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Federal Aid Highway Routing Procedures: A Voice for All Parties

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I. Introduction

One of the most difficult problems coincident with the massive United States network of federal-aid highways, the largest single public works project in history, is route determination. The location of major metropolitan areas and the exigencies of national defense have largely pre-determined the general corridors for main highway networks. Determination of specific route locations has been entrusted to the state administrative bodies responsible for route selections within their respective states, usually the state highway department. These state agencies have been coordinated nationally by the Federal Bureau of Public Roads.

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2 In the Interstate System alone, more than 29,638 miles of a contemplated total of more than 41,000 miles of roadways are now open to traffic. Construction is currently underway on 4,782 miles. Engineering studies and right-of-way acquisition are in progress on additional mileage. FHA Q. Rep (Dec. 31, 1969).

3 "[The Interstate System] shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense . . . ." 23 U.S.C. § 103 (d) (1964).

4 23 U.S.C. § 103 (b), (c), (d) (1964). In most states, this will be the state highway department, although in various states the body entrusted with the power may bear a different name. For example, in New York the Department of Transportation is statutorily empowered to choose highway routings. N.Y. Transp. Law § 5 (McKinney 1969) (transferring functions of Bureau of Public Works to Department of Transportation).

5 The Bureau of Public Roads was originally a part of the Department of Commerce. Upon creation of the Department of Transportation in 1967, the duties of the Bureau were transferred to it when the new Department subsumed the Federal Highway Administrator and the Bureau of Public Roads. 49 U.S.C. §§ 1652 (a), (f)(4), 1655 (Supp. 1968).
While the procedures followed by these highway departments in routing federally-aided highways vary somewhat from state to state, certain features are common to most of them. After an initial finding that there is need for increased highway service between two points, the state highway department begins route feasibility studies within a broad corridor. Preliminary engineering and cost-analysis studies pare the many potential routes within the corridor to a more readily manageable number, retaining, however, a great deal of flexibility. As information is assimilated, it is formulated into tentatively preferred routes which are then presented at a public hearing. The function of this public hearing, as it has evolved, is largely informative; the state highway department informs the public of its considered proposals and fields any inquiries directed to it by hearing participants. A transcript of the hearing is made to preserve the suggestions of interested persons for later consideration by the department. Bureau approval of a location and authorization to proceed with right-of-way acquisition and construction are obtained upon evaluation of the hearing-gathered information, in conjunction with the other data made available. Right-of-way acquisition, through purchase or condemnation, then begins along the approved route. Final engineering studies are then completed with subsequent requests for competitive bids on the project. Actual construction follows.

6 This description of the routing procedure is necessarily brief. For a detailed discussion of routing procedure, see Note, Pressures in the Process of Administrative Decision: A Study of Highway Location, 108 U. PA. L. REV. 534 (1960) [cited hereinafter as Pressures].

Not infrequently this basic procedure has been only the theoretical and not the actual procedure followed. In such instances, it seems that statutes calling for a consideration of alternative routes and a broad range of relevant factors have been sacrificed to economic and political expediency.


The term "tentatively preferred route" is misleading. Highway planners tend to adamantly defend, rather than profitably discuss, their initial suggestions after presentation at the public hearing.


9 23 U.S.C. §§ 103 (e), 106 (a) (1964).


11 Pressures, supra, note 6 at 575.
Misunderstandings between a state highway department and individuals or concerned groups may often arise during this routing process. When the department and concerned individuals reach a serious impasse on route selection, resolution within the administrative framework is sometimes impossible. The court is then the only forum to which these opponents of the administrative will can turn for relief. The number of highway miles built annually, the great size of each individual project, and the decisions to route new highways through heavily urban areas have combined to multiply the instances of discontent sufficient to motivate a judicial challenge of a route determination. This increased frequency of judicial challenges to highway routings has highlighted problems for which a court can only effectuate case-by-case solutions. Resolution of those underlying problems which create such litigation can only be achieved through improvements in the administrative routing procedures themselves.

Ultimate responsibility for the inadequacy of present highway routing procedures rests with no one person or group. These procedures were originally designed to solve the narrow problem of engineering a highway from situs A to situs B and they have succeeded remarkably well. It is recognized today, however, that the route selection process involves more than a minimum-cost analysis of alternatives. Highway location and design is intimately related to questions of sociological and environmental planning. Yet this relationship is still frequently ignored and the route selection process continues to operate in a vacuum isolated from

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12 Such misunderstandings frequently stem from a breakdown in communications between the two groups. This may occur when one side obtains its information primarily from newspapers or other public media and the information is partially untrue, or, taken out of context, is misleading. Usually a simple clarification of each side's position will lead to renewed amicability. At least it can lead to adjustments which resolve the temporary impasse. These "easy" problems can frequently be solved entirely within the administrative context.

13 This may be so despite the availability of a procedure allowing informal appeal to the Federal Highway Administrator. Because the procedure is not documented, its availability is unknown to one who might otherwise make use of it.

14 Some states have adopted binding route arbitration to resolve disputes. For example, see MICH. STAT. ANN. § 9-1095. (51)-(58) (1968) and MINN. STAT. ANN. § 161.17(2) (1960). For a discussion of the Minnesota statute, see Tippy, Review of Route Selections for the Federal Aid Highway Systems, 27 MONT. L. REV. 131, 145 (1966) [hereinafter cited as Tippy].
these broader concerns. This seems to be largely the result of a failure to properly define the problem. Without an initial consensus on the relevant factors, the development of standards on which to base a more intelligent selection process is impossible.

The current lack of standards is detrimental to the entire routing system. Administrators have no guidelines to help them better evaluate route alternatives. As a consequence their decisions are more susceptible to unfounded judicial challenge because parties have no valid minimum standards against which to weigh whether a given decision constituted an abuse of discretion.

The absence of standards not only increases the likelihood that an abuse may occur, but also that it will go unchallenged, for again citizens lack any background against which to evaluate the relative merits of their cause. Resultant uncertainty may cause them to undervalue the strength of a favorable case for relief and forego a court challenge. If there is a judicial challenge, the court will have no guidelines for review, resulting in diseconomy at best and possibly a poor decision.

However, the selection process itself can serve as a valuable breeding-ground for needed standards. Recognizing this, the Bureau of Public Roads has promulgated a new Policy and Procedure Memorandum (PPM) designed to alleviate some of the major sources of friction between the administrators and the public in the route selection process.15 At the same time, the Memo-

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15 34 Fed. Reg. 727 (1969). All references herein for the Memorandum are to the Federal Register. At the time of printing the Memorandum is not yet incorporated as an addendum to the Code of Federal Regulations. The original proposal seemed to envision promulgation of new Federal Regulations, not a Policy and Procedure Memorandum. 33 Fed. Reg. 15663 (1968). However, a number of comments objected to the issue of the procedure in the form of a proposed new Part 3 and recommended instead that, if the procedures were to be issued at all, they be issued in the form of a Bureau of Public Roads Policy and Procedure Memorandum (PPM). This recommendation has been adopted. (34 Fed. Reg. at 727)

When the Federal-aid Highway Act was enacted in 1956, a Federal Bureau which had final authority but lacked the ultimate expertise of the state highway departments was confronted with the problem of providing direction in an area in tremendous flux without alienating the state-level groups with which it had to work. One vehicle which the Bureau of Public Roads found well suited to this dual task was the Policy and Procedure Memorandum. The Memorandum was flexible. It could re-
Randum introduced new elements into the process which could lead to the formulation of needed guidelines for that process.

