-71].


130. The replacement housing must be sufficient to accommodate all persons requiring it and must be available at rents or prices within the financial means of those being displaced. In addition to being decent, safe and sanitary, it must be reasonably accessible to the places of employment of those displaced and be in areas having generally equivalent public and commercial services to those areas being evacuated. 23 U.S.C. § 502 (1970); 42 U.S.C. §§ 4625(c)(3), 4630 (1970).

131. Memorandum for Plaintiffs, supra note 21, at 62-64.
These allegations required extensive in-court testimony on the conduct of many details of the program. Much of the testimony was conflicting, particularly on the issue of the amount of relocation payments offered.\textsuperscript{132} The court was clearly reluctant to try and assess the program on this level, presumably from fear of being forced into a position of actually administering it. The court concluded that the Division of Highways had been adhering to the regulations and that any failures were isolated and de minimis.\textsuperscript{133}

The court indicated that the plaintiffs' failure was evidentiary in nature and that with additional documentation they might be able to prove their allegations in a full trial on the merits.\textsuperscript{134} It is clear, however, that most ordinary citizens faced with the prospect of seeing their homes displaced by a freeway hold a more expansive view than do state and federal authorities about what constitutes "adequate" relocation assistance. The question might be framed essentially in terms of how great a burden properly can be placed on the displaces themselves to acquire suitable replacement housing. In most relocation programs there is an obvious need for more continuous personal contact with residents, for more emphasis on the specialized needs of disadvantaged individuals or classes of persons, and for more extensive and reliable lists of available replacement housing.\textsuperscript{135} This is especially true when a large number of persons to be displaced are relatively poor, uneducated, or elderly—individuals who cannot reasonably be expected to relocate easily by relying primarily on their own initiative and limited resources.

It is evident that the FHWA and state regulations, providing for informational brochures and a list of three replacement dwellings,\textsuperscript{136} do not envision such extensive and individualized services, however real the need for them may be. Even full compliance with existing statutes and regulations may result in a relocation program which offers little effective assistance to those who are unable for some reason to help themselves. It is possible that at some future time a court may be willing to make its own independent reevaluation of the sufficiency of the programs provided, rather than simply to determine the extent of a state's compliance with the

\textsuperscript{132} Plaintiffs had charged that residents of the corridor had been told that no payments were available, then were offered gradually increasing payments as an inducement to sell quickly. \textit{Id.} at 64. The court observed that plaintiffs' testimony was contradicted on all points by the Division of Highways representatives and concluded simply that differences of opinion existed between the residents and the right-of-way agents concerning the value of the homes being taken and those available as replacement housing. 352 F. Supp. at 1344-45, 4 ERC at 1363.

\textsuperscript{133} 352 F. Supp. at 1346, 4 ERC at 1364.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{See} Note, \textit{An Investigation into Relocation,} supra note 17, at 499-500.

\textsuperscript{136} FHWA regulations require that relocation assistance include "personal contact" with all persons to be displaced and delivery of a brochure which explains in general terms available relocation services and payments, and the means by which they may be obtained. See IM 80-1-71, ¶ 12a, 23 C.F.R. App. A (1972). The California Division of Highways requires that before anyone can be ordered to vacate his home, the Division must send him a 30-day written notice accompanied by a list of three comparable and available replacement homes. 352 F. Supp. at 1345, 4 ERC at 1364.
regulations. It is unlikely, however, that any court would be willing to substitute its judgment for that of the FHWA or to assume responsibility for creating more comprehensive standards. Any attempt to force revision of the regulations through litigation must necessarily be limited to the facts and evidence presented in a specific case. Even if the desired result is obtained, it would carry little, if any, weight as precedent. Continued efforts to present extensive factual evidence of widespread inadequacies of relocation programs operated in full compliance with applicable statutes and regulations may result in legislative pressure for overhaul of agency requirements. However, such relief is only after-the-fact and assumes continued dislocation through highway construction.

