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Case Notes

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AIRPORTS—ENVIRONMENTAL IMPACT STATEMENT—A Court May Halt Only Federal Participation in a Runway Construction Pending the Filing of an Adequate Environmental Impact Statement as Required by the National Environmental Policy Act. *City of Romulus v. County of Wayne*, 392 F. Supp. 578 (E.D. Mich. 1975).

An action was brought for a preliminary injunction to halt construction of a third parallel runway at Detroit Metropolitan Wayne County Airport in a project jointly funded under the matching grant provision of the Airport and Airway Development Act.[1] Plaintiffs sought an injunction to halt expansion of the airport,[2] or alternatively, to enjoin the use of federal funds until the requirements of the National Environmental Policy Act (NEPA) were met.[3] Plaintiffs contended the Environmental Impact Statement (EIS) filed by the Federal Aviation Administration (FAA) pursuant to NEPA[4] was misleading, scientifically inaccurate, and failed

[1] 49 U.S.C. § 1711-1727 (1970).

[2] A suit for temporary injunction is the common judicial relief used to require federal agencies to fulfill the mandate of NEPA and submit sufficient environmental statements. *See* Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971), Silva v. Romney, 342 F. Supp. 783 (D. Mass. 1972).

[3] National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1970).

[4] *Id.* § 102(2)(c), 42 U.S.C. § 4332(2)(C) (1970) provides:

> The Congress authorizes and directs that, to the fullest extent possible: . . .
> (2) all agencies of the Federal Government shall
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> (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.

to comply with the basic policy behind NEPA.[5] The court found the statement insufficient in two areas: the study on the need for a new runway, and the study on the sound effects of the proposed runway. *Held, preliminary injunction granted*: A court may halt only federal participation in runway construction pending the filing of an adequate Environmental Impact Statement as required by the National Environmental Policy Act.

The overriding policy of NEPA is a commitment to the protection and safeguarding of the environment.[6] NEPA is an environmental full disclosure law which seeks to effectuate substantive changes in agency decisionmaking by requiring agencies to consider the policies set forth in the Act.[7] To assure that environmental consequences are properly considered by the agency, section 102(2)(c) of NEPA requires that an EIS be prepared to assess adverse effects and to discuss alternatives to the proposed action.[8] According to NEPA, an EIS must be prepared only when federal participation is involved in a project.[9] The completed EIS is a single compilation presenting a proposed project's potential im-

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Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact. Copies of the statement and the comments and views of the appropriate federal, state, and local agencies which are authorized to develop and enforce environmental standards shall be made available to the President, the Council on Environmental Quality and to the public.

[5] Plaintiffs alleged in *Romulus* that the final EIS was not a full and fair disclosure to the public and commenting agencies in three areas: the study on the need for a new runway, the alternatives discussed, and the study on the sound effects of the proposed runway. The court found the discussion of alternatives was adequate and needed no further discussion. City of Romulus v. County of Wayne, 392 F. Supp. 578, 589-91 (E.D. Mich. 1975).

[6] National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970) states:

> The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote effects which prevent or eliminate damage to the environment.

[7] Environmental Defense Fund v. Corps of Eng'rs, 470 F.2d 289, 298 (8th Cir. 1972); Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974).

[8] Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 786 (D.C. Cir. 1971).

[9] *See* note 1 *supra*. Courts have adopted a liberal interpretation of "federal action" in order to maintain NEPA's basic policy. *See* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), Life of the Land v. Brinegar, 485 F.2d 460, 465 (9th Cir. 1973).

pact upon the environment and proposed available alternatives.[10] It serves as a comprehensive document upon which responsible agency officials and others may rely when balancing all the factors involved in the project.[11]

Prior to making any detailed EIS, the responsible agency must submit the draft statement for comment from other federal agencies that have a particular expertise in the subject matter.[12] Pro-environmental organizations and citizens who have expressed an interest in the project must also be afforded an opportunity to review the draft.[13] The purpose of the process is to solicit different views on the project to form a factual basis for a decisionmaker's review.[14]

In the EIS the agency participating in a project must discuss fully its reasoning and analysis in arriving at its conclusions by objectively evaluating its project.[15] When a court reviews an EIS to determine whether it meets the requirements of NEPA,[16] it does

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[10] National Resources Defense Council, Inc. v. TVA, 502 F.2d 852, 853 (6th Cir. 1974).

[11] *Id.*; National Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 833-34 (D.C. Cir. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1113-14 (D.C. Cir. 1971).

[12] If a project is within the Environmental Protection Agency's (EPA) scope of authority, that agency is required by law to comment on the EIS. Statutes which require EPA comment are the Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1955); Noise Control Act, 42 U.S.C. § 4901 *et seq.* (Supp. IV, 1974). BNA Env't Reptr., Monograph No. 17, at 10 (1974); Comment: *Four Years of Environmental Impact Statements: A Review of Agency Administration of NEPA*, 8 AKRON L. REV. 545, 551-53 (1975).

[13] Section 102(2)(c), 42 U.S.C. § 4332(2)(c) (1970). The courts have supported a broader view toward circulation of the statement for review which appears to evolve from the CEQ Guidelines coupled with Executive Order No. 11514, 35 Fed. Reg. 4247 (1970) and agency regulations adopting the provisions of the Guidelines. Any abbendum, which is essentially a draft statement, is subject to the same review procedure by other agencies, pro-environmental groups and the public. National Resources Defense Council, Inc. v. Morton, 337 F. Supp. 170 (D.D.C. 1972).

[14] Conflicting views may not be used to discredit the statement since this is a step toward full disclosure. *See* Life of the Land v. Brinegar, 485 F.2d 460, 472-73 (9th Cir. 1973): " . . . disagreement among experts will not serve to invalidate an EIS . . . the purpose of the EIS is to inform decisionmakers of the environmental ramifications of the proposed action." *See also*, Cohen, *Mandate of the National Environmental Policy Act: The Preparation of EIS*, 41 J.B.A.D.C. 27, 39 (1974).