This article examines the legal barriers which have been confronted in the courts by those challenging administratively determined highway routes and, in so doing, it traces these legal barriers to their sources within the routing structure itself. Against this backdrop, the article analyzes the Policy and Procedure Memorandum, indicating some of the problems which it will resolve and offering suggestions for those it will not resolve.

II. Judicial Challenge of Routing Decisions

A. The Problem of Standing

Judicial challenges of highway routings have traditionally occurred in contested eminent domain proceedings. In large part, however, judicial review in the eminent domain proceeding concentrated solely on the procedural aspects of the routing determination, seeking assurance that minimal due process had been observed. Most courts avoided a determination of the necessity for taking in condemnation any particular parcel of land, characterizing the need to show lack of all necessity as being with the person whose property was to be taken. Tippy, supra note 14, at 140.

Although this article deals primarily with the Federal-aid Highway System, much herein is applicable to route determination for roadways funded exclusively at the state and local levels.

This collateral attack was available because, in theory at least, the burden was on the condemnor to show the necessity for any taking of land. In practice, this burden was slight because mere selection of the route by the condemnor was prima facie proof of necessity. The burden of showing lack of all necessity lay with the person whose property was to be taken. Tippy, supra note 14, at 135-140; compare, Texas Eastern Transmission Corporation v. Wildlife Preserves, Inc., 48 N.J. 261, 225 A.2d 130 (1966), in which the burdens of going forward were judicially reversed.
terizing the issue as a "political," "administrative" or "legisla-
tive" question which the courts could not decide.\textsuperscript{19} Even in that
minority of courts which allowed review of the necessity for
taking the contestant landowner's particular parcel,\textsuperscript{20} the con-
demnee was usually confronted with a difficult burden of proof.
To overturn the administrative decision, the condemnee was re-
quired to show fraud, bad faith, or an abuse of discretion by the
administrative body.\textsuperscript{21}

Since the condemnation proceeding was open only to those
persons whose property was to be taken, an additional problem
faced one whose property was not to be condemned, but who,
nevertheless, felt aggrieved by a particular route selection. The
absence of a recognized "individual legal right" which would be
infringed by the administrative determination, other than own-
ership of property to be taken, often resulted in judicial refusal to
review state-selected routes because the individual lacked requis-
ite "standing."\textsuperscript{22}

\textsuperscript{19} Id. Characterization of the question as one which courts \textit{would} not determine also seems
proper. The typical judicial attitude was expressed in Department of Public Works &
Buildings v. Lewis, 411 Ill. 242, 103 N.E. 2d 595 (1952) where landowners com-
plained of "lack of necessity" in a condemnation proceeding against their property for
a federal-aid highway improvement. The court waid at 597:

The general rule is that, where the right of eminent
domain is granted, the necessity for its exercise, within
constitutional restrictions, is not a judicial question, and
its exercise is not a proper subject for judicial in-
terference or control unless to prevent a clear abuse of
such power.

\textsuperscript{20} \textit{See}, for example, Forest Preserve Dist. of Cook County v. Kean, 298 Ill. 37, 131 N.E.
117 (1921).

\textsuperscript{21} In the absence of a controlling statute, the general rule which seems to
be followed is that a finding of necessity by the con-
demnor will not be disturbed in the absence of fraud, bad
faith, or gross abuse of discretion on the part of the con-
demnor. Contentions by landowners that the highway
might be better constructed in a different location than
that proposed by the highway authorities almost in-
variably are unsuccessful. Helstad, \textit{Recent Trends in
Highway Condemnation Law}, 1964 WASH. U.L.Q. 58,
60-1.

\textit{See also} Netherton, \textit{Implementation of Land Use Policy: Police Power v. Eminent

\textsuperscript{22} There are property owners among the plaintiffs who own property the
value of which may be reduced by the projects involved
in this action. They have no standing to sue because they
Expansion of the traditionally narrow concept of standing has resulted from concurrent developments in both the legislature and the courts. The most significant statutory change has been the Administrative Procedure Act which opens courts to "persons aggrieved." The courts have shown an apparent willingness to implement these statutory provisions quite liberally. Even in the absence of expansive statutory language, courts have been broadening the parameters of recognized standing. Scenic Hudson have no legal personal rights that are being adversely affected. Some of the individual plaintiffs claim to be users of public parks within the area of the projects and they contend that their rights to use the parks will be interfered with. They have no rights separate and apart from the rest of the public and they have no standing to sue. D.C. Federation of Civic Associations, Inc. v. Airis, 275 F. Supp. 533, 537 (1967), reversed, 391 F. 2d 478 (D.C. Cir. 1968).

Civic associations, conservation interests and religious groups have been among the most prevalent aggrieved "non-property" owners. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to a judicial review thereof. 5 U.S.C.A. § 702 (1966).

"Aggrieved persons" language is also found in the Communications Act of 1934, 48 Stat. 1093 (1934), as amended, 47 U.S.C. § 402 (b) (6) (1964) and in the Federal Power Act, infra note 27. Some courts did so on the ground that citizens may act as "private attorneys general" in protecting "public rights." Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1281-83 (1961) [hereinafter cited as Jaffe, Public Actions]. Other courts expanded standing through judicial implementation of statutorily created legal rights or through increased awareness that legal rights previously unrecognized in the courts did, in fact, exist. These latter two arose as an individual sought to protect his private interests. See Jaffe, Private Actions 75 Harv. L. Rev. 255 (1961).

More than one basis for standing may be present in any given case. When this occurs, it may be difficult to perceive which asserted basis a court has found persuasive. Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941, (1966), infra at note 26; and Bedford v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967), infra at note 33.

23 A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to a judicial review thereof. 5 U.S.C.A. § 702 (1966).


25 Some courts did so on the ground that citizens may act as "private attorneys general" in protecting "public rights." Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1281-83 (1961) [hereinafter cited as Jaffe, Public Actions]. Other courts expanded standing through judicial implementation of statutorily created legal rights or through increased awareness that legal rights previously unrecognized in the courts did, in fact, exist. These latter two arose as an individual sought to protect his private interests. See Jaffe, Private Actions 75 Harv. L. Rev. 255 (1961).
Preservation Conference v. Federal Power Commission,\textsuperscript{26} exemplifies the inquiry process which courts now undertake in determining whether one has the requisite standing to obtain judicial review of an administrative decision under statutory "aggrieved persons" language. The court relied on section 313(b) of the Federal Power Act\textsuperscript{27} in finding that petitioners had standing, specifically rejecting the government's contention that "petitioners do not have standing to obtain review [because they] make no claim of any personal economic injury" resulting from the Commission's action.\textsuperscript{28}

Scenic Hudson is important also because it presents four basic propositions which count heavily toward a successful judicial challenge of a highway route decision: (1) the standing of aggrieved parties does not depend on whether they have suffered direct economic injury;\textsuperscript{29} (2) "representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process;"\textsuperscript{30}(3) there are

\textsuperscript{26}354 F. 2d 608 (2d Cir. 1965), cert. denied. 384 U.S. 941 (1966). In this case, popularly known as Storm King, a citizen's association and three New York towns sought review of an order of the Federal Power Commission granting Consolidated Edison a license to construct a pumped-storage hydro-electric facility on the Hudson River at Storm King Mountain. Petitioners who had been parties to the original administrative proceedings (compare Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) at note 30 infra, and text accompanying note 36 infra) sought to have the case remanded to the FPC for further hearings. A primary contention was that inadequate consideration had been given to possible alternative locations for the project.