2. Statewide v. Project Assurances

The regulations contained in Instructional Memorandum 80-1-68 prohibited FHWA approval of any phase of a state highway department project causing displacement until satisfactory assurances were filed on five separate points: (1) that relocation payments and services would be provided; (2) that the public would be adequately informed about them; (3) that the state would provide a full analysis of the extent of replacement housing if such housing might not be available within a reasonable period of time prior to displacement; (4) that a 90-day written notice would be provided all persons to be displaced; and (5) that the state's relocation program was realistic and adequate to provide "orderly, timely, and efficient" relocation with minimum hardship on displacees.\footnote{137}

The California Division of Highways claimed to have satisfied these requirements in a letter to the FHWA division engineer dated October 21, 1968.\footnote{138} The letter did not specifically mention the Century Freeway. Plaintiffs charged that the assurances made by the Division referred to all federal-aid highway projects in the state and not directly to the Century Freeway. They maintained that the state had to do more than simply reassure the FHWA that the state was capable of conducting an adequate relocation assistance program in order to comply with the Federal-Aid Highway Act and the FHWA regulations.

The court agreed that the guarantees made by the Division had in fact been merely "general statewide assurances." Citing a recent Ninth Circuit decision on the same issue,\footnote{139} the court held that the Federal-Aid Highway Act and the 1968 regulations demanded specific assurances from the state highway authorities for each separate project.\footnote{140} However, in 1970 the Uniform Relocation Act superseded the Federal-Aid Highway Act and the FHWA promulgated a new set of regulations, contained in Instructional...
Memorandum 80-1-71.\textsuperscript{141} These new regulations require individual project assurances only on the availability of replacement housing and the adequacy of the state's relocation program.\textsuperscript{142} Despite the elimination of the other three requirements contained in the 1968 regulations, the court felt that the new regulations represented "reasonable implementation" of the Uniform Relocation Act and provided a satisfactory procedure for the FHWA to determine whether a specific federal-aid project is in compliance with the Act. It chose, therefore, not to apply the full requirements of the 1968 regulations retroactively; it did, however, order that right-of-way acquisition cease until the state had provided project assurances on the two points required by the 1971 regulations.\textsuperscript{143}

3. Availability of Replacement Housing

The state had continually insisted throughout the litigation that adequate replacement housing was in fact available. The question remained whether that conviction was justified. Both the 1968 and 1971 FHWA regulations provide that a state's assurances on this point must be supplemented by a comprehensive study of housing availability in the general vicinity of the freeway and an inventory of the needs of individuals and families in the target area.\textsuperscript{144} On the basis of this data, the state must prepare a report outlining the types of relocation problems expected and a method of operation to resolve them.\textsuperscript{145} This availability study must be reviewed and approved by the FHWA before it can grant the state authorization to begin acquisition of right-of-way.\textsuperscript{146}

The plaintiffs in \textit{Keith} attacked both the accuracy of the availability studies\textsuperscript{147} and their conclusions that adequate satisfactory replacement hous-