[15] Silva v. Lynn, 482 F.2d 1282, 1287 (1st Cir. 1973); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 295 (8th Cir. 1972); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 348 (8th Cir. 1972).

[16] Agency action under NEPA is subject to judicial review pursuant to § 10(e)

not balance the different environmental values nor evaluate the decisions of the administrator. The court's duty is to see that the environmental implications, alternatives, and all relevant views are set forth in the statement as a basis for responsible evaluation and criticism.[17] The court has the additional responsibility to determine that the agency has complied in good faith with NEPA "to the fullest extent possible,"[18] and has followed the procedures contemplated by Congress in order that the official entrusted with the decision to authorize, abandon, or modify the project shall be clearly advised of all environmental factors.[19]

According to *Sierra Club v. Froehlke*,[20] an EIS should be sufficiently detailed so that, if challenged, the courts will not be left to guess the source of the data supporting the agency's conclusions when reviewing the EIS to determine whether the requirements of NEPA have been met.[21] This guessing is exactly what the *Romulus* court had to do in analyzing the FAA's conclusion that the new runway would substantially reduce traffic delays and thus lower costs.[22] The FAA neglected to include in the EIS readily available

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of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)(19) (1970); *See*, Cohen, *supra* note 14, at 39.

[17] Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972), National Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

[18] U.S. CODE CONG. & AD. NEWS, 91st Cong., 1st Sess., 2770 (1969), Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); I-291 Why? Ass'n v. Burns, 372 F. Supp. 223, 241 (D. Conn. 1974).

[19] Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783, 786-87 (D.C. Cir. 1971); Daly v. Volpe, 350 F. Supp. 252, 256-57 (W.D. Wash. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971). In *Romulus*, the plaintiffs did not attempt to prove that the substantive decision to construct a third parallel runway was erroneous; their argument was that the EIS failed procedurally to disclose information so that a rational decision could be rendered. The court at no time in *Romulus* expressed an opinion as to whether the facts and evidence set forth in the EIS comply with the substantive requirements of Section 101 of NEPA. 392 F. Supp. at 583.

[20] 359 F. Supp. 1289, 1342 (S.D. Tex. 1973); Wayman, Dutton & Dunn, *The Adequacy of Environmental Impact Statements and the Development of State Law*, 27 SW. L.J. 630, 631-33 (1973).

[21] Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).

[22] The EIS showed an annual activity level of 350,000 aircraft operations. This figure was used to determine a delay increase of eighty-seven percent under the existing runway system; with the addition of the new proposed runway, hourly capacity would supposedly increase fifty percent in order to handle the increased operations and to reduce delay. The court noted that nowhere in the statement

figures, prepared by the FAA itself, pertaining to actual aircraft numbers and future projections.[23] This omission failed to meet the good faith and full disclosure standard as applied by the courts.[24] In addition, many factors supporting the statement's conclusion predicting future saturation under present conditions were likewise unexplained.[25] Because it did not contain this necessary information, the statement fails as the "environmental source material for . . . the making of relevant decisions."[26]

The discussion in the EIS concerning the impact of anticipated noise from the expansion took into account only one sound threshold. The system used by the FAA failed to take into account whether an area would be exposed to noise levels above and below the threshold which could significantly affect humans.[27] Because noise pollution is one of the worst by-products of an airport operation,[28] it is incumbent upon the agency preparing the statement to be meticulous in this critical area in terms of accuracy, efficiency,

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was a forecast made of 350,000 annual operations. The figure apparently "just appeared" for the computation of delay increases under present conditions. This guesswork of trying to ascertain the source of data supporting the conclusion of the need for a new runway is not a proper judicial function. 392 F. Supp. at 588.

[23] I-291 Why? Ass'n v. Burns, 372 F. Supp. 223, 256 (D. Conn. 1974) held that as long as information was available NEPA and the CEQ guidelines obligate the federal agency to include in the EIS information available at the time of preparation.

[24] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 296; Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974).

[25] The term "delay" is never defined despite its pivotal importance. The computation of acceptable delay refutes the conclusion of impending saturation. Other factors must enter into it but are left unstated. Also, the demand forecast predicts a stable number of operations for general aviation in the future, but in the fleet mix predictions the types of aircraft described as general aviation decreases in the number of operations over the next couple of years. When compared to the relative increase in carrier craft as a percentage increase of the fleet mix, a greater dollar savings arises than under demand forecast. This is another example of unexplained inconsistencies. 392 F. Supp. at 588-89.

[26] National Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972).

[27] The method used to discuss the noise ramifications was the "Aircraft Sound Description" (ASDS). The ASDS uses as its threshold of annoyance a level of 83dB(A). The EIS states that the Occupational Safety Act of 1970 establishes that continuous noise levels of 90dB(A) are unacceptable, however, the statement failed to disclose noise levels above 85dB(A), 392 F. Supp. at 591-93.

[28] For discussions on sound impact created by an airport, *see* Berger, *Nobody Loves an Airport*, 43 So. CAL. L. REV. 631 (1970); Fadem and Berger, *A Noisy Airport Is a Damned Nuisance*, 3 S.W.U.L. REV. 39 (1971).

and disclosure.[29] The public has a right to know of the project's noise ramifications because of the potential danger to life and property.[30] Since results from all available information were not included, the EIS prepared by the FAA failed to achieve the policy of NEPA "to inform decisionmakers of the environmental ramifications of the proposed action."[31] The *Romulus* court concluded the EIS analysis deficient in discussing the possibility of detrimental effects of noise pollution on people in the vicinity of the airport.

