

# TAKING CONGRESS’S WORDS SERIOUSLY: TOWARDS A SOUND CONSTRUCTION OF NEPA’S LONG OVERLOOKED INTERPRETATION MANDATE

BY

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*This Article analyzes subsection 102(1) of the National Environmental Policy Act (NEPA) which directs that “to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . .” After a discussion of the plain language and the (pithy) legislative history of this often overlooked yet nonetheless significant Congressional mandate, the Article examines the substantive policies that NEPA sets forth as a guidepost for regulatory and statutory interpretation and implementation. It also focuses on whom the subsection applies to and the likely meaning of the phrase “to the fullest extent possible.” Finally, drawing for illustration on a recently decided United States Supreme Court case, National Ass’n of Home Builders v. Defenders of Wildlife, the Article explores the rich potential of this portion of NEPA as a mechanism for illuminating and harmonizing the requirements of federal environmental statutes.*

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## I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> was one of the first federal environmental enactments of the modern environmental era. Best known for its environmental impact statement (EIS) requirement,<sup>2</sup> and its establishment of the Council on Environmental Quality (CEQ) in the Executive Branch,<sup>3</sup> NEPA has been the basis of numerous lawsuits regarding federal governmental projects that will or may have an adverse impact on the human environment.<sup>4</sup> Despite that fact, however, and notwithstanding the significance of the statute as a catalyst to the study and analysis of environmental trends and the environmental consequences of major federal actions, some of NEPA's provisions have been persistently overlooked by the federal courts and the attorneys who appear before them.

This Article focuses on one such provision: subsection 102(1).<sup>5</sup> Surprisingly (at least to this author), in the thirty-nine years since NEPA's enactment, that brief subsection has been directly applied only six times in judicial opinions.<sup>6</sup>

In Part II of this Article, I will discuss the plain language of NEPA subsection 102(1) and its pithy (and unenlightening) legislative history, and I will identify several important questions that the provision appears to raise. In the following three Parts I will consider each of those questions in more detail, taking account of the (minimal) judicial construction thus far given to subsection 102(1). Those three portions of this Article examine in turn what policies are "set forth" in the statute as a guidepost for regulatory and statutory interpretations, to whom the NEPA interpretation provision applies, and what is meant by the statutory phrase "to the fullest extent possible." Finally, drawing for illustration on the United States Supreme Court's decision in *National Ass'n of Home Builders v. Defenders of Wildlife*<sup>7</sup>—a recently decided environmental case in which subsection 102(1) played no part—I will examine how NEPA's interpretation requirement can and may be applied in future disputes where federal judges are called upon to explain (and harmonize) the meaning of environmental legislation.

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<sup>1</sup> 42 U.S.C. §§ 4321–4370f (2000).

<sup>2</sup> *Id.* § 4332(2)(c).

<sup>3</sup> *Id.* § 4342.

<sup>4</sup> As of September 11, 2008, the Lexis-Nexis database contained 5602 references to NEPA in federal court opinions (search terms: nepa or "91-190" or "83 Stat. 852" or ("42 USC!" pre/3 (432! or 433! or

434! or 435! or 436! or 437a or 437b or 437c or 437d or 437e or 437f)) or

"National Environmental Policy Act"). The EIS requirement established in 42 U.S.C. § 4332 (2)(c) was referred to 2473 times in the same set of judicial decisions (search within the original result set for "42 U.S.C. § 4332(2)(c)").

<sup>5</sup> 42 U.S.C. § 4332(1) (2000). In this Article, I will refer to this provision as "the NEPA interpretation mandate," "the NEPA interpretation requirement," or "the NEPA interpretation provision."

<sup>6</sup> Each of the six opinions will be examined in Section IV of this Article. This count does not include the few cases in which courts have cited or quoted from subsection 102(1) but have neither applied nor analyzed the provision. *See, e.g.,* Natural Res. Def. Council, Inc. v. Sec. & Exch. Comm'n., 432 F. Supp. 1190, 1198 (D.D.C. 1977), *rev'd on other grounds*, 606 F.2d 1031 (D.C. Cir. 1979). *See also* I-291 Why? Ass'n v. Burns, 372 F. Supp. 223, 227 n.3 (D. Conn. 1974), *aff'd*, 517 F.2d 1077 (2nd Cir. 1975).