\textsuperscript{142} Id. \textsection 7.
\textsuperscript{143} 352 F. Supp. at 1344, 4 ERC at 1363. Since both state and federal defendants had consistently defended the adequacy of the state's relocation program and replacement housing, the court assumed that the appropriate project assurances would be "promptly forthcoming" and that the order would have minimal effect on the freeway project. \textit{Id}.
\textsuperscript{144} IM 80-1-68, \textsection 7 (Sept. 5, 1968); IM 80-1-71, \textsection 15, 23 C.F.R. App. A (1972).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Apparently these studies were quite extensive, including detailed information on the needs of those facing displacement and on replacement housing which was available in the vicinity of the freeway corridor (which it correlated with the data on the needs of the displacees). Perhaps even more significantly, the Division of Highways had also attempted to include in the studies analyses of special problems such as the effect of racial discrimination on the availability of replacement housing for displaced blacks, the proximity to public transportation facilities of replacement housing for elderly people, and the impact of other public works projects on the relevant housing market. Although the details of the local housing market and the needs of the displacees must both be considered by the state in its analysis of the relocation problem, FHWA regulations require that only the data on the displacees' needs must actually be recorded. One commentator has noted that such provisions tend to result in inadequate reporting of the local housing market and submarkets, which in turn
ing in the vicinity of the freeway was available to those who wanted it, at prices within their means. Plaintiffs’ primary objection to the state’s data was based on the method used by the Division to compute its figures for the estimated number of available replacement homes. The Division had taken the annual turnover rate (the percentage of houses in the area bought and sold during the average year) and multiplied it by the estimated number of owner-occupied houses in the area. Since the resulting figures for the number of estimated vacancies exceeded the number of displacees who could be expected to seek replacement housing in the same area, the studies concluded that sufficient relocation housing was available. Plaintiffs argued that vacancy rates (the percentage of homes actually vacant at one time) are the only accurate measure of availability. The Division’s results were inaccurate because the turnover formula ignored the fact that housing in the area might be sought by persons who were not displacees and that the intended destruction of 7,000 existing units would significantly alter normal demand and supply. Plaintiffs also pointed out that HUD specifically prohibits the use of turnover rates in such computations.

Following these arguments, the court indicated the doubtful validity of the Division’s conclusions and noted several additional shortcomings in the availability studies. The Division had correctly used vacancy rates in computing the availability of rental housing, but its reports contained significant mathematical errors in rental statistics. Studies for two of the freeway segments also indicated a shortage of available housing in several price ranges, despite the Division’s conclusions to the contrary. More crucial were the failures of several other studies to provide data on the number of

makes any review of the studies' findings or conclusions difficult except through independent investigation. Note, An Investigation into Relocation, supra note 17, at 480-81. Similarly, state highway departments frequently fail to consider the effect of a racially-segregated housing market or concurrent displacements from other public works projects. Note, In the Path of Progress, supra note 17, at 385.

148. These conclusions were accepted by the FHWA, which approved the State housing reports between October 1969 and January 1970, 352 F. Supp. at 1346-47, 4 ERC at 1365.

149. Plaintiffs cited a HUD Relocation Handbook which stated:

The use of turnover for relocation is not permissible. Turnover is a process, not a resource. It is the dynamic operation by which occupancy changes occur within a standing inventory over a period of time and theoretically could occur in the complete absence of vacancies, on a person-to-person basis.

Reply Memorandum for Plaintiffs, supra note 99, at 43. Turnover data is apparently used frequently by states to inflate the estimated supply of relocation housing. See Note, An Investigation into Relocation, supra note 17, at 490, 496; Note, In the Path of Progress, supra note 17, at 384-85.

150. The court mentioned HUD’s rejection of the use of turnover data and said that “The accuracy of the Division’s figures on available housing is, in short, questionable.” 352 F. Supp. at 1348, 4 ERC at 1366.

151. One study submitted to the court contained figures indicating that 30 fewer units of replacement housing would be needed than would actually have been required. Id.

152. Another study indicated a shortage in single-family residences costing from $10,501 to $15,000 and in rental housing at practically all price levels. Id.
rooms in the available apartments and to indicate whether the apartments were “decent, safe and sanitary.”

Despite these shortcomings, the court was unwilling to find that adequate replacement housing would not, in fact, be available within a reasonable period of time prior to displacement. The court noted that the studies had been completed before the Uniform Relocation Act had increased the maximum relocation payments available to displaced persons and had authorized the construction of new housing and the renovation of existing housing to maintain a sufficient supply. The court felt that these provisions would “do much to ensure” that adequate housing would be available to persons displaced by the freeway.

153. Studies for three of the five segments of the freeway contained statistics on available apartments categorized only on the basis of monthly rent. Id. Information on the “decent, safe and sanitary” character of replacement housing was particularly necessary in light of the FHWA’s strict standard. See note 128 supra.