The standard used by courts, requiring conclusions based on sound reasoning shown on the face of the EIS, was not met in *Romulus.* This standard must be enforced by courts so that the agency's statement reflects a good faith effort to comply with the policy of NEPA and prevent biased statements composed of deliberate misrepresentations.[32]

In *Romulus* a preliminary injunction was granted against the FAA to refrain from any participation in the runway project until the requirements of section 102 of NEPA were met. The court found that the project was not sufficiently "federal" to qualify for a blanket injunction. In determining when the federally funded project becomes "federalized," the courts attempt to find the point at which the federal government enters into a "partnership" with the nonfederal body.[33] Until this point is reached, NEPA does not apply to the non-federal portion of the project, and a federal court is without jurisdiction to enjoin the non-federal portion. *City of Boston v. Volpe,*[34] upon which the *Romulus* court relied, held that

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[29] In *Life of the Land v. Brinegar,* 485 F.2d 460 (9th Cir. 1973), the primary reason for the construction of the new runway was to reduce the level of jet noise, therefore much planning was directed toward achieving that goal. The court was satisfied with the methods used by the agency in showing a significant reduction in noise pollution.

[30] For dangers to man *see* PANEL ON NOISE ABATEMENT, DEP'T OF COMMERCE, THE NOISE AROUND US, 2 (1970); AMERICAN SPEECH & HEARING ASS'N, NOISE AS A PUBLIC HAZARD (1969); Note, *Urban Noise Control,* 4 COLUM. L.J. & SOC. PROBS. 105 (1969).

[31] Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971).

[32] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 342 F. Supp. 1211, 1214 (E.D. Ark. 1972).

[33] Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974); Silva v. Romney, 473 F.2d 287, 290 (1st Cir. 1973). *See,* Brown, *Applying NEPA to Joint Federal and Non-Federal Projects,* 4 ENV. AFF. 135, 136-38 (1975).

[34] 464 F.2d 254 (1st Cir. 1972). *See* Note, 39 J. AIR L. & COM. 121 (1973).

a temporary allocation of federal funds did not so "federalize" an airport expansion project that the non-federal party could be enjoined from further construction. This temporary funding was not a legally binding decision to authorize federal funds. Thus, until there is a final commitment made by the federal government, a federal court has no power to enjoin non-federal parties from working on a project.

This piecemeal approach is contrary to the whole concept of NEPA that the environment will be considered *before* a project is started—while it is a proposed action, not a *fait accompli*.[35] Unless NEPA is applicable at the beginning of the project, the goal behind the Act will never be reached. Many environmental considerations including alternatives to the project would be foreclosed before the actual grant is made and is subject to review.[36] In such a situation, if the plaintiffs do eventually prevail on the merits, millions of federal dollars will have already been spent on the project, and even if the project is not completed, the initial environment effects may be irreparable.

One year after deciding *City of Boston v. Volpe*, the First Circuit applied a different test to determine when projects become "federalized" in *Silva v. Romney*.[37] In *Silva* the First Circuit found a "partnership" existed and restrained the private land developer from acting until the procedural requirements of NEPA were met. The court refused to apply the "final decision" test from *City of Boston v. Volpe*[38] but chose instead to concentrate on the overall nexus between the federal agency and the developer to find a partnership. The court held in *Silva* that entry into a binding contract was only one manifestation of the ongoing planning process. The reasonable expectations of the parties and the early federal involvement in the planning stage were other considerations the *Silva* court took into account before granting the injunction.

[35] U.S. CODE CONG. & AD. NEWS, 91st Cong., 1st Sess., 2770 (1969), all agencies submit a statement on the environmental impact of a proposed action, Department of Transportation Order No. 5050.2, Paragraph 5: Action is defined: "Every airport development action *potentially* involving federal financial aid falls within the purview of both the Airport Act and the Environmental Act." (emphasis added).

[36] *See* Conservation Soc'y, Inc. v. Secretary of Transp., 508 F.2d 927, 936 (2d Cir. 1974).

[37] 473 F.2d 287 (1st Cir. 1973).

[38] *See* Brown, *supra* note 33 at 140-44.

This nexus test appears to be an easier burden for plaintiffs in proving the existence of the necessary relationship between the federal agency and the potential receiver of federal funds. A district court in Massachusetts had an opportunity to clarify the standard in *City of Boston v. Brinegar.*[39] In *Brinegar,* a runway expansion case, plaintiffs sought an injunction against the non-federal party even though there was no temporary allocation of federal funds. The district court factually distinguished *Silva v. Romney* from *City of Boston v. Volpe* and reluctantly followed *City of Boston v. Volpe,* holding that the relationship had not entered the "partnership" stage because no obligation had been created on the part of the federal government. The *Brinegar* court did recognize the unfortunate consequences stemming from the reality of its holding:

> Even though the timing of actual construction in relation to the grant application may eventually result in effective, if not deliberate frustration of the NEPA, the court has no present power to enjoin the construction of the runways projected by the Authority.[40]

On appeal the First Circuit had an opportunity to abolish the test formulated in *City of Boston v. Volpe* based on the progress parties have made in the funding process and establish the overall nexus test of *Silva v. Romney.* The courts could then deal more effectively with the problem of agencies circumventing the statute by intentionally ignoring preliminary environmental activity, despite a temporary allocation of funds based on an informal agreement. Unfortunately, the appeal was dismissed on grounds of mootness and the dilemma as to what test the courts should apply remained unsolved.[41] In *Friends of the Earth, Inc. v. Coleman,*[42] the Ninth Circuit did have an opportunity to apply the nexus test but denied a preliminary injunction against the non-federal body because the plaintiffs failed to show the project was so interrelated that all work must stop. The court nevertheless recognized the

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[39] 6 E.R.C. 1961 (D. Mass. 1974).

[40] *Id.* at 1966. The court also noted that by the time the required EIS is prepared all of the environmentally significant decisions are likely to have been made.

[41] 512 F.2d 319 (1st Cir. 1975) the Court found that an EIS had recently been submitted and state action had enjoined the nonfederal action on the project.

[42] 518 F.2d 323 (9th Cir. 1975).

nexus test and stressed the importance of looking at all the circumstances when applying it.[43]

Under the circumstances in *Romulus*, the court could have found a sufficient nexus. Federal money was being used to help construct the runway. Grant provisions had already been formulated and the planning process had certainly surpassed the negotiation stage as the county had already floated a sixty-nine million dollar bond issue to meet its half of the financial burden.[44] This bond issue supports the conclusion that both parties were under the "reasonable expectation" that federal funds would be forthcoming.