<sup>7</sup> 127 S. Ct. 2518 (2007).

## II. NEPA'S INTERPRETATION MANDATE: PLAIN LANGUAGE, LEGISLATIVE HISTORY, AND UNANSWERED QUESTIONS

The interpretation provision of NEPA is notable for its brevity. Subsection 102(1) simply states that “[t]he Congress authorizes and directs that, to the fullest extent possible[,] the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . .”<sup>8</sup>

On a careful reading of this sentence, several of its aspects are immediately apparent. First, the subsection is unmistakably mandatory. In clear terms, Congress has not merely urged or suggested that the interpretation and administration of the laws referred to in the provision be consistent with NEPA's policies, it has *required* that to occur. The subsection employs the verb “shall,” as opposed to “may” to describe what must occur, traditionally an indication of an intended command as opposed to a mere aspiration.<sup>9</sup> The first sentence of section 102 also indicates that Congress both “authorizes and *directs*” that the sort of legal interpretation and administration that the provision mentions must take place.<sup>10</sup> That phraseology provides a further unambiguous indication that what Congress refers to in the provision is non-discretionary.

Second, the subsection makes plain that what is to be construed and administered in accordance with NEPA's policies are “the policies, regulations, and public laws of the United States.”<sup>11</sup> This set of laws is referred to without any term of qualification. Thus, at a minimum, subsection 102(1) directs that the nation's *environmental* laws—certainly including but by no means limited to NEPA itself—must be administered and interpreted in the fashion indicated in the provision. These laws are, after all, unquestionably public laws. Notably, however, the language of subsection 102(1) is not limited in its applicability to federal environmental policies, regulations, and enactments. By its terms, the subsection appears to encompass, without limitation, *all* federal legal authorities that may be described as policies, regulations, or public laws.

Third, NEPA's interpretation mandate plainly directs that the required legal interpretation and administration it refers to must take place “to the fullest extent possible.”<sup>12</sup> I will further consider the ways courts have thus far construed that phrase—mostly in the context of another NEPA provision, subsection 102(2)—shortly. Nonetheless, even a cursory reading of that phrase makes it evident that in subsection 102(1) Congress was requiring a wholehearted and vigorous application of the policies set forth in NEPA. Partial and/or conditional implementation of NEPA's policies, or a failure or refusal to apply them to some particular subset of

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<sup>8</sup> 42 U.S.C. § 4332(1) (2000).

<sup>9</sup> When used in statutes, the word “shall” connotes having a duty or being required to do something. BLACK'S LAW DICTIONARY 1407 (8th ed. 2004). This definitional proposition is well supported in case law. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Ass'n of Civil Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994).

<sup>10</sup> 42 U.S.C. § 4332 (2000) (emphasis added).

<sup>11</sup> *Id.* § 4332(1).

<sup>12</sup> *Id.* § 4332.

national policies, regulations, or public laws, seems far less than the statute demands.

Notwithstanding these self-explanatory features, however, the plain language of subsection 102(1) standing alone leaves certain questions unresolved. It is unclear from the provision itself precisely which policies “set forth in this chapter” are to provide the basis for interpreting and administering federal policies, regulations, and public laws. Moreover, NEPA’s interpretation directive does not indicate, at least in so many words, to whom the provision applies. Finally, the phrase “to the fullest extent possible” is not squarely defined, either in subsection 102(1) or elsewhere in the statute.

The legislative history of NEPA sheds little light on these questions. Like the interpretation requirement of NEPA itself, the legislative history is pithy. As Professor Daniel R. Mandelker observes, “NEPA’s legislative history provides some but only limited guidance on the meaning of the statute. . . . The legislative history of the statute is important more for what is omitted than what is included in the way of explanation.”<sup>13</sup> Mandelker’s observation appears particularly apt with respect to subsection 102(1).