154. Arguably it should be improper to add the relocation supplements to the current housing costs of a displacee in calculating which replacement housing will be within his financial means. When more people with more money to spend seek housing in a market in which the supply remains static or decreases, the result may well be a short-run inflation of rents and prices for existing housing which will hurt both displaces and other persons, who must compete for housing. Furthermore, the supplements may temporarily insulate the displaces from the impact of long-term inflation and leave tenants, in particular, in an even more disadvantaged position at the end of four years when the payments terminate. See Note, In the Path of Progress, supra note 17, at 381. One case dealing with urban renewalflatly rejected this approach, apparently condoned in Keith. Tenants and Owners in Opposition to Redevelopment (TOOR) v. HUD, Civil No. C-69-324 SAW (N.D. Cal., decided April 29, 1970) (slip opinion at 22).

155. Section 206 of the Uniform Relocation Act provides that federal and state agencies may use project funds to build new housing or renovate old housing if adequate replacement housing would not otherwise be available. 42 U.S.C. § 4626 (1970). This section has been interpreted as a mandatory requirement. Note, In the Path of Progress, supra note 17, at 389 n.99. If necessary relocation housing is not available and cannot be made available by other means, HUD regulations indicate that the only permissible alternatives are: (a) to stop, reject, or abandon the project; (b) to revise the project to reduce displacement; or (c) to use project funds under section 206 to provide the needed housing. 37 Fed. Reg. 3633 (1972).

Similarly, California’s Ralph Act, CAL. STS. & H’WAYS CODE §§ 135.3-35.7 (West Supp. 1972), provides that the Department of Public Works, of which the Division of Highways is part, is to provide replacement housing through the acquisition of housing, the refurbishment of existing housing, and the construction of new housing.

The Division had in fact constructed a certain amount of replacement housing for displacements caused by the Century Freeway. According to evidence presented to the court, the most severe shortage existed along the Watts-Willowbrook segment. The state had moved homes previously acquired by eminent domain in the area of the Los Angeles Airport to vacant lots in Watts-Willowbrook and then completely renovated them. At the time of the court’s decision on July 7, 1972, only 29 homes had been made available in this manner, but the state intended to provide more if there was a public demand for them. Apparently, as of May 1972, nine of the 29 homes were still vacant. Testimony conflicted as to whether or not the cause of the vacancies was small size of the houses and undesirability of the lots on which they were relocated, or whether the vacancies indicated that displaced persons had found suitable replacement housing by other means. 352 F. Supp. at 1349, 4 ERC at 1366.

156. Id. at 1349, 4 ERC at 1367.
The court then indicated that had this been "an ordinary suit for equitable relief," it would have refused to grant the preliminary injunction on this issue, since plaintiffs were not likely to prevail on a full trial on the merits. But since the case was not an "ordinary" one, the court ruled that the injunction was warranted. It rested this conclusion on the recent Ninth Circuit decision in *Lathan v. Volpe,* which had also involved a motion for a preliminary injunction based on alleged violation of NEPA and the Federal-Aid Highway Act. The court in *Lathan* had refused to consider the likelihood of the plaintiffs' ultimate success, stating that

"[T]he longer there is delay in applying Chapter V of the Federal-Aid Highway Act, . . . the fewer will be the residents who receive the full benefit of the chapter. . . . In short, this is one of those comparatively rare cases in which, unless the plaintiffs receive now whatever relief they are entitled to, there is danger that it will be of little or no value to them or to anyone else when finally obtained."