\textsuperscript{27}Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any Circuit wherein the licensee or public utility to which the order relates is located. 16 U.S.C.A. § 825(b) (1960)

\textsuperscript{28}Scenic Hudson v. F.P.C., 354 F.2d at 615.

\textsuperscript{29}Id.

\textsuperscript{30}354 F.2d at 617. The court was addressing itself to the government contention that to allow standing here would result in "court flooding." The position taken by the court is a realistic one. As the court itself recognized, "[t]he expense and vexation of legal proceedings is not lightly undertaken." (Id.) To argue that the challenge would or even could be borne by any individual, let alone by large numbers in individual challenges, taxes reality. This idea was also expressed in United Church of Christ where the court reversed the decision of the Federal Communications Commission and permitted members of a radio station's listening audience to intervene in license
factors other than the economic or engineering which must be given adequate consideration in the decisional process and which the court will scrutinize to ascertain whether there has been an abuse of administrative discretion;\(^3\) and (4) "... the existence of a more desirable alternative" may be advanced by an aggrieved party as one of the "... factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity."\(^3\)

All four factors appeared shortly after Scenic Hudson in a suit challenging a proposed highway routing. In Bedford v. Boyd,\(^3\) an action for a preliminary injunction, the court considered the merits of a claim that the Secretary of Transportation and the acting Secretary of Commerce had acted arbitrarily in compelling the State of New York to construct a portion of the national interstate highway system along the route chosen. Those advocating an alternate route included two conservation groups, a self-proclaimed community development association, residents of the town to be affected, and the town itself. Discussing plaintiffs' standing to challenge the route determination, the court reviewed the reasoning of Scenic Hudson, analogizing the provisions of the Federal Power Act there under consideration to the Administrative Procedure Act claimed to grant standing in Bedford.

The Administrative Procedure Act (5 U.S.C. § 702) entitles a person who is "aggrieved by agency action within the meaning of a relevant statute," to obtain judicial review of that action. The "relevant statute" in this instance is the Federal Highways Act. That Act

\(^{31}\) 354 F.2d at 616.

\(^{32}\) 354 F.2d at 617. The prevailing judicial attitude toward the highway challenge had been that the existence of an alternative was not a factor for the consideration of the court. For example, see Dept. of Public Works & Buildings v. Lewis, 411 Ill. 242, 103 N.E.2d 595 (1952), supra note 19 (presentation of an alternative route in condemnation proceeding presents an engineering and not a judicial question).

presses the intent that "local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce." (23 U.S.C. § 101(b)) A project, among other things, is "to conform to the particular needs of each locality." (23 U.S.C. § 109(a)).

The court declared:

[These provisions are sufficient, under the principle of Scenic Hudson, to manifest a congressional intent that towns, local civic organizations, and conservation groups are to be considered "aggrieved" by agency action which has allegedly disregarded their interests. I see no reason why the word "aggrieved" should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act.]

The court thus felt expressly warranted in extending the rationale of Scenic Hudson to allow these plaintiffs to bring an independent action for judicial review of the administrators' decision, although they had not been formal parties to the administrative proceeding.

As with Scenic Hudson, it could plausibly be argued that Boyd was not an unusual application of the concept of standing because of the peculiarly public character of the conservation interests before the courts. However, a subsequent decision in the Sixth

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34 270 F. Supp. at 660.
35 270 F. Supp. at 661.
36 See note 26 supra.
37 For a case which might support one arguing this restrictive interpretation of Scenic Hudson and Boyd, see Citizens Comm. for Hudson Valley v. Volpe, 302 F. Supp. 1083 (1969). In deciding that the Sierra Club, a non-profit conservation corporation, had standing to maintain an action against the public officials charged with construction of the proposed Hudson River Expressway, the court stated at 1092:

The rule, therefore, is that if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.
Circuit suggests otherwise. In Nashville I-40 Steering Committee v. Ellington members of an unincorporated association of Negro and white businessmen, teachers, ministers, civic and professional leaders, and residents of the North Nashville, Tennessee area through which the challenged highway had been routed, were allowed to maintain an action seeking to enjoin construction along the proposed route. Citing Scenic Hudson, the court said simply, "Appellees urge that appellants [plaintiffs] have no standing to maintain this action. We reject this contention."

The standing issue is merely the initial obstacle which a non-property-owner must overcome. Other substantial barriers to relief face both the property-owner and the non-property-owner as judicial challengers.

B. Barriers to Relief

I. Non-Reviewability

Prior absolute judicial deference to an administrative decision has generally disappeared so that inquiry in a court challenge to a highway routing no longer stops short of review of the substantive claims against the selected route. However, com-

This "rule" seems to replace the factual, statute-by-statute search for "congressional intent" contemplated in Scenic Hudson and Boyd with a per se finding of "congressional intent" upon a showing that a statute involved in a controversy is concerned with the protection of natural, historic and scenic resources. This is neither an accurate reading of either of those two cases nor an approach which is necessarily valid without independent analysis, even though it may coincidentally happen that there will be no case in which a "conservation" statute will be found to contain no "congressional intent" to grant standing to interested persons.

38 387 F.2d 179 (6th Cir. 1967), cert. denied 390 U.S. 921 (1968).
39 387 F.2d at 182. Shortly after Ellington was decided, the Court of Appeals for the District of Columbia granted an injunction against District of Columbia and federal highway officials, forbidding them to proceed with the construction of four highways for failure to comply with the proper statutory procedure for route designation. D.C. Federation of Civic Associations, Inc. v. Airis, 391 F.2d 478 (D.C. Cir. 1968). Plaintiffs, individual District of Columbia taxpayers, landowners affected by the challenged highways and the Democratic Central Committee for the District of Columbia, had been dismissed in the lower court for lack of standing. D.C. Federation of Civic Associations, Inc. v. Airis, 275 F. Supp. 533 (D.C. Dist. 1967) (see note 22 supra). This issue was reversed without discussion on appeal.