In fact, the only reference to section 102 in NEPA’s legislative history may be found in the report of the conference committee on the bill that was later enacted.<sup>14</sup> That conference report makes no specific mention of subsection 102(1). It refers instead to section 102 in its entirety, a section including NEPA’s EIS requirement along with the statute’s interpretation provision. The report’s comments seem mostly to pertain to the EIS portion of section 102:

The purpose of [section 102] is to make it clear that each agency of the Federal Government shall comply with the directives set out in sub-paragraphs (A) through (H) unless the existing law applicable to such agency’s operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However as to other activities of that agency, compliance is required. . . . [T]he language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section “to the fullest extent possible” under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.<sup>15</sup>

As several commentators have explained, the conference committee version of NEPA reflected a House-Senate compromise, in which the House conferees agreed to drop a House-passed amendment that would have limited the impact of NEPA’s EIS requirement on federal agencies.<sup>16</sup> The deleted language would have provided

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<sup>13</sup> DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* 2-5 to 2-6 (2d ed. 1998).

<sup>14</sup> H.R. REP. NO. 91-765, at 9–10 (1969) (Conf. Rep.), *reprinted in* 1969 U.S.C.C.A.N. 2769–70.

<sup>15</sup> *Id.*

<sup>16</sup> For detailed examinations of NEPA’s legislative history, see *Pacific Legal Found. v. Andrus*, 657 F.2d 829 (6th Cir. 1981); Daniel Dreyfus & Helen Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243 (1976); Lynton Caldwell, *Is NEPA Inherently Self-Defeating?*, 9 ENVTL. L. REP. 50,001 (1979).

that “nothing in this Act shall increase, decrease, or change any responsibility of any Federal agency or official.”<sup>17</sup>

Conceivably, it might be argued that the language of the NEPA conference report reflects a consensus among the conferees that NEPA’s interpretation mandate applies *only* to federal agencies. Such a reading of the conference report, however, appears strained and incorrect. Although NEPA’s sponsors were undoubtedly concerned with the possibility that federal agencies would attempt to avoid NEPA’s action-forcing requirements, absolutely nothing in the statute’s legislative history indicates that subsection 102(1) was not *also* intended to apply to any *other* federal governmental entity that is charged with the interpretation of federal law. In particular, as I will discuss forthwith, the statute’s text and the judicial interpretations rendered thus far support the conclusion that the provision squarely applies to the federal judiciary as well as to federal agencies and departments.<sup>18</sup>

### III. WHAT POLICIES DOES NEPA SET FORTH?

Although subsection 102(1) does not itself define the “policies set forth in the chapter” to which the interpretation mandate applies, it seems plain that those policies were fully expressed in sections 2 and 101 of NEPA, the portions of the statute to which that phrase obviously refers.

Section 2 provides:

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.<sup>19</sup>

In subsection 101(a), Congress declared that:

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.<sup>20</sup>

Moreover, at subsection 101(b) NEPA provides that:

[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve

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<sup>17</sup> H.R. REP. NO. 91-765 at 10.

<sup>18</sup> See *infra* notes 27–59 and accompanying text.

<sup>19</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000).

<sup>20</sup> *Id.* § 4331(a).

and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.<sup>21</sup>

Some may contend that in contrast to subsection 101(a)—which describes the goals it enumerates as “the continuing policy of the Federal Government”—the goals expressed in subsection 101(b) were not meant to be a basis for the interpretation of policies, regulations, and public laws authorized and directed in subsection 102(1). Under this view, subsection 101(b) is a mere announcement of “the continuing responsibility of the Federal Government,” as opposed to a statement of “policy,” and thus not within the scope of subsection 102(1). This notion, however, seems entirely devoid of merit.