Similarly in *Keith,* plaintiffs had consistently argued that work on the freeway must be enjoined before it became a *fait accompli* and the statutory violations mere points for academic discussion. The court in *Keith* stated:

"No one can be completely sure, on the basis of the studies heretofore conducted, that the available replacement housing is adequate. For many of the people still living in the Century Freeway corridor the consequences of proceeding with the freeway in the face of an inadequate supply of replacement housing could be severe. The time to determine whether the shortcomings in the housing availability studies are significant is now. Therefore the court believes that the most equitable course of action is to order the Division of Highways to conduct additional housing availability studies, and further work on the freeway should be enjoined until the completion of those studies."

The necessary resolution of the uncertainties left by the studies would be accomplished most efficiently by requiring the state to conduct the additional studies at the same time it was complying with the requirements of NEPA, CEQA, and section 128(a) of the Federal-Aid Highway Act.

4. Summary

The court's resolution of the relocation issues may be analyzed on several levels. The case is initially useful for its willingness to approach the question of "satisfactory assurances" at all. Courts deciding urban redevelopment cases increasingly have accepted the propriety of judicial review on this point and *Keith* reinforces that development. However, most courts have limited review to an essentially procedural question, that of

157. *Id.*
158. 455 F.2d 1111, 3 ERC 1362 (9th Cir. 1971).
159. *Id.* at 1116-17, 3 ERC at 1365 (emphasis in original).
160. 352 F. Supp. at 1349-50, 4 ERC at 1367.
161. *Id.*
whether or not the Secretary of HUD or of Transportation had substantial or supporting facts on which to base his acceptance of a state's relocation or redevelopment program. Often the issue is phrased in terms of whether or not a secretary's exercise of discretion was "arbitrary or capricious." Thus far the courts have consistently refused to evaluate the substantive adequacy of a program. On this issue the treatment in *Keith* of the relocation advisory program is neither exceptional nor particularly valuable, for it merely echoes holdings that a government showing of a reasonable and good faith effort to provide an adequate relocation program will generally defeat an attack on the program.

It is *Keith*’s treatment of the housing availability question which is potentially most significant. On this issue the court appears to have gone beyond the usual standard of review by evaluating not solely the "satisfactoriness" of the assurances in a procedural sense, but the actual data on which those assurances were based. This evaluation of the studies has three

163. For example, in Western Addition Community Organization (WACO) v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968), the court, while disclaiming that it was "presumptuously attempting to administer the complexities of urban redevelopment," enjoined the Secretary of HUD from disbursing federal funds to continue a local redevelopment project and prohibited displacement of site residents by condemnation or threats of condemnation. The issue, in the court’s view, was not whether the relocation program itself was adequate, but whether HUD had received "satisfactory assurances" that the project was adequate. On the facts before it the court decided the latter question in the negative and issued a preliminary injunction. Shortly thereafter the court was assured by HUD that the Department was in fact satisfied with the project, and in WACO v. Romney, 320 F. Supp. 308 (N.D. Cal. 1969), the court dissolved the preliminary injunction, despite plaintiffs’ continued attempts to show that the program was substantively inadequate. The second opinion reemphasized the narrow range of judicial review enunciated in the earlier opinion, abandoning any actual finding on "adequacy" to the discretion of the federal agency.

164. In *Hanley v. Volpe*, 322 F. Supp. 1306 (E.D. Wis. 1971) the court stated: "Although assurances when required are subject to judicial review, it is only an arbitrary abuse of the Secretary’s discretion which should provoke judicial intervention." *Id.* at 1308, citing WACO v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968).

165. *Hanley v. Volpe*, 305 F. Supp. 977 (E.D. Wis. 1969). *But see* La Raza Unida v. Volpe, 337 F. Supp. 221, 3 ERC 1307 (N.D. Cal. 1971), a highway case in which the court held: "From the evidence thus far presented it . . . appears that, despite sincere efforts, the state has an inadequate relocation assistance program." *Id.* at 233, 3 ERC at 1314. The court did not, however, discuss the program further and did not indicate what specific corrections it considered necessary.