40 See notes 18-21 supra, and accompanying text.

It is probable that a threshold liberalization of judicial willingness to examine the content of a routing decision was a necessary prerequisite to the expanded concept of
plainants are still frequently faced with the contention that the administrative decision may not be reviewed by a court. For example, in *Boyd*, defendants Secretary of Commerce and Federal Highway Administrator moved to dismiss on the ground that their decision could not be reviewed in the courts. In denying the motion, the Court noted the "... trend of recent scholarly comment in favor of judicial review of so-called 'legislative' administrative acts," and concluded:

I see nothing in the Highways Act which indicates a congressional intent to immunize the Bureau of Public Roads from judicial scrutiny of its acts. Moreover, the new Department of Transportation Act specifically makes the Administrative Procedure Act applicable to proceedings under the Act. 49 U.S.C. § 1655(h).... To hold that these decisions cannot be reviewed, no matter how arbitrary they may be, would be unsound and unjust.41

This approach is rapidly gaining adherents. Indeed, the Supreme Court has held that the Administrative Procedure Act establishes a presumption in favor of judicial review so that the court should restrict access to judicial review only upon a clear showing that the legislative intent is that there be no judicial review.42

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2. Burden of Persuasion

Unfortunately, a formidable burden of persuasion has replaced earlier judicial reluctance to review these administrative decisions. For instance, the remedy sought in *Boyd* was an injunction, normally available on a showing of irreparable injury, lack of an adequate remedy at law, and proof that the act sought to be enjoined is illegal or unauthorized. The latter requirement, in cases challenging an administrative decision, usually includes proof of an abuse of the limits of the statutory discretion granted to the administrative body. This is often a difficult burden to meet because the discretion granted to the highway administrator is usually stated in broad terms. The challengers in *Boyd* failed to overcome this difficult burden of persuasion. The court recognized the degree of proof required, saying, “the [administrative] decision must be allowed to stand unless it was plainly wrong,” and concluded that “… this administrative decision was *not* wrong enough to permit this court to upset it.” [Emphasis added]

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43 Tippy, supra note 14, at 140.
44 In Pennsylvania, for example, the only standards to guide the Pennsylvania Secretary of Highways in the exercise of his discretion in locating highways outside cities are that such location be made “… in order to correct danger or inconvenience to the traveling public, or lessen the cost to the Commonwealth in the construction, reconstruction, or maintenance thereof.” PA. STAT. ANN. tit. 36, § 670-210 (1961).
45 *Boyd*, 270 F. Supp. at 663. The complainants in *Ellington*, 387 F.2d 179 ran into a similar problem, though it arose in a different procedural guise. In *Ellington*, the Court of Appeals reviewed the denial of a preliminary injunction pending a hearing on the merits of plaintiffs’ claims. Since the denial of this injunction is discretionary with the trial judge, the initially high burden of persuasion was compounded by appeal at this early stage. Though hindsight shows that an appeal at this stage was perhaps a tactical error because of the compounded burden of persuasion, delaying the appeal until after a hearing on the merits would probably have resulted in laches. See discussion of the laches problem, infra notes 47-50 and accompanying text. The court did evince reluctance in the denial of plaintiffs’ appeal. “Under the standards of judicial review in this type of action we conclude that, despite the showing of heavy damage to the North Nashville area, we have no choice except to affirm…” at 185. The heavy damage referred to occurred solely in the Negro section of the city. The main business street was to be gravely affected by closings and relocations; a public park used predominantly by Negroes was to be destroyed; and traffic reroutings were to funnel many cars through the center of Fisk University, at 186. See also SAT. EVENING POST, Dec. 14, 1968, at 22. Somewhat surprisingly, the court noted that there had as yet been no formal approval of the route by the Department of Transportation. Accordingly, the court stated at 186:
3. **Laches – The Expended Sums**

There is a complex tactical decision that must be made by one contemplating a judicial challenge to a proposed routing. On the one hand, the administrative remedies must be exhausted. Yet to delay the legal battle might well result in the equitable defense of laches.

The most prominent element of the laches defense raised against challengers of a chosen routing is monetary cost. Substantial expenditures, composed primarily of engineering and right-of-way acquisition costs, have usually been made before the judicial challenge is undertaken. To a large extent these expenses are dictated by the routing process itself. The nature of federal appropriations and funding also encourages a certain “spend-it-while-you-have-it” attitude.

We cannot presume the Department of Transportation will fail to give consideration to possible revisions in the plans and specifications so as to alleviate as much as feasible the grave consequences which this record shows will be imposed under the present plans upon the North Nashville community.

This could have been a simple statement of fact, an understated hint at failure to have exhausted all administrative remedies, or an admonition directed to the Department of Transportation. The tenor of the opinion, though not its holding, indicates that the court may have had the third possibility foremost in its mind.

The Administrative Procedure Act precludes judicial review of acts committed by law to the discretion of the agency. 5 U.S.C. § 701 (a)(1964). Because highway routing is largely a discretionary matter, judicial challenges must arise under that portion of the act which allows review of “final agency action for which there is no other adequate remedy in the court...” [Emphasis added] 5 U.S.C. § 704 (1964).

The enormity of the projects requires that all possible measures, including the pre-acquisition of rights-of-way, be employed to avoid what might otherwise result in inordinate delays in project completion and consequent spiraling of construction costs. See note 10, supra.

At least one court has taken judicial notice of this fact. In State Road Dept. of Fla. v. Southland, Inc., 117 So.2d 512 (Fla. 1960) the court said at 516:

This court takes judicial notice of the fact that funds for the construction of the interstate system are budgeted, received and expended on an annual basis... The lack of funds in any given fiscal year to commence immediate construction of a segment of the interstate highway which has been surveyed, located and duly designated, should not be a bar to the Department’s authority to acquire by eminent domain the rights-of-way necessary for such highways, even though for financial reasons construction must necessarily be deferred to a future date within the time limits of the overall interstate highway program.
The court in *Boyd* was well aware of the costs involved; approximately $9,000,000 had been committed under a construction contract for labor, materials and equipment; the state had spent more than $1,000,000 to engineer the proposed route and $200,000 had been used to acquire rights-of-way. The court foresaw only chaos should the route be enjoined. In addition, "substantial delay, perhaps amounting to over two years, would be encountered before a new route could be surveyed and engineered." There had been a nine-month delay between the Highway Administrator's route selection and the institution of the challenging suit. "In the meantime both federal and state authorities have changed their position in reliance upon that decision. This comes perilously close to laches. At the very least it is a factor which this court must take into account."50

A related problem arises when a timely challenge is made but the opposed project is completed before there can be any final judicial determination on appeal. In *Washington Park, Inc. Appeal*51, complainant condemnee obtained an order halting construction of a road until the Pennsylvania Supreme Court could convene in the Fall term to hear the case on appeal. Although it appeared that the three-month construction delay that would result would inconvenience no one and that, absent the delay, the project would be completed "by the time the autumn leaves fell," the order halting construction was overturned by other members

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50 270 F. Supp. at 664. The *Ellington* case is an excellent example of what can occur. There the chosen route had been substantially the same for ten years and $10,000,000 had already been spent for engineering and land acquisition before a suit challenging the route was initiated. 387 F.2d at 184. Plaintiffs claimed that whenever interested persons had inquired about the status of the disputed route over those years "they were told that the route was 'preliminary' and 'subject to change.'" SAT. EVENING POST, supra note 45, at 24. The court stated at 186 that "[i]t also is to be regretted that appellants [complainants] waited so late to begin their efforts to correct the grave consequences which will result from the construction of this highway." However, appellants' alternatives were not clear. A premature resort to the courts would have resulted in a clear failure to have exhausted administrative remedies. On the other hand, a challenge instituted after the decisional process is complete often faces a fait accompli. See also note 46 supra, and accompanying text.