Perhaps the *Romulus* court believed that by halting federal participation the policy of the Act would be fulfilled because the county would realize that any negative environmental results could reduce the possibility of federal funding. This reasoning, however, is limited to situations in which a local government is dependent upon federal funds. The public should not be forced to gamble on the confidence the non-federal party has in its ability to obtain federal funds in order to determine whether the project continues. The problem of when a project becomes "federalized" has been temporarily solved in the recent case of *Citizens Airport Committee v. Brinegar*.[45] Plaintiffs sought to restrain all defendants—county, state, and federal—concerned with improvements to an airport until a satisfactory EIS was prepared. The district court in *Citizens Airport Committee* refused to follow *City of Boston v. Brinegar* and in a liberal interpretation of NEPA held that the airport development project was federalized when the FAA received the local government's request for federal aid. By voluntarily requesting aid the defendant county had entered into a "partnership agreement" with the federal government and became subject to NEPA.

This ruling will certainly be tested on appeal but it is an indication that the courts recognize that NEPA applies to projects well

[43] *Id.* at 329: "Determination of whether federal and state projects are sufficiently interrelated to constitute a single federal action for NEPA purposes will generally require a careful analysis of all facts and circumstances surrounding the relationship. At some point, the nexus will become so close, and the projects so intertwined, that they will require joint NEPA evaluation."

[44] The project is jointly funded under the Airport and Airway Development Act, 49 U.S.C. § 1701 *et seq.* on a fifty percent matching up to $8.39 million. 392 F. Supp. at 596.

[45] 5 E.L.R. 20385 (N.D.N.Y. 1975).

before any final federal commitment is made. Since the intention of the Act is protection of the environment, a county, upon requesting federal funds, should be under an obligation to preserve the environment while waiting for the allocation of those funds. This obligation is especially important because the federal authorization is in many cases only a question of time. During the initial stages of construction the destructive effects on the environment are often as great as they are for a completed project. Therefore, it appears that halting all work is really the only effective solution.[46]

The court in *Romulus* failed to take the step forward as *Citizens Airport Committee* did a few months later. The *Romulus* court was satisfied that the intent of the Act in this case would be met by withholding federal participation. The court in *Romulus*, however, did recognize that the situation called for total relief,[47] but refused to halt all construction, insisting it had no power to act since the statute appeared on its face to apply only to federal parties. In acting conservatively the court may have subjected the environment to a great deal of harm which could result in irreparable damage.[48]

NEPA was designed to assure that the environmental effects of federally funded projects would be carefully considered before a project proceeded. Section 102 of NEPA requires that each federal agency "shall to the fullest extent possible comply with the NEPA" by filing an EIS discussing environmental factors related to the project.[49] The reviewing court is to make certain that this purpose is met by determining that the EIS contains "full disclosure of environmental consequences to the decisionmakers."[50] In *Romulus*, the district court carefully analyzed the EIS and concluded that it failed to fully, clearly, and correctly present to a reader the data necessary to evaluate the need for the proposed project and the environmental costs involved. By establishing the practice that the

[46] A similar argument was directed to the decision in *Boston v. Volpe*. *See* Note, 39 J. AIR L. & COM. 121 (1973).

[47] 392 F. Supp. 578, 596. "These facts strongly suggest that all work on the project should be enjoined."

[48] *See* Environmental Defense Fund, Inc. v. Corps of Eng'rs, 348 F. Supp. 916, 932 n.18 (N.D. Miss. 1972). The district court recognized that the intent of Congress was to insure that all potential environmental costs be considered in the early planning stage of a project.

[49] *Id.* at 927.

[50] *Id.* at 926-27, Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 749 (E.D. Ark. 1971).

statement will be critically evaluated in measuring its adequacy and accuracy, the court performed half of its judicial function.

An equally important function of the court, ensuring that no further activity on the project continued, was not accomplished. A temporary injunction issued against the entire project would have fulfilled this function if the court had liberally interpreted the word "federalized." This action would have been more in line with the intent of NEPA than the indirect approach used by the *Romulus* court in relying on the threat of loss of federal funds to prevent the county from proceeding on a project on which an insufficient EIS had been filed.

Richard John Billik, Jr.

FEDERAL TORT CLAIMS ACT—DISCRETIONARY FUNCTION EXCEPTION—When Issuing of FAA License Involving Matching Clear Regulational Standards Against Given Facts, Issuance of License in Disregard of Such Standards Was Not A Discretionary Function, But Constituted Actionable Negligence Under the Federal Tort Claims Act. *Hoffman v. United States*, 398 F. Supp. 530 (E.D. Mich. 1975).

Several passengers were injured in the crash of an airplane owned and operated by the American Aviation Company. The carrier was the holder of an Air Taxi/Commercial Operator (ATCO) certificate[1] issued by the FAA, but had not been granted CAB economic authority because of its failure to carry adequate liability insurance against passenger injury.[2] The passengers brought an action under the Federal Tort Claims Act (FTCA),[3] contending that the FAA negligently issued the certificate in violation of its own regulation requiring CAB economic authority as a

[1] Air Taxi/Commercial Operator (ATCO) operating certificates signify that the holder has conformed with the minimum safety standards promulgated by the FAA.

[2] *See* 14 C.F.R. § 298.42(a)(1), which requires an air taxi operator to carry at least $75,000 of liability insurance per passenger against bodily injury or death.

[3] 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (1970) [hereinafter referred to as the "Act"].

prerequisite to FAA licensing.[4] The Government moved for summary judgment, asserting that the issuance of an ATCO license was a discretionary function specifically excepted from suit under the FTCA.[5] *Held, denied:* When issuing of an FAA license involved matching of clear regulational standards against given facts, issuance of the license in disregard of such standards was not a discretionary function, but constituted actionable negligence under the Federal Tort Claims Act.