166. In *Lathan v. Volpe*, 455 F.2d 1111, 3 ERC 1362 (9th Cir. 1971), the court found that the defendants had violated the applicable relocation statutes and ordered them to develop a relocation housing plan. On remand, defendants submitted to the district court exhibits purporting to comply with the statutes and regulations. One of the exhibits contained a 39 page relocation plan, a statistical analysis of persons to be displaced and replacement housing available, detailed maps showing the relationship of the project to key points in the community, and other data supportive of the statistical summary. 350 F. Supp. 262, 264-65, 4 ERC 1487, 1489 (W.D. Wash. 1972). Although these studies do not appear to have been as detailed as those submitted in *Keith*, the district court did not attempt to evaluate the substantive data contained in the studies, holding simply that defendants had complied with "the letter and the spirit" of the relocation laws. Plaintiffs apparently did not allege that there was inadequate replacement housing available to displaceses; their only complaint was
important aspects. The first is its rejection of the use of turnover rates. This practice is commonly used by states in the computation of housing statistics and has been strongly condemned by HUD and by commentators on the highway relocation problem.\textsuperscript{167} Second, the court emphasized, perhaps unfortunately, that increased relocation payments and the construction of new replacement housing might avoid many of the unfortunate effects of highway displacement. This approach ignores the potential inflationary effects of the relocation payments on the housing market\textsuperscript{168} and the limited utilization of the construction option.\textsuperscript{169}

Third, the court's rejection of the usual test for injunctive relief,\textsuperscript{170} which had been similarly rejected in \textit{Lathan},\textsuperscript{171} is very important. It strongly emphasizes the crucial significance of early court review and rapid relief in appropriate cases.\textsuperscript{172} Detailed relocation plans are presently not prepared by the state until after design hearings are held, often barely a year before actual displacement begins.\textsuperscript{173} It is understandably difficult to calculate early in the planning process the extent of potential displacement, particularly before the exact route is known;\textsuperscript{174} but by the time design hearings are held, "hardship" acquisitions may already have occurred, some residents have probably left the freeway corridor, and neighborhoods and property values have begun the inevitable deterioration that precedes

that the addresses of the replacement dwellings were not listed. The court responded that there was no requirement, by statute or regulation, that addresses be given. \textit{Id.} at 265, 4 ERC at 1489.

\textsuperscript{167} See note 149 supra.
\textsuperscript{168} See note 154 supra.
\textsuperscript{169} See note 155 supra. Presumably state highway departments are reluctant to get overly involved in endeavors considered to be the province of urban renewal and redevelopment agencies. FHWA regulations do not contain any standards to aid the state highway department in deciding when to construct replacement housing. Several commentators have strongly argued that standards should be established by which to evaluate a state's assurances of available replacement housing, and that a minimum vacancy rate of 5% should trigger the construction of replacement housing, preferably on a 1-to-1 basis. The 5% figure is presently utilized by HUD in its operations, but no similar formulation has been attempted by the FHWA. \textit{See Note, An Investigation into Relocation, supra} note 17, at 500-01; \textit{Note, In the Path of Progress, supra} note 17, at 387-88.

\textsuperscript{170} The traditional test requires that the plaintiffs demonstrate a likelihood of prevailing on the merits, that the balance of irreparable harm favor issuance of the injunction, and that the public interest support the claim for injunctive relief. 7 J. \textit{Moore, Federal Practice} \S 65.04[1] (2d ed. 1972).
\textsuperscript{171} 455 F.2d 1111, 1116-17, 3 ERC 1362, 1365 (9th Cir. 1971).
\textsuperscript{172} In \textit{Lathan}, the court noted:

\textit{If the purpose of the [relocation] statute is to be accomplished, it must be fully implemented not later than the approval of the "corridor" or "route" of the highway .... "Hardship" displacements may use up all of the available housing that meets statutory requirements, leaving the project stalled and the remaining residents ... trapped in ... a deteriorating area, because at the time of design approval the necessary assurances cannot be given.}