51 425 Pa. 349 (1967).
of the Supreme Court. The roadway was then apparently completed before the appeal was heard, thus rendering the issue moot.

This situation presents more than "laches" in a tacit form. As the dissent clearly noted, there was no possible remedy had the court found, on appeal, that there had in fact been an unconstitutional taking or denial of due process as the complainant alleged. It seems inexplicable that the court, in effect, foreclosed itself from any decision other than the one reached.

4. Piecemeal Construction

Construction of the federal-aid highway system is necessarily a "piecemeal" process. There is neither the administrative and engineering capacity nor the funds to proceed on any other basis. This piecemeal construction approach can result in a suit challenging the "link-up" section of highway needed to connect two previously completed portions. A challenge in this posture begins in a most disadvantageous position. It has been observed by a court:

Only chaos can result if local law or municipal corporations across the nation may block the progress of construction, and prevent the logical and planned extension and connection of those completed projects to achieve the interstate system envisioned by Congress.

52 In a typically vigorous opinion dissenting from affirmance of the lower court holding, Musmanno, J., castigated the majority for their handling of the case.

Nothing can be more important in law than preservation of the res, the thing in controversy, until the Court decides its fate. ... The time to decide whether a road should or should not be constructed was before the steam shovels, bulldozers, and concrete mixers joined in a mighty welding operation to tie together in perpetual bond a solid structure that could never be reduced to its original elements again. ... The appeal was finally heard and now the Majority has affirmed the action of the court below. It could not do otherwise. It would be folly to order the destruction of $500,000 worth of road building. The concrete cannot be liquified and transmuted into gold to put back into the State's treasury.... Washington Park was denied due process because its property right was physically destroyed when the supersedeas was dissolved. 425 Pa. at 360-361, 363-364.

For an example of a case whose handling contrasts markedly with the injudicious disposition found here, see note 53.

All of the above problems constitute barriers to obtaining relief from an undesired highway routing. However, some of these barriers are simply manifestations of the routing process itself; they can be traced to no specific deficiency in the procedure, but are only incidental effects of that procedure. The "link-up" problem exemplifies this kind of barrier. This obstacle is little more than an inevitable effect of the piecemeal construction approach.

sub. nom. United States v. Pleasure Driveway and Park District of Peoria, Ill., 314 F.2d 825 (7th Cir. 1963). The case involved an eminent domain proceeding against a city park. The land under dispute lay between two previously completed sections of one highway in the interstate system.

A problem related to both "laches" and "piecemeal construction" may arise if different agencies are successively responsible for elements of what is essentially one joint decision. In such a situation, a failure to consider all agencies' decisions concurrently will foreclose any choice in the agency last to render a decision due to the prior expenditures made in reliance on the approval of the agency which first considered the project.

Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (1969) is an example of the type of difficulty which can arise. The court accepted plaintiffs' contention that a river-fill permit granted as part of a highway construction project had issued illegally from the Army Corps of Engineers due to the Corps' failure to secure Congress' approval as required by statute. The court then went on to declare that the Corps must simultaneously seek the statutorily required approval of the Secretary of Transportation for a causeway which was part of the same overall project, even though the causeway was not part of the fill project which the Corps could seemingly (with consent of Congress) independently authorize. The court reasoned that the Corps' failure to obtain the Transportation Secretary's approval:

... effectively relinquished the jurisdiction of the federal Department of Transportation, and its discretion to deny the approval of the future causeway, for how could the Secretary of Transportation deny the future request, if he were to be so inclined, after the enormous expense and work the State would have already put into the project. 302 F. Supp. at 1089–1090.

In conclusion the court stated:

Such a piecemeal approach ... would also frustrate one of the main purposes of the Department of Transportation Act, i.e., the conservation of the country's natural resources .... If this massive fill project is completed before [Secretary of Transportation] approval is sought, he will be presented with a fait accompli. There will not be any need for him to consider the effects on natural resources as the harm, if any, will be done. Id., at 1090.

The court is to be commended for its administrative handling of this case. The Second Circuit, recognizing the irreparable harm which could result from any dumping of fill before the appeal, ordered an immediate trial on the merits while denying plaintiffs' appeal for a preliminary injunction. Through prompt action, the court was able to render a decision on the merits less than six months after the initial grant of the permit, preserving revocation of the permit as a viable alternative. Compare Washington Park, discussed in text at note 52 supra.
which fails to adequately forewarn interested landowners. This is not true, however, of all barriers to relief; many can be traced to an operational failure of the system itself.

IV. Procedural Deficiencies in the Highway Routing Process

A. Stale Data

One problem caused primarily by the "piecemeal" method of highway construction is that information, current when considered, may have become stale by the time funds are available for construction; that is, the information is no longer accurate. The limited availability of federal funds and the fact that further delay may increase land acquisition costs not only hastens the initial findings, possibly causing oversight and miscalculation, but also inhibits later review of those decisions. It is conceivable that cost estimates once validly favoring one route may have changed dramatically by the time construction has begun. When a judicial challenge arises, however, the route chosen on the basis of the earlier estimates, now outdated, is staunchly defended. In Boyd, for example, a cost differential of $4.3 million between two routes was a major factor underlying recommendation and approval of the route chosen. Yet in the ten-month period from February, 1966, when a cost of $18.8 million was used to justify the chosen route, to November, 1966, when estimates were made prior to requesting bids for construction contracts, the estimated cost of the chosen route had risen one-hundred forty-eight percent.54 Thus, route determination had been made on the basis of cost figures which were startlingly unrealistic and out-of-date less than one year later.

B. Public Hearing

The primary safeguard against administrative error through failure to gather all relevant data before arriving at a decision

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54 Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction, Bedford v. Boyd, 270 F.Supp. 650. This increase included a design change made after route approval.
should be the public hearing. Yet the present failure to provide for a public hearing has been held insufficient to warrant judicial relief.\textsuperscript{55} The denial of a public hearing, leaving judicial challenge as the only alternative, puts the interested party at an immediate disadvantage. The proceeding before the courts is adversary in nature, not informational, as the public hearing should be. The participant in a public hearing may present his facts relatively unburdened. The person challenging a routing decision in court, however, is confronted with: (1) administrators defending a route which they have selected, and in which they have a vested interest, against a charge of arbitrariness or abuse of discretion; and (2) a burden of persuasion which is not present at an administrative hearing. Facts adduced at a hearing can be much more persuasive because presented in a relatively neutral setting. Tender of the same facts at trial is an uphill struggle.