The Federal Tort Claims Act, enacted in 1946, represented the first comprehensive legislative revocation of sovereign immunity since the doctrine's affirmation in 1821.[6] Dissatisfaction with existing remedies was the prime motivation for the Act,[7] and many authorities believed that the Act would provide a more rational and practical measure for the adjudication of citizen claims.[8]

In general, the Act provides that the United States is liable in tort "in the same manner and to the same extent as a private individual under the circumstances."[9] Certain exceptions are enumerated in section 2680, one of which disallows recovery for "an act or ommission of an employee of the Government, exercising due care in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

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[4] *See* 14 C.F.R. § 135.15(b), which provides that in order to be eligible for an ATCO certificate, a person *must* "hold such economic authority as may be required by the Civil Aeronautics Board . . ." (emphasis added).

[5] 28 U.S.C. § 2680(a) (1970) excepts from action under the Act any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

[6] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 257 (1821). The case evidenced a complete change from the Court's original treatment of the doctrine, which had rejected sovereign immunity as inconsistent with popular sovereignty. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[7] *Hearings Before the Joint Comm. on the Organization of Congress Pursuant to H. Con. Res. 18*, 79th Congress, 1st Sess., pt. 1, at 67-69 (1945). *See also* Feres v. United States, 340 U.S. 135, 140 (1950).

[8] Prior to the adoption of the FTCA, the only means for citizen relief was a private relief bill introduced before Congress. By the 1940's thousands of such bills were being introduced each year, but less than fifteen per cent were passed. 86 CONG. REC. 12,018 (1940).

[9] 28 U.S.C. § 2674 (1970).

agency or an employee of the Government, whether or not the discretion involved be abused."[10]

It has been said that this particular exception has caused most of the difficulty which now surrounds the Act:

> None could be expected to foresee at the time [of enactment] the monstrous joker now threatening to engulf the entire Act in a twilight zone—the vague and ambiguous exceptions from federal liability for 'due care in the execution of a statute' and 'performance of a discretionary function.'[11]

This "twilight zone" threat was brought on by the confusion of the judiciary concerning the purpose and scope of the discretionary function exception. Legislative history offered little aid in clarification,[12] and as a result, the early cases conflicted badly.

The primary source of legislative history for the exception is the 1945 *House of Representatives Report.*[13] The report notes the design of the exception to prevent liability for any injury caused by governmental projects when a statute or regulation authorizing the project is allegedly invalid, and the only basis of the action is that a private person would be liable under similar circumstances.[14] Other examples falling within the exception are also noted, specifically including claims against regulatory agencies for abuse of discretionary power.[15] Unfortunately, however, the legislative history makes no effort to define the meaning of "discretionary," and the stated examples furnished no guidelines for general application. The absence of helpful legislative authority to clarify the exception's purpose and scope was a source of concern to many writers who could not predict how far the courts would extend the exception.[16] Their concern was not unjustified, as the cases construing the exception later revealed.

Although the United States Supreme Court ruled soon after the FTCA's passage that the entire Act should be strictly construed

[10] 28 U.S.C. § 2680(a) (1970).

[11] Stomswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U. INTRA. L. REV. 41, 42 (1955).

[12] *See generally* Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 83 (1968).

[13] H.R. REP. No. 1287, 79th Cong., 1st Sess. 1 (1945).

[14] *Id.* at 5-6.

[15] *Id.*

[16] Reynolds, *supra* note 12, at 84.

against the government,[17] the early cases involving the discretionary function exception seemed to evidence little of this stern attitude. Some courts noted that since the words "discretionary function" were selected only after considering the separation of powers doctrine, *all* matters involving administrative discretion were within the exception.[18] Following this "hands-off" doctrine, the exception was extended to cover situations where only minimal discretion was involved.[19] This reasoning led to a rule that the exception should be strictly construed against the *citizen*, since by its enactment Congress specified situations in which governmental immunity was to be preserved.[20]

Other courts, however, made efforts to limit the extent of the exception's application by adopting a doctrine emphasizing governmental liability when discretionary policy decisions were negligently implemented.[21] The general rule was stated that when a decision has been made to do an act, the government must use reasonable care in the performance of that act. Any injury sustained through negligent implementation of the policy decision would result in liability, despite the exercise of discretion in the original decision.[22] This interpretation of the exception resembles the "good samaritan"

[17] *See* United States v. Aetna Cas. & Surety Co., 338 U.S. 366 (1949).

[18] *See* Coates v. United States, 181 F.2d 816 (8th Cir. 1950). Separation of Powers does appear to have been a motivating force behind the exception, since it was designed to emphasize the need for judicial restraint in matters involving administrative discretion. *See Hearings on H.R. 5373 & 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess., ser. 13, at 29 (1942); Peck, *A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956).

[19] *See, e.g.*, Mid-Central Fish Co. v. United States, 112 F. Supp. 792 (W.D. Mo. 1953), *aff'd sub nom.*, Nat'l Mfg. Co. v. United States, 210 F.2d 263 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954) (breach of statutory duty to provide correct weather information held to be within the exception).

[20] *See* Toledo v. United States, 95 F. Supp. 838 (D.P.R. 1951).

[21] *See generally*, Reynolds, *supra* note 12, at 90.

[22] Costley v. United States, 181 F.2d 723 (5th Cir. 1950); *see also* Grigalauskas v. United States, 103 F. Supp. 543 (D. Mass. 1951), *aff'd*, 195 F.2d 494 (1st Cir. 1952) (hospital negligence resulted in injury to child at birth); United States v. Gray, 199 F.2d 239 (10th Cir. 1952) (mental patient negligently treated at Government institution); Hambleton v. United States, 87 F. Supp. 994 (W.D. Wash. 1949), *rev'd on other grounds*, 185 F.2d 564 (9th Cir. 1950) (Army sergeant interrogated a civilian until she became ill); Hernandez v. United States, 112 F. Supp. 369 (D. Hawaii 1953) (Government employees erected a roadblock and failed to give adequate warning); Dishman v. United States, 93 F. Supp. 567) (D. Md. 1950) (veteran's hospital employee poured carbolic acid in a patient's ear).

doctrine extant in other areas of tort law, whereby once a person decides to do an act, he is bound to use reasonable care in its performance.[23]

With multiple interpretations of the exception announced and endorsed by the courts, and no real guidelines available for the application of either construction, courts construing the exception were increasingly faced with conflicting precedents.[24] It was at such a time that the United States Supreme Court first considered the purpose and scope of the exception.