\textit{Id.} at 1119-20, 3 ERC at 1367. \textit{See also} La Raza Unida v. Volpe, 337 F. Supp. 221, 3 ERC 1306 (N.D. Cal. 1971).
\textsuperscript{173} \textit{See Note, An Investigation into Relocation, supra} note 17, at 498.
\textsuperscript{174} \textit{See id.} at 478.
The need for prompt judicial intervention is underlined graphically by those cases in which appellate relief was rendered moot because no residents remained in the freeway corridor by the time the case was decided.176

\[ D. \ The \ Scope \ of \ Relief \]

The initial question confronting the court on each of the major issues was whether any relief should be granted. In each case the court answered affirmatively, holding that a preliminary injunction should be granted pending compliance with the four applicable statutes—NEPA, CEQA, the public hearing requirements of the Federal-Aid Highway Act, and the relocation provisions of that Act and its successor, the Uniform Relocation Act.

Having decided that relief should be granted, the court's response to the second question—what and how much relief to grant—may be of particular value in the perspective of future highway litigation. The court held that NEPA required the preparation of an impact statement, despite the fact that the Century Freeway project was begun long before that Act was passed. It further stated the specific potential environmental effects the statement was to consider and suggested standards and variables to be used in the course of that consideration. In addition to deciding that the Century Freeway design hearings were subject to section 128(a) of the Federal-Aid Highway Act and the 1968 regulations, the court retroactively applied the Highway Act and the regulations to the corridor hearings, a decision which may have extensive disruptive effects on the planning of uncompleted freeways which become the subject of litigation. Although the court's forceful order to the state to "focus" on air and noise pollution at the new design hearings may be of questionable validity, the court did clearly impose a broad duty on state authorities conducting the hearings to ensure that all relevant information about the highway is made available to the public. Finally, while the court did not require abandonment or major revision of the relocation program, despite plaintiffs' attempts to demonstrate its serious inadequacies, the court did indicate a need for (as well as its willingness to make) a reevaluation of the accuracy of the state's conclusions regarding the availability of replacement housing.

Although the court was forced to make certain exceptions to the preliminary injunction in its supplemental opinion, they were made as narrow as possible by requiring approval for all further action on a case-by-case basis. Among the amendments to the preliminary injunction sought by the state were blanket authorizations to continue to acquire freeway right-of-way

175. If extensive hardship acquisitions have been made before design approval, relocation assurances given after design approval can be rendered almost meaningless. See Lathan v. Volpe, 455 F.2d 1111, 3 ERC 1362 (9th Cir. 1971). See also Note, In the Path of Progress, supra note 17, at 394-95.

without any restrictions pending the preparation of the environmental impact statements, to continue to construct additional housing, and to exempt from the injunction all contracts with outside agencies entered into before the date of the decision for the planning of relocation of public utilities. Each request was denied.\textsuperscript{177}

The court emphasized that the more money the state expended on the freeway, the more difficult an objective reevaluation and possible abandonment of the project would become. Recognizing that any delay in resolution of the future of the freeway could cause great inconvenience and uncertainty to those living in the freeway corridor, the court did modify the injunction to allow the Division of Highways to appraise and acquire the property of those who decided to leave and to provide such individuals with the relocation payments and services to which they would otherwise have been entitled. The Division was required, however, to satisfy the court in each case that the resident had “freely and voluntarily” decided to leave.\textsuperscript{178}

Similarly, the court announced its intention to approve requests for the construction of housing on a case-by-case basis. It indicated it might look favorably on such requests; any additional money spent on the construction of housing would probably be small in comparison with what might be spent on right-of-way acquisition and would not impede objective reevaluation of the project.\textsuperscript{179} Finally, the court reiterated that additional expenditures on the outside contracts would jeopardize the reevaluation required by NEPA and CEQA, and pointed out that there had been no showing that any significant harm would result from holding the contracts in abeyance until the preliminary injunction was dissolved.\textsuperscript{180}