It can be assumed that the function of any highway routing procedure should be to bring as many factors to bear on the routing problem as is possible. However, routing administrators have often failed to consider relevant factors simply because existing procedures are not adequate for this purpose. To remedy the problem, the Bureau of Public Roads promulgated a new Policy and Procedure Memorandum.\textsuperscript{56}


A distinctly contrasting view of the role of the public hearing was set forth in D.C. Federation of Civic Associations, Inc. v. Airis, 391 F.2d 478 (1968). There, in reversing and remanding, the Circuit Court of Appeals for the District of Columbia held that District officials entrusted with highway planning for the District were not authorized to disregard section 7-115 of the District Code which requires a public hearing before approval of a highway plan. The court said at 484:

\begin{quote}
The public hearing required by § 7-115 offers the public an opportunity to participate in the administrative decision and forces the administrators to spell out the reasons for their decision—a check and balance basic to our entire system of government.
\end{quote}

Although Airis did not deal directly with the Federal Act, the approach and philosophy are nonetheless distinctly applicable.

\textsuperscript{56} Fed. Reg. 727 (1969), See also note 15, supra.
V. Development of an Effective Routing Procedure

To ensure that the views of all are effectively presented, a procedure is required which affords each interested party the opportunity to interpose his views at an early stage in the proceedings. The Bureau of Public Roads recognized the absence of early access to the route selection system as one of its chief weaknesses.

The rules, policies, and procedures established by this PPM are intended to afford full opportunity for effective public participation in the consideration of highway location and design proposals by highway departments before submission to the Federal Highway Administration for approval. They provide a medium for free and open discussion and are designed to encourage early and amicable resolution of controversial issues that may arise.\textsuperscript{57}

Whether the PPM in fact accomplishes its avowed purpose is open to question.

A. The Dual Hearing Procedure

1. Structure

The basic innovative feature of the Policy and Procedure Memorandum is a dual hearing procedure:

Both a corridor public hearing and a design public hearing must be held, or an opportunity afforded for those hearings, with respect to each Federal-aid highway project that:

(1) Is on a new location; or
(2) Would have a substantially different social, economic or environmental effect; or
(3) Would essentially change the layout or function of connecting roads or streets.\textsuperscript{58} [Emphasis added]

\textsuperscript{57}Id. at 728, § 1.
\textsuperscript{58}Id. at 729, § 6(a). The PPM also anticipates the problems which could arise due to a "change of plans" after a public hearing has been held:
The *corridor public hearing* is a conscious effort to afford interested persons an opportunity to express their views on the location of a federal-aid highway at a stage when flexibility of response to proffered suggestions still exists.

A "corridor public hearing" is a public hearing that:

1. Is held before the route location is approved and before the State highway department is committed to a specific proposal;
2. Is held 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; and
3. Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative highway locations, and the social, economic, and environmental effects of those alternate locations.58

The opportunity for another public hearing shall be afforded in any case where proposed locations or designs are so changed from those presented in the notices specified above or at a public hearing as to have a substantially different social, economic, or environmental effect. (§ 7(c)).

Note that the PPM only requires that an *opportunity* be afforded for the hearings whenever federal funds are involved. As long as the procedure for requesting the hearing is not too complex, and the public is well informed as to that procedure, the PPM public hearings will be effectively available to interested persons. The PPM does presently require, however, that the procedure for requesting a public hearing be explained in the published notices of opportunity for a public hearing. (§ 7(a)).

58Id. at 728, § 4(a). For the definition of "social, economic, and environmental effects," see note 63 infra. Despite language to the contrary in the Memorandum, to infer that there will be an opportunity to discuss the need for a federal-aid highway at the corridor public hearing is misleading. The earlier version of the Memorandum envisioned a corridor public hearing which would focus specifically on the question of alternative methods of transportation. See note 15 supra. The promulgated Memorandum recognized the "validity of the contention that the public has the right to actively participate in that ['highway-no highway'] decision," but realized that this issue must be explored at a much earlier stage. As a result, the Bureau expressed an intent to amend other Memoranda to require that interested persons be allowed to express their views with respect to the choice among alternative modes of transportation. 34 Fed. Reg. 727 (1969). Administrative minds may have retained the wording here to indicate that an earlier determination that a highway facility is the answer to a transportation problem (as opposed to, say, a monorail or subway system) is not necessarily conclusive, but may be reconsidered in the light of data.
Growing realization that aesthetic, conservation, recreation and related considerations are legitimate components of the routing process prompted the creation of the *highway design public hearing*. This hearing is held after route approval, following the corridor hearing, and:

> [p]rovides a public forum that affords a full opportunity for presenting views on major highway design features, including the social, economic, environmental, and other effects of alternate designs.\(^{60}\)

The two public hearings are of equal importance. It is now recognized that, although highways are programmed, planned and projected for the foreseeable use-requirements of a twenty-year period,\(^{61}\) the roadways themselves will last for more than fifty years.\(^{62}\) Because of this fifty-year life span for roadways, the *determinative* impact of a new highway is greater than its determined usefulness; that is, roadways will continue to influence other planning decisions long after their peak usefulness has been attained. It has thus become imperative not only to project urban growth rates and usages, but to attempt to envision what the very concepts of “city” and “transportation” will be in the year two thousand twenty. This requires serious consideration of those “social, economic, or environmental” effects\(^{63}\) which both hearings are intended to examine.

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acquired subsequent to that decision, including that received at the public hearing. An argument can be made for delaying the final mode-determination until all the engineering studies have been completed prior to the corridor public hearing. However, the type of information needed to determine the relative feasibility of one form of transportation as against another seems to be much broader than information developed in support of highway route locations would be. In any event, to indicate that the decision will be delayed until the corridor hearing is misleading. Anyone waiting until then to enter the decisional process will have been effectively foreclosed from participation in the determination of the type of system to be developed because of the massive expenditures in pursuance of specific route selections. To allow public access to the “highway-no highway” decision at a stage in the planning procedure when there has been relatively little expended on any specific form of transportation, as is now contemplated, should allow true public participation in that decision.

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\(^{62}\) SAT. EVENING POST, *supra* note 45, at 27.

\(^{63}\) Social, economic, and environmental effects” means the direct and indirect benefits or losses to the community and to high-
2. A Standard to Rectify the Basic Weakness

Unfortunately, the Memorandum provides no explicit standards against which administrators can evaluate the relative merits of the factors which must be considered in selecting a route. In determining whether a net neighborhood loss of sixty homes would justify increased expenditures along an alternate route, or

way users. It includes all such effects that are relevant and applicable to the particular location or design under consideration such as:
(1) Fast, safe and efficient transportation.
(2) National defense.
(3) Economic activity.
(4) Employment.
(5) Recreation and parks.
(6) Fire protection.
(7) Aesthetics.
(8) Public utilities.
(9) Public health and safety.
(10) Residential and neighborhood character and location.
(11) Religious institutions and practices.
(12) Conduct and financing of Government (including effect on local tax base and social service costs).
(13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
(14) Natural and historic landmarks.
(15) Noise, and air and water pollution.
(16) Property value.
(17) Multiple use of space.
(18) Replacement housing.
(19) Education (including disruption of school district operations).
(20) Displacement of families and businesses.
(21) Engineering, right-of-way and construction costs of the project and related facilities.
(22) Maintenance and operating costs of the project and related facilities.
(23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design. 34 Fed. Reg. 727, supra note 15, at 728-29, § 4(c).

Note that, because of the broad definition given here, the two hearings should be available in the vast majority of Federal-aid highway projects. See text accompanying note 58 supra. If there is any doubt whether a public hearing is required, the opportunity for one must be afforded. 34 Fed. Reg. 727, supra note 15, at 729, § 7(d).