Dalehite v. United States[25] marked the Court's endorsement of a broad construction of the exception. Arising out of the great Texas City disaster of 1947, which involved explosions and fires occurring after the government's loading of ships with combustible fertilizer, *Dalehite* involved allegations of negligence against not only government officials who had planned the loading and shipment, but also employees involved in the actual bagging and loading of the dangerous materials. In holding against the plaintiffs on all counts, the Court noted that the discretionary determinations of executives and administrators were within the exception, *as well as the acts and failures of employees in carrying out those discretionary plans.*[26] Although liability was acknowledged to exist for negligent execution at the "operational" level,[27] the *Dalehite* Court found that the employees in that case exercised some discretion in specifying the labels and bills of lading; hence, their actions were excepted from liability.[28]

The dissent in *Dalehite* found the majority opinion much too broad. In a scathing criticism, Mr. Justice Jackson asserted that the careless execution of a discretionary judgment should not be excepted from liability.[29] If mere housekeeping chores such as the handling, loading, and bagging of combustibles were made the

[23] *See generally* PROSSER, HANDBOOK OF THE LAW OF TORTS 168-69 (4th ed. 1971).

[24] One case even evidenced confusion as to what constituted a discretionary *function. See* Avina v. United States, 115 F. Supp. 579 (W.D. Tex. 1953) (paradoxically holding that a government canal itself is a discretionary function).

[25] 346 U.S. 15 (1953).

[26] *Id.* at 35-36.

[27] *Id.* at 42.

[28] *Id.* at 41.

[29] *Id.* at 57-58.

subject of the exception, he asserted, "the doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can only do little wrongs.' "[30]

Much confusion existed in the lower courts as to which interpretation of the exception *Dalehite* had actually endorsed. Some held that the Court had supported a broad interpretation of "discretionary" which would include all acts involving judgment, no matter how slight.[31] Others asserted that the case had established a more limited interpretation, excepting those acts performed on a policy-making "planning" level, but not protecting mere execution of policy decisions on the "operational" level.[32] Each test pre-

[30] *Id.* at 60. Legal writers also criticized the majority opinion. *See* Comment, *Federal Tort Claims Act: A More Liberal Approach Indicated*, 22 MO. L. REV. 48, 70-71 (1957); Note, *Discretionary Exception Under Federal Tort Claims Act: Sovereign Immunity Dies A Slow Death*, 4 DUKE B.J. 34 (1954); Note, 32 TEX. L. REV. 474 (1954).

[31] *See* Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967) *and* Goddard v. District of Columbia Redev. Land Agency, 287 F.2d 343 (D.C. Cir. 1961) (manner and procedure of executing condemnations held discretionary); Ashley v. United States, 215 F. Supp. 39 (D. Neb. 1963), *aff'd per curiam*, 326 F.2d 499 (8th Cir. 1964) (handling of a bothersome park bear excepted); United States v. Morrell, 331 F.2d 498 (10th Cir. 1964), Powell v. United States, 233 F.2d 851 (10th Cir. 1956) *and* Chournos v. United States, 193 F.2d 321 (10th Cir. 1951) (issuance of grazing permits within the exception); Harris v. United States, 205 F.2d 765 (10th Cir. 1953), *noted at* 22 GEO. WASH. L. REV. 496 (1954) (choice of which particular herbicide to use for destruction of trees on Government property held a discretionary function); Colorado Ins. Group, Inc. v. United States, 216 F. Supp. 787 (D. Colo. 1963) (actions of the SEC while participating in corporate reorganizations excepted); Cooley v. United States, 172 F. Supp. 385 (D.S.D. 1959) *and* McGillic v. United States, 153 F. Supp. 565 (D.N.D. 1957) (construction and maintenance of a dam held discretionary); F. & M. Schaefer Brewing Co. v. United States, 121 F. Supp. 322 (E.D.N.Y. 1954) (conducting of dredging operations excepted).

[32] The "planning-operational" approach has found significant support in cases involving air traffic control. *See* Eastern Airlines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd*, 350 U.S. 907 (1955), *noted in* 33 J. AIR L. & COM. 185 (1967) (day-to-day operation of air traffic system not a discretionary function); *accord*: United Airlines v. Weiner, 335 F.2d 379 (9th Cir. 1964), *noted in* 31 J. AIR L. & COM. 269 (1965); Tilley v. Delta Airlines, Inc., 249 F. Supp. 696 (D.S.C. 1966); *cf.* Ingham v. Eastern Airlines, Inc., 373 F.2d 227 (2d Cir. 1967); *but cf.* Rowe v. United States, 272 F. Supp. 462 (W.D. Pa. 1964) (dicta); Kullberg v. United States, 271 F. Supp. 788 (W.D. Pa. 1964) (dicta); Braniff Airways, Inc. v. United States, 203 F. Supp. 602 (S.D. Fla. 1961). Other aviation cases have also followed the planning-operational test. *See* Wenninger v. United States, 234 F. Supp. 499 (D. Del. 1964), *aff'd*, 352 F.2d 523 (3d Cir. 1965) (disregard of governmental policy regarding issuance of weather notices held actionable); Wildwood Mink Ranch v. United States, 218 F. Supp. 67 (D. Minn. 1963) (Negligent choice of course and altitude of flights, resulting in sonic boom damage, not excepted).

sented serious problems in application: the former because of its excessive breadth,[33] and the latter because of the lack of effective guidelines for determining where the "planning" level ends and the "operational" level begins.[34]

Despite the confusion created by *Dalehite* it seemed certain that the Court had effectively indicated its disposition away from any "good samaritan" interpretation by specifically refusing to set limits on discretion. Two years later however, the Court decided to reconsider, perhaps in response to the intense criticism of the *Dalehite* opinion.[35] In *Indian Towing v. United States*,[36] the Court, as dicta, cited its approval of the "good samaritan" interpretation by noting that after the government had exercised its discretion to operate a lighthouse, it was obligated to use due care to keep the light in good working order. The Court's remarks concerning the exception made the validity of the broad interpretation of *Dalehite* doubtful,[37] prompting some writers to claim that the "radical language" of *Dalehite* had been overruled.[38] Since the issue of the exception was not directly before the Court, however, a conclusion that *Dalehite* was overturned seems unjustified.[39] Nevertheless, *Indian Towing* and later cases did evidence a trend in the attitude of the Court in favor of a more limited interpretation of the exception and implied a readiness to accept a "good samaritan" approach.