*Black's Law Dictionary* defines the term “policy” as “[t]he general principles by which a government is guided in its management of public affairs.”<sup>22</sup> An express statement of the “continuing responsibility” of a government appears to fall squarely within that definition.

Moreover, the idea that subsection 101(b) is a legislative declaration of policy finds authoritative support in the only opinion of the United States Supreme Court in which subsection 102(1) was even minimally analyzed. In *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*,<sup>23</sup> the Court considered a challenge by a group of law students to a decision of the Interstate Commerce Commission not to suspend a surcharge on railroad freight rates without preparing a NEPA EIS.<sup>24</sup> The Court reversed a United States District Court decision that had set aside the Commission's order pending the preparation of an EIS.<sup>25</sup> However, in a footnote, the Court made a significant observation with respect to subsection 102(1):

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<sup>21</sup> *Id.* § 4331(b).

<sup>22</sup> BLACK'S LAW DICTIONARY 1178 (8th ed. 2004).

<sup>23</sup> 422 U.S. 289 (1975).

<sup>24</sup> *Id.* at 297–98.

<sup>25</sup> *Id.* at 328.

Part of NEPA provides that “the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter,” 42 U.S.C. § 4332 (1); and *one of the policies of the chapter is to “approach the maximum attainable recycling of depletable resources.”*<sup>26</sup>

Since maximizing resource recycling is one of the six goals listed in subsection 101(b), this statement carries the clear (and logically supportable) implication that all of the considerations set forth in that subsection are indeed “policies of this chapter”—policies that were meant to provide a principled basis for administering and interpreting other federal policies, regulations, and statutes.

#### IV. TO WHOM DOES THE INTERPRETATION MANDATE APPLY?

As noted previously, subsection 102(1) does not indicate on its face whether the type of interpretation (of policies, regulations, and public laws) that it directs applies to implementation by federal courts as well as federal agencies, and NEPA’s legislative history fails to clarify that question. Nonetheless, there is good reason to conclude that it is indeed the case.

As we have seen, subsection 102(1) directs that interpretation of the public laws of the United States, along with the nation’s policies and regulations, is to be in accordance with NEPA’s policies. The language of this subsection contrasts sharply with that of subsection 102(2), NEPA’s EIS provision, which contains a specific set of mandates that are made expressly applicable to “all agencies of the Federal Government.”<sup>27</sup> The omission of any reference to “all agencies of the Federal Government” in subsection 102(1) appears highly significant. Had Congress wished to limit the applicability of the interpretation mandate to federal agencies, it could surely have drafted the subsection to declare that “all agencies of the Federal Government shall interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in this chapter.” Its refusal to do so carries an unmistakable implication: subsection 102(1) applies to *all* governmental entities in *all* branches of the federal government that are responsible for the interpretation as well as the administration of our nation’s policies, regulations, and public laws.

In a common law system, it is axiomatic that one of the responsibilities of judges is to interpret the meaning of statutes. Federal agencies, of course, have an important role to play in the administration of federal laws; and (at least in some circumstances) courts will defer to the interpretations that those agencies make of federal statutes that the agencies have been directed to implement.<sup>28</sup> Nevertheless, courts have construed legislative enactments since the earliest days of the Republic, a fact that Congress was undoubtedly aware of at the time that NEPA was passed into law. In view of this, it seems logical to read the nonspecific language of subsection 102(1) as a broad instruction—to *courts and agencies alike*—that they are to interpret federal statutes in accordance with NEPA’s stated policies.

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<sup>26</sup> *Id.* at 317 n.18 (emphasis added).

<sup>27</sup> 42 U.S.C. § 4332(2) (2000).

<sup>28</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. (Chevron)*, 467 U.S. 837, 842–44 (1984).

To date, no federal court has reached a contrary conclusion. In fact, as discussed in more detail below, the still small body of decided cases in which the interpretation mandate of NEPA has been directly discussed or applied have all focused only on the extent to which subsection 102(1) imposes a requirement on federal agencies and officials. No reported case has yet addressed the question of whether the interpretation mandate applies to the federal judiciary.