64 For a list of the factors, see note 63 supra.
in determining a feasible alternative to a route through a public park, administrators receive no specific guidance from the Memorandum. It is, of course, impossible to draw guidelines for all situations. Application would inevitably demand modification in practice. Nevertheless, a general principle can be formulated which sets a fundamental standard on which the route selector must build. This fundamental standard should be that each facet of every selected route should, to the greatest extent possible, meet the minimum requirements of the department or agency which would treat the question were it to arise outside the highway routing context. The decisions and standards of those departments or agencies would set the floor for consideration of these matters by the highway administrators. The Memorandum provides an inroad for the application of this standard through its emphasis on governmental coordination. The Policy and Procedure Memorandum itself states that:

When a State highway department begins considering the development or improvement of a traffic corridor in a particular area, it shall solicit the views of [those state, federal and local agencies] which it believes might be interested in or affected by the development or the improvement.\textsuperscript{65} [Emphasis added]

The views solicited from agencies should, if feasible, constitute the minimum standard for each factor considered. Unfortunately, the PPM imposes no such requirement.

\textbf{B. Governmental Coordination—Local Benefits}

The most manifest benefits of the required state solicitation of views should accrue to local government. State and federal levels of government have undeniable interests in the location and design of major thoroughfares. However, it is the metropolitan area which is potentially most affected by highway construction. Roadway construction within a city can condemn large amounts of

taxable property, thereby depleting the city's tax base and possibly increasing the burden on remaining property-owner taxpayers. It is the city which will lose parklands and playgrounds.\textsuperscript{66} Local school districts are the potential victims of concrete disruption of their public school systems. Entire neighborhoods face destruction of their identity through relocation of a large percentage of their population or loss of their shopping districts or churches when a highway threatens to displace or impair access to these elements of community.\textsuperscript{67}

The presence of the local government unit in the routing process is important for several reasons. First, it can present its own position as a representative of the entire population, balancing competing needs and aiding in a temperate solution to routing problems. Second, the mantle of elected authority worn by the local official lends strength to the positions assumed by that official. The municipality can, by substituting authority for popularity, effectively champion a viewpoint worthy of consideration but held by only a small minority. This assures some modicum of meaningful access to the decisional process for the interested minority.

Finally, in augmenting those ideas worthy of support and moderating those considered radical, the municipality will accumulate information which may be passed on to the routing authorities. This should relieve some of the burden on routing officials who would otherwise be responsible for accumulating such information. At the same time, the individual has continuing access to the public hearing as a safeguard against irresponsible local government action. Yet the Memorandum leaves lingering doubts about the effectiveness of the hearings as a means of access to the routing process for interested persons.

\textsuperscript{66}For an extended discussion of the impact of highway construction on parklands see Forer, \textit{Preservation of America's Park Lands: The Inadequacy of Present Law}, 41 N.Y.U.L. Rev. 1093 (1966). See also 23 U.S.C.A. § 138 (Supp. 1968) declaring that the preservation of countryside beauty is a national policy. This section prohibits Federal approval of a project requiring the use of public park or recreation lands unless there is no feasible alternative to its use.

\textsuperscript{67}For example, see the facts of Ellington, note 45 supra.
C. Access to Technical Data

In its attempt to involve the public in the routing process, the Memorandum specifies that “maps, drawings, and other pertinent information developed by the State highway department and written views received as a result of the coordination outlined in Paragraph 5.a will be made available for public inspection and copying . . . .”68 However, merely making these documents available for inspection and copying is not sufficient to guarantee that less affluent, yet nonetheless vitally interested, persons will be able to obtain these documents in preparation for the public hearing. Some provision making these materials available at reproduction cost or free to a group of some specified minimum size is necessary to include the poor among those who hope to participate in the routing process.69

Yet even this may not provide effective access to the routing process for an interested person or group unable to comprehend the technicalities and ultimate ramifications of the material distributed. Those groups which lack sufficient expertise must receive aid in obtaining an explanation of the data provided to them. Assistance along these lines could most easily come from within the state highway department itself by allocating to one of its members the responsibility of “public education” on route selection. The alternative would be to pay experts retained as consultants by the interested parties when the parties themselves

69 Information concerning studies of alternate routes should be made available to the public prior to the public hearings. The Memorandum only requires that it be made available at the public hearing. 34 Fed. Reg. 727, supra note 15, at 730, § 8(b)(3). In the past, alternative route studies have been generally unavailable to the public. For example, see Binghampton Citizens Penn-Van R. 17 H.C. v. Frederick, 180 N.Y.S.2d 913, 7 App.Div.2d 170 (3d Dept. 1958); compare, Cal. St. & H'WAYS Code § 75.6 (1965), and see Tippy, supra note 14, at 148 for a discussion of this problem.

Some citizens have found that even the data which the highway department has accumulated is inadequate to formulate any judgments about alternatives. They discovered that they needed access to highway department computers in order to test the relative effects of intermodal inputs of various alternatives in ways that the highway department had not. Letter from Robert J. Sugarman, on file at PROSPECTUS office, February 11, 1970.
could not afford a consultant. The former alternative would seem preferable, although some provision must be added to cure the credibility problems which could arise concerning the statements of highway officials. This information and assistance should be made available upon the first notice of public hearing, thirty to forty days before that hearing is to be held.

Discussion of tentative right-of-way acquisitions and of construction schedules at the hearings will allow persons whose homes and lands may be affected to plan intelligently for any contingency. The discussion of relocation assistance contemplated by the Memorandum will arm affected persons with all available information concerning government aid in finding new home and business locations. This general approach should cause any dissatisfaction with a chosen route or route proposal to surface quite early in the procedure, thereby enabling compromise discussion to begin before plans have become too rigid. One possible disadvantage is, of course, that the disenchantedment of persons or groups could earlier coalesce into organized opposition to a certain proposal and delay or prevent any solution, even a compromise one, at the administrative level.

Further, to support its request for route or design approval, the state highway departments must submit comparative studies of

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70 The federal government might provide substantial funds for this effort. The current Memorandum indicates reimbursement for expenses associated with the public hearing on the same shared basis (90% Federal-10% State) as other preliminary engineering costs. 34 Fed. Reg. 727, supra note 15, at 730, § 12.

71 Such a credibility problem arose in Ellington. See note 50 supra. Elimination of the problem could most easily be accomplished by requiring that explanations to the public be in writing upon request and by holding the highway department legally bound by the answers which they formulate. This may force the highway department to specially scrutinize the factor inquired about, but should really impose no burden beyond the one theoretically borne at present—to examine all aspects relevant to a routing or design determination.

72 The PPM already imposes such a requirement as to material currently made available to the public. 34 Fed. Reg. 727, supra note 15, at 729, § 8(a)(3). For types of information currently available to the public under the PPM, see note 69 supra and accompanying text.