Despite opportunity to do so,[40] the Court has not yet directly

[33] Reynolds, *supra* note 12, at 110.

[34] *Id.* at 106. Examples were still the main source of clarification, and even these were in conflict. *Compare* Jemison v. The Duplex, 163 F. Supp. 947 (S.D. Ala. 1958) *with* F. & M. Schaefer Brewing Co. v. United States, 121 F. Supp. 322 (E.D.N.Y. 1954).

[35] Comment, *Judicial Interpretation of the Federal Tort Claims Act*, 14 AM. U. L. REV. 200, 206 (1965).

[36] 350 U.S. 61 (1955).

[37] *The Supreme Court 1955 Term*, 70 HARV. L. REV. 83, 136-37 (1956).

[38] *See* Comment, *Federal Tort Claims Act, supra* note 30, at 72.

[39] In *Indian Towing* the Government had conceded that no discretionary function was involved and that liability existed for some governmental activities at the operational level. The basic issue before the Court was whether uniquely governmental activities would be actionable.

[40] *See* Eastern Airlines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955); *cf.* Rayonier, Inc. v. United States, 352 U.S. 315 (1957). Although the "good samaritan" rationale of *Indian Towing* is still acknowledged by many courts, its use has been more sporadic in recent years (possibly due to significant development of the planning-operational approach). *See* Ingham v. Eastern Airlines, Inc., 373 F.2d 227 (2d Cir. 1967) (failure to warn pilot of

approved application of the "good samaritan" rule; nor has it conclusively chosen to support either of the other interpretations. The district court in *Hoffman* was, therefore, faced with the choice confronting any present day court considering the discretionary function exception: which existing interpretation is proper? The *Hoffman* court chose to apply the planning-operational interpretation, and in so doing followed the trend of the judiciary in developing effective guidelines for application of the discretionary function exception. Although the court did not extensively enumerate its reasons for preferring the planning-operational construction over the other interpretations, it may safely be presumed that it concluded the chosen construction offered the most secure precedental support and the best developed guidelines for application to the given fact situation. The case development of the constructions set forth by *Dalehite* and *Indian Towing* shows a clear trend toward a limited approach to the exception, and this movement has found favor with legal writers.[41]

Although the Government cited cases in *Hoffman* which emphasized a broad interpretation of the exception,[42] the court clearly rejected the broad construction as inapplicable to the facts of the case.[43] It is noteworthy that the *Hoffman* decision does not express *complete* disfavor for the broad interpretation; rather, the court merely states that such an interpretation is not suited for application in *all* situations.[44]

Hoffman recognized the emergence of these dual interpretations by citing the 1968 case of *Coastwise Packet Company v. United States.*[45] *Coastwise Packet* involved an action brought against the

hazardous weather conditions actionable); Fair v. United States, 234 F.2d 288 (5th Cir. 1956), Friedland v. United States, 209 F. Supp. 684 (D. Mass. 1962), Lange v. United States, 179 F. Supp. 777 (N.D.N.Y. 1960) (dealing with negligent treatment at Government hospitals); United States v. Lawter, 219 F.2d 559 (5th Cir. 1955) (negligence in rescue operations held actionable).

[41] *See, e.g.*, Reynolds, *supra* note 12, at 125-32; *But see* Clark, *Discretionary Function and Official Immunity: Judicial Forays Into Sanctuaries From Tort Liability*, 16 A.F.L. REV. 33, 40 (1974); Peck, *supra* note 18 at 219; Note, 42 J. AIR L. & COM. 227 (1976).

[42] The Government cited the grazing permit cases, *supra* note 31, to support the broad proposition that the granting and denial of licenses is discretionary under all circumstances. 398 F. Supp. at 539.

[43] *Id.*

[44] *Id.*

[45] 398 F.2d 77 (1st Cir. 1968).

Coast Guard for delay in the granting of a certificate of inspection, alleging the unreasonableness of the certification standards. In finding that the Coast Guard's actions were excepted from suit as discretionary functions, the court noted:

> Plaintiff's is not a case where there was a single, known, objective standard which, because of administrative negligence, the Coast Guard failed to apply. In such an area there might be questions [as to the availability of the exception]. When no standard exists, then the process of certifying, insofar as it involves groping for a standard, is within the discretionary exemption of the Act.[46]

In choosing a limited interpretation, the *Hoffman* court cited *Marr v. United States*,[47] a suit against the CAB for negligence. In that case the plaintiff contended that the CAB had been negligent in issuing a certificate of economic authority to a particular carrier and in licensing a particular pilot, neither being qualified. The government claimed that the actions fell within the discretionary function exception. In refusing to dismiss the action, the court noted that while the establishment of requirements for pilots and aircraft and of methods for determining whether those requirements have been met is an excepted discretionary function, *"the carrying out of those requirements and methods in some instances may not be discretionary."* (Emphasis added)[48]

Under these precedents, the crucial determination to be made by a court considering the discretionary function exception is whether the *facts* of the case suit a broad or limited interpretation. However, merely stating that factual considerations may in some instances merit a more limited construction of the exception leaves a significant question unanswered: what particular facts will dictate application of a limited approach? *Hoffman* states the general rule that governmental immunity via the discretionary function exception will be limited in situations where the governmental action involves the matching of clear standards against given facts. In such a case, the action is not a discretionary function, but mere

[46] *Id.* at 79.