The first judicial decision to apply subsection 102(1) that was not subsequently reversed was decided approximately two years following the passage of NEPA.<sup>29</sup> In *Arlington Coalition on Transportation v. Volpe*,<sup>30</sup> the Fourth Circuit Court of Appeals considered whether the United States Department of Transportation was required to prepare an EIS with regard to a proposed, federally funded interstate highway project.<sup>31</sup> Rejecting a United States District Court opinion holding that the NEPA EIS requirement did not apply to the challenged road project, the Fourth Circuit cited subsection 102(1) in support of the conclusion that the Transportation Department was, indeed, subject to NEPA.<sup>32</sup> Referring to the interpretation requirement, and quoting directly from subsections 102(a) and (b), the court noted the particular importance of prompt compliance with NEPA procedures when highway projects were involved.<sup>33</sup> It enjoined “any and all further work” on the highway project in question “pending preparation and consideration of the environmental report.”<sup>34</sup>

One of the next reported decisions in which subsection 102(1) of NEPA played any part was *National Helium Corp. v. Morton*,<sup>35</sup> in which the court maintained the effectiveness of an injunction barring the United States Department of Interior from terminating a national conservation program for helium gas.<sup>36</sup> Most of the court’s opinion concerned whether the court had jurisdiction in the case, the appropriate scope and standards for judicial review, and whether the final EIS prepared by the Department satisfied NEPA’s EIS requirement.<sup>37</sup> However, in dicta, the court quoted the language contained in subsection 102(1) in support of the notion that NEPA required the Secretary of Interior to give a broad, environmentally sound, reading to another federal public law, the Helium Act.<sup>38</sup> It stated that “[a]lthough it is unnecessary to reach the Secretary’s ultimate decision in this case . . . the Court would advise the Secretary to carefully review the Helium Act *as a whole*, and especially in light of its legislative history.”<sup>39</sup>

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<sup>29</sup> As the United States District Court decision in *Arlington Coalition on Transportation v. Volpe*, was later reversed, I have not referred to it as the “first case” in this area. *Arlington Coal. on Transp. v. Volpe*, 332 F. Supp. 1218 (E.D. Va. 1971), *rev’d*, 458 F.2d 1323 (4th Cir. 1972).

<sup>30</sup> 458 F.2d 1323 (4th Cir. 1972).

<sup>31</sup> *Id.* at 1326–27.

<sup>32</sup> *Id.* at 1332.

<sup>33</sup> *Id.* at 1332–33.

<sup>34</sup> *Id.* at 1334.

<sup>35</sup> 361 F. Supp. 78 (D. Kan. 1973), *rev’d on other grounds*, 486 F.2d 995 (10th Cir. 1973).

<sup>36</sup> *Id.* at 107–08.

<sup>37</sup> *Id.* at 90–99.

<sup>38</sup> *Id.* at 93 (Helium Act Amendments of 1960, 50 U.S.C. §§ 167–167m (2000)).

<sup>39</sup> *Id.*



*Sierra Club v. Froehlke*,<sup>40</sup> another federal court decision citing NEPA's interpretation requirement, also focused on the extent to which NEPA applies to the activities of a federal agency. At issue in *Froehlke* was whether the Act required the United States Army Corps of Engineers to prepare an EIS prior to constructing one component of a lock and dam project in South Texas.<sup>41</sup> As in the *National Helium Corp.* case, much of the court's opinion involved the applicability of the NEPA EIS requirement to the project. Nonetheless, in discussing the extent to which NEPA requires federal agencies to re-evaluate their policies and procedures on a regular basis, the court quoted subsection 102(1) and a related portion of NEPA's legislative history:

Section 102 directs all agencies of the federal government, to the "fullest extent possible," to ensure that the "policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter. . . ." This sets a high standard and obligates the agencies continually to review and reappraise existing policies and procedures, not only in light of the developing law, but also in light of the developing agency awareness of environmental factors as issues arise at project sites. Congress sought to ensure that "no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid compliance."<sup>42</sup>