73 This is currently required under the PPM. 34 Fed. Reg. 727, supra note 15, at 729, § 8(a)(4).

74 Id., § 8(a)(5). Relocation assistance includes mandatory advisory aid from the state as well as monetary payments for displaced individuals and businesses. 23 U.S.C.A. §§ 501-511 (Supp. 1968).
route or design alternatives to the federal division engineer who grants initial federal approval of projects, thereby making them eligible for federal funds. These studies point out the significant differences between the alternatives and indicate the reasons why one alternative is favored.\textsuperscript{75} This is probably the most significant coordinative provision in the Memorandum; in amassing the accumulated data, it is, in effect, the fruit of all other sections. However, the Memorandum fails to take full advantage of the information submitted to the division engineer by not requiring that he support his decision with findings of fact gleaned from the data submitted. Such a requirement would help ensure that no aspect crucial to the decision has been overlooked. It would at least discourage arbitrary decisions. Over an extended period of time, this fact-finding process would elicit certain general standards applicable to all highway routing decisions.

\section*{VI. Effect of the Memorandum}

It is difficult to predict the effect of the Policy and Procedure Memorandum on the highway route judicial challenge. At the very least, the Memorandum should tend to minimize the necessity of resort to the courts by providing access to the decisional process at a time when comments on proposals are meaningful and may provoke action. On the other hand, the PPM might also eliminate many previous barriers to success when judicial relief is sought.

Early inclusion of interested persons in the routing procedure should result in those persons becoming aware of the effects of any potential decision and should operate to diminish use of the “laches” defense in routing challenges. It will put interested persons “on notice” at a stage in the route selection process when there has been comparatively little monetary expenditure favoring one alternative over another.\textsuperscript{76} In addition, it will encourage time-

\textsuperscript{75} 34 Fed. Reg. 727, \textit{supra} note 15, at 730, \$ 10 (b) (1)-(4).

\textsuperscript{76} See text accompanying notes 46-49 \textit{supra}. However, earlier access to data supporting various routes may cause a court to be less patient with those who wait until a decision is “final” for any extended period. This may be especially true insofar as the PPM clarifies the tactical decision as to when a court challenge may be made. \textit{See} note 77 \textit{infra}. 
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ly coalition of opposition to a routing or design proposal between persons who find themselves in a common plight. Their subsequent action may take the form of compromise discussion. Should it result in legal action, however, that step will be taken at a much earlier time than has been true in the past.

Moreover, the tactical decision as to when to initiate a judicial challenge is simplified under the procedures outlined. While there is, as yet, no formalized administrative appeal from the determination of the division engineer,\(^7\) splitting the route selection process into the two distinct administrative decisions on location and design provides a definite, appealable, final administrative decision before the process is beyond the influence of interested persons.\(^8\) There can be no doubt that a route has been chosen upon notice of the "highway design public hearing."\(^9\) Promulgation of formal administrative appeal procedures should further simplify this tactical decision.\(^8\)

Because the technical data concerning a route and its alternatives will be available to prospective disputants,\(^8\) the burden of suggesting a feasible alternative route during the course of judicial challenge has been eased; the expensive accumulation of plaintiff's supporting data will have been accomplished by the routing authorities.

\(^7\) Though embodied in the originally proposed version (see note 15 supra), the promulgated Memorandum contains no formal procedure for appeal from the decision of the division engineer who may grant initial federal approval to a state-requested route or design. A proposal so providing has been withdrawn for further study in search of a procedure which will "facilitate the ultimate disposition of highway issues without unduly delaying the needed highway construction." 34 Fed. Reg. 727, supra note 15. The original proposal contained an automatic stay of all action of the division engineer while an appeal was under consideration. 33 Fed. Reg. 15663, 15666 (1968). This provision could have significantly hindered progress if used indiscriminately. The present PPM should encourage an orderly mode of appeal by informing interested persons that an informal appeal procedure does exist, enabling proper direction of comments on, and objections to, decisions made. In a sense, this will formalize the now concededly informal appeals procedure.

\(^8\) See note 46 supra, and accompanying text. This partially avoids the "expended interest" component of laches. See text accompanying note 76 supra.

There are three distinct decisions if the "highway-no highway" determination is counted. However, until there is active public participation in that decision, citizens are likely to be unaware that this decision has been made. See note 59 supra.

\(^9\) See text accompanying note 60 supra.

\(^8\) See note 77 supra.

\(^8\) See note 72 supra, and accompanying text.
While these barriers to judicial review and relief may be removed by the implementation of the Policy and Procedure Memorandum, a new barrier may have been created. If the courts became increasingly willing to review the administratively determined route because they felt existing regulations and procedures inadequate to protect the rights of involved persons, the implementation of competent, comprehensive procedures may cause the courts to once again assert the deference to administrative decisions characterized by earlier judicial opinions. However, the PPM itself counters this by making available more comprehensive technical data from which administrative decisions are made. This should provide courts with a certain degree of expertise or at least more information which will make them more at home in the process of review and could lead to greater, rather than less, activism.

Another potential benefit of the new procedure is the development of a more uniform system of highway routing within the United States. Each state must conform substantially to the outlines of the Memorandum in their routing procedures for federal-aid highways. Rather than adhere to state procedures for their own highways, the states may discover that the federal framework best fits their needs for intrastate roadways. Widespread use of these procedures should lead to the evolution of standards which may guide the selective process on a national basis.

VII. Conclusion

The Memorandum fails to take account of one factor which may delay or even prevent full development of needed routing standards through its coordinative provisions. The PPM does not shift the responsibility for the route selection; it operates merely as an input device which channels information into the hands of the present decision-makers.

Highway department staff and officials have traditionally been

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82 See notes 18-20 supra, and accompanying text. Jaffe, Public Actions, note 25 supra, states at 1284, "The prime argument, thus, for the public action would be the absence of these [administrative or political] controls."
trained as engineers. As a result, they may be particularly unable
to grasp adequately the importance of much of the sociological or
environmental information likely to be introduced under the
Memorandum's procedures. Their training has been geared to the
inquiry process of a problem thought to be much narrower than is
now recognized. The same individuals who are eminently quali-
fied to handle an engineering problem may not be as well qualified
to comprehend and fully appreciate the ramifications of these
other problems. This is an additional reason to require that the
highway administrator should, to the greatest extent feasible,
view the opinions solicited from other departments or agencies as
the minimum standard for his treatment of the complicated fac-
tors involved in a highway routing decision. If this deficiency can
be overcome, either through direct involvement of other inter-
tested groups in the decisional process or through a natural
process of education in continued highway department exposure
to these diverse elements, the Memorandum should develop fair
and efficient standards for route selection.

The Memorandum seeks to elicit general standards for the
routing process to remedy the present inadequacies of that sys-
tem. Widespread employment of the Memorandum's procedures
by both federal and state highway administrators, coupled with
increased coordination between various departments and levels
of government in the route selection process should facilitate the
development of such standards. Requiring the federal division
engineer to support his approval decision with findings of fact
would give added impetus to this development.

The standards would improve the quality of highway routing to
ensure that a decision is made which is beneficial to all people
affected by the new highway. Such standards would also provide
a framework within which the courts can operate intelligently in
cases of judicial challenge. Even if these standards are slow to
evolve, the Memorandum represents a forward step in the solu-
tion of highway routing problems.