[47] 307 F. Supp. 930 (E.D. Okla. 1969).

[48] *Id.* at 931. In order for the court to determine whether the acts in question were operational or discretionary, plaintiff was ordered to furnish additional information. After plaintiff amended the complaint to allege CAB failure to promulgate effective regulations, the court dismissed the action, stating the alleged acts were discretionary in nature. *Id.* at 932.

operational execution, and the Government will be liable for any injury proximately caused by its unauthorized disregard of existing standards.[49]

These factual distinctions are further clarified in *Hendry v. United States*,[50] which was expressly followed in *Hoffman*. In *Hendry* the plaintiff alleged that the Coast Guard had negligently withheld his license on the basis of a faulty psychological determination. The court disagreed that the alleged negligence was excepted as a discretionary function, noting that although a broader interpretation might be suitable in some situations, "[*W*]*here the grant involves nothing more than the matching of facts against a clear rule or standard, the grant will be considered operational and not discretionary.*"[51] The *Hoffman* court followed *Hendry*, adopting its interpretation of the planning-operational construction originated in *Dalehite*. *Hendry* specifically noted that *Dalehite* seemed to subject to suit those governmental decisions which apply an existing rule to given facts.[52]

A basic factor in determining whether a complaint alleged negligent performance of a discretionary function was found to be whether the petition attacked the *nature* of the promulgated rules or whether it attacked the *manner* in which the rules were applied.[53] The court in *Hoffman* agreed that promulgation of regulations was a discretionary function, but refused to hold their application discretionary under all circumstances. In particular, the court found that since the regulation specifying conditions for ATCO certification set forth clearly ascertainable standards to be applied to given fact situations, application of that regulation involved no exercise of discretion by the examiner.[54]

Another factor the *Hoffman* court considered was whether the decision-maker necessarily looked to considerations of public policy.[55] No exception would be allowed in cases where the governing regulation did not appear to convey discretion to identify and con-

[49] 398 F. Supp. at 539.

[50] 418 F.2d 774 (2d Cir. 1969).

[51] *Id.* at 782.

[52] *Id.* at 783.

[53] 398 F. Supp. at 538.

[54] *Id.* at 539.

[55] *Id.* at 538.

sider public safety goals. The FAA regulation under consideration evidenced no grant of authority to the examiner to consider public policy—the regulation was formulated *after* considerations of public policy had been made, and no authority was granted to the examiner to inject his own policy views into its application. The court emphasized that a claim of negligent application of this particular regulation did not involve a discretionary function. By its very terms, the regulation connoted a lack of discretion: "To be eligible for an ATCO certificate . . . a person *must* [emphasis added] meet a readily ascertainable standard; he must hold CAB economic authority. Negligence in the application of this regulation would render the Government liable." (Brackets in original)[56]

Hoffman is one of the first cases to allow suit against a governmental agency for alleged wrongful licensing.[57] Although previous cases dealt with refusals to license,[58] it seems logical to extend liability to cover wrongful acts as well as omissions. Governmental liability has been recognized for other wrongful acts, and it would be illogical to afford wrongful licensing any special treatment.

The first practical effects of *Hoffman* will likely be noted in changes in FAA procedures. Two courses of action are available to the agency: it may strictly enforce the regulation and require all carriers to have CAB economic authority before licensing, or the regulation may be amended to allow for licensing in the absence of CAB approval. Should the FAA choose to strictly enforce its licensing requirements, the effect on carriers operating without CAB economic authority will be great. The carriers will be forced either to upgrade their standards to meet CAB specifications or be grounded for failure to comply with FAA licensing requirements. Either event would be costly to the carrier, although the public would likely benefit from having safer aircraft. If the regulation is

[56] *Id.* at 539. The court noted that the result of the case would be different had the regulation not been as specific, giving the FAA discretion in its application.

[57] *See also* Rapp v. Eastern Air Lines, 264 F. Supp. 673 (E.D. Pa. 1967), *aff'd*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968); Gibbs v. United States, 251 F. Supp. 391 (E.D. Tenn. 1965); *See generally*, Comment, *Federal Tort Claims Act—Governmental Liability for Negligent Chart Publication & Aircraft Certification*, 19 WAYNE L. REV. 1201 (1973).

[58] *See* Coastwise Packet Company v. United States, 398 F.2d 77 (1st Cir. 1968); Hendry v. United States, 418 F.2d 774 (2d Cir. 1969); Duncan v. United States, 355 F. Supp. 1167 (D.D.C. 1973); *see also* cases cited *supra* note 31 (involving issuance of grazing permits).

amended, it will probably delete the prerequisite of CAB economic authority. The regulation could instruct FAA personnel not to deny ATCO certification because of an applicant's failure to meet CAB standards, but rather to refer the violations to the CAB for enforcement. Such an amendment would merely formalize the procedure of the FAA prior to *Hoffman*,[59] and would bar subsequent suits on facts similar to *Hoffman*.[60]

On the broader scale, *Hoffman* may be seen as a further step towards clarifying the purpose and scope of the discretionary function exception of the Federal Tort Claims Act. The case follows the current trend of the judiciary to impose meaningful limitations on governmental immunity, thus affording citizen relief in accord with the original intentions of the Act. The adoption and application of the "clear standards" test in *Hoffman v. United States* offers needed clarification to an area which has long been engulfed in vague and ambiguous interpretations.

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[59] The facts of the case revealed the FAA regulations were disregarded pursuant to an express FAA notice instructing examiners to ignore any lack of CAB certification in licensing. The court noted that the result would have been different had the Government produced authority supporting regulational modification by any method short of repeal or formal amendment. No authority was produced, and the court concluded that since the informal notice and the regulation were inconsistent, the regulation should prevail. 398 F. Supp. at 539.

[60] Since promulgation of regulations and amendments thereto is a discretionary function, had the FAA notice in *Hoffman* been a valid means of regulational amendment, suit would have been barred. *Id.*

Current Literature