In the next reported decision that made reference to NEPA subsection 102(1), however, the interpretation requirement played a different (and lesser) role. *Carolina Action v. Simon*<sup>43</sup> raised the issue of whether the Secretary of the Treasury was required to prepare an EIS when he disbursed federal monies for the construction of a local city hall and judicial building pursuant to the federal Revenue Sharing Act.<sup>44</sup> The *Carolina Action* court answered that question in the negative, concluding that NEPA does not apply to a project in which "the only federal participation is the distribution of revenue sharing funds to aid local communities in financing the project."<sup>45</sup> The court noted that, in contrast to block grant programs, the objective of the Revenue Sharing Act was to return revenues collected by the federal government to state and local governments with "no strings" attached, and it mentioned that NEPA's legislative history had indicated that "Congress did not contemplate NEPA's applicability to unrestricted block grants of federal funds to states in which there was no continuing federal role in the expenditure of the funds at the local level."<sup>46</sup> In a footnote, the court added:

The Court is cognizant of the argument that 42 U.S.C. §4332(1) requires agency compliance with NEPA except where compliance is expressly prohibited or

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<sup>40</sup> 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd on other grounds sub nom.* *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

<sup>41</sup> *Id.* at 1311.

<sup>42</sup> *Id.* at 1338 (quoting National Environmental Policy Act of 1969, 42 U.S.C. § 4332(1) (Supp. 1972) and H.R. REP. NO. 91-765, at 10 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2770).

<sup>43</sup> 389 F. Supp. 1244 (M.D.N.C. 1975), *aff'd*, 522 F.2d 295 (4th Cir. 1975).

<sup>44</sup> *Id.* at 1245 (the Revenue Sharing Act referenced by the court is the amended State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 6702-6720 (2000)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1248-49.

impossible. . . . This argument could not be made with respect to the Revenue Sharing Act the purpose of which was clearly to preclude federal intervention not specifically required in the Act.”<sup>47</sup>

*People v. City of South Lake Tahoe (South Lake Tahoe)*,<sup>48</sup> the next federal court decision to consider the meaning of NEPA’s interpretation requirement, concerned a very different question: whether NEPA applies to the activities of a bi-state governmental agency created by interstate compact. In *South Lake Tahoe* the California Department of Transportation sought to enjoin such an agency, the Tahoe Regional Planning Agency (TRPA), from constructing a portion of a proposed loop road connecting the California and Nevada portions of Lake Tahoe without first complying with NEPA.<sup>49</sup> Among other things, the plaintiff contended that the interstate compact that had created the TRPA was a “public [law] of the United States,” and that, by virtue of subsection 102(1), TRPA was required to administer the compact in accordance with NEPA.<sup>50</sup> The *South Lake Tahoe* court was not persuaded. After summarizing the plaintiff’s argument, it declared:

Plaintiff misconstrues the purpose of section 102(1), for it was intended to ensure that federal agencies subject to NEPA by virtue of section 102(2) would interpret the NEPA provisions as a supplement to their existing authority and as a mandate to view traditional policies in light of NEPA’s national environmental objectives. The phrase “to the fullest extent possible” was intended to make sure that federal agencies must comply with NEPA’s requirements unless the law applicable to those agencies expressly prohibits or makes compliance impossible. . . . Thus we reject plaintiff’s contention that section 102(1) is relevant to the present issue, and for the foregoing reasons we hold that TRPA is not subject to the provisions of NEPA.<sup>51</sup>

*Natural Resources Defense Council, Inc. v. Berkland*,<sup>52</sup> an additional reported case involving the NEPA interpretation requirement, was an action brought by environmental organizations who sought a declaratory judgment empowering the United States Department of Interior to reject applications from private parties for “preference right leases” to mine coal on federal lands on the basis of environmental considerations. Under a program established pursuant to the Mineral Leasing Act of 1920,<sup>53</sup> the Department had granted applications for prospecting permits where the existence of coal deposits was not yet known.<sup>54</sup> A prospecting permittee could then apply to the Department for a preference right lease, allowing the actual extraction of coal, which would be granted automatically if the private party could demonstrate that the federal land in question contained commercial quantities of coal.<sup>55</sup>

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<sup>47</sup> *Id.* at 1249 n.14.

<sup>48</sup> 466 F. Supp. 527 (E.D. Cal. 1978).

<sup>49</sup> *Id.* at 530.

<sup>50</sup> *Id.* at 536.

<sup>51</sup> *Id.*

<sup>52</sup> 609 F.2d 553 (D.C. Cir. 1979).

<sup>53</sup> 30 U.S.C. §§ 181–287 (2000).

<sup>54</sup> *Berkland*, 609 F.2d at 555.

<sup>55</sup> *Id.* at 556.

Dismissing the plaintiff's contentions, the *Berklund* court concluded that subsection 102(1) of NEPA did not give the Department of Interior the authority to reject lease applications by prospective permittees who have discovered commercially useful coal.<sup>56</sup> The D.C. Circuit Court of Appeals noted that the Department required scrutiny and analysis of environmental impacts before it stipulated lease terms and approved specific mining plans.<sup>57</sup> Thus, the Department had abided by NEPA's requirements "to the fullest extent possible."<sup>58</sup> The court stated that "not even the policies of NEPA, which are of the utmost importance to the survival of our environment, can rewrite [the Mineral Leasing Act] to undermine the property rights of prospecting permittee lease applicants."<sup>59</sup>

As the foregoing summary of cases suggests, the judicial interpretations of subsection 102(1) to date have been few in number. Thus far the federal courts have not yet considered whether the NEPA interpretation mandate applies to their own duties as an authoritative interpreter of federal public law. Most of the courts that have discussed the question to any extent have seen NEPA's subsection 102(1) as a direction to federal agencies to administer federal policies, regulations and statutes with sensitivity to environmental concerns. In a few, perhaps anomalous, cases—in which federal involvement was quite minimal, or an established administrative procedure had established what appeared to be a private "right"—the courts have reached a contrary conclusion. Nonetheless, upon a close reading of all judicial cases that refer to subsection 102(1), it seems fair to conclude that the words of that provision alone provide the best (and only) indication of whether its mandate extends to federal judges as well as executive branch officials. As discussed above, it appears that it does.

#### V. WHAT IS MEANT BY "TO THE FULLEST EXTENT POSSIBLE?"

As we have observed, section 102 of NEPA requires that both the interpretation and administration of federal laws and policies and the EIS requirement imposed on all federal agencies be carried out in accord with NEPA's policies "to the fullest extent possible." Thus far that phrase has not been judicially construed as it pertains specifically to subsection 102(1). Nonetheless, federal courts have addressed the meaning of "to the fullest extent possible" as those words apply to the duty of federal agencies to prepare and consider EISs. Those decisions appear to give some guidance—indirect and imprecise though it may be—for the future application of subsection 102(1).

The most influential interpretation of "to the fullest extent possible" was made soon after NEPA's enactment by Judge Skelly Wright in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission* (*Calvert Cliffs*).<sup>60</sup> At issue in *Calvert Cliffs* was the validity of a set of rules that the United States Atomic Energy Commission (AEC) had adopted governing the consideration

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<sup>56</sup> *Id.* at 557.

<sup>57</sup> *Id.* at 558.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 559.

<sup>60</sup> 449 F.2d 1109 (D.C. Cir. 1971).

of environmental issues.<sup>61</sup> Among other things, those rules prohibited outside parties from raising nonradiological environmental issues at any AEC hearing for which a public notice had been given prior to March 4, 1971.<sup>62</sup> They allowed AEC hearing boards to ignore environmental factors unless they were affirmatively raised by staff members or outside parties, and they prohibited hearing boards from independently evaluating environmental factors if other agencies had certified that their own environmental standards were satisfied.<sup>63</sup> The