The court maintained that it was not determining the future of the Century Freeway: “Whether or not it will ever be built remains for the appropriate federal and state agencies to decide.”\textsuperscript{181} The court was seeking to assure that the decision would be made within the context of compliance with statutes protecting significant public interests in minimizing urban dislocation and enhancing environmental quality—and that compliance be immediate in order to serve the policies of those statutes. Evidently the court had in mind the warning given by the Ninth Circuit in a similar context:

\textsuperscript{177} 352 F. Supp. at 1352, 4 ERC at 1562. In Stop H-3 Ass'n v. Volpe, — F. Supp. —, 4 ERC 1904 (D. Haw. 1972), the defendants similarly requested that the preliminary injunction be stayed, as a large monetary loss would result if all work was stopped. The court denied the request, holding that the defendants failed to make a sufficient showing of likely success on the merits, that prospective monetary loss was not irreparable injury, and that the public interest would be harmed by lifting the stay.

\textsuperscript{178} Id. at 1357, 4 ERC at 1566. The State was thus required to petition the court for approval in each case. The petitions could be on an ex parte basis provided the plaintiffs received actual notice of all hearings. Despite the additional time required by this case-by-case procedure, the court felt that it was the best way to protect both the property owners who wished to remain in the freeway corridor and those who voluntarily wished to leave. The court indicated that the applications could be processed in at most a few days. Id.

\textsuperscript{179} Id.

\textsuperscript{180} Id.

\textsuperscript{181} 352 F. Supp. 1350, 4 ERC 1368.
In the language of NEPA, there is likely to be an "irreversible and irretrievable commitment of resources", which will inevitably restrict the [highway officials'] options. Either the [highway planners] will have to undergo a major expense in making alterations in a completed [plan] or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.\(^\text{182}\)

**CONCLUSION**

The value of the decision in *Keith* lies primarily in the court's willingness to broaden the scope of judicial review of several aspects of the administrative planning of a federal-aid highway and to grant relief commensurate with this more rigorous scrutiny. In this sense *Keith* reinforces a trend developing from cases which have confronted the far-ranging environmental and social impacts of highway construction. It is clear that the court's major concern was the potential environmental damage threatened by construction of the Century Freeway. This concern determined the court's decision under NEPA and CEQA, and formed the basis for the ruling on the public hearing issue. Environmental questions thus essentially provided the court with three independent and adequate grounds for issuing the preliminary injunction. Although the opinion is unusual in its lengthy discussion of the faults of the relocation program, it is not clear that the court would have been willing to enjoin work on the freeway on this issue alone.

The likelihood of the approach in *Keith* being adopted eagerly by other courts is uncertain, especially in light of the traditional reluctance of courts to substitute their judgment for that of administrative agencies in areas of the latter's expertise. Questions of judicial competence in evaluating environmental effects of a proposed freeway or in establishing standards for adequate planning and relocation operations are no more easily disposed of than they have been in the equally complex arenas of school desegregation and reapportionment. *Keith* necessarily raises more problems than it solves. The value of the court's approach to the application of NEPA and CEQA lies in its flexibility, but for the same reasons it is more likely to provoke litigation than to render it unnecessary. Although the requirement of new corridor hearings seems justified in light of the decisions regarding NEPA and CEQA, the court's direction that specific problems receive primary attention at the new hearings makes this ruling suspect. The response of the court to the relocation problem leaves unresolved the larger issues raised by the plaintiffs concerning the fundamental adequacy of present relocation assistance programs. Yet, however unsettling the decision may be on these points, *Keith* is a valuable exposition of the major grounds on which highway projects are vulnerable to challenge and as an affirmation of the increased willingness of the federal courts to attempt to deal with these issues thoroughly and realistically.

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\(^{182}\) Lathan v. Volpe, 455 F.2d 1111, 1121, 3 ERC 1362, 1368 (9th Cir. 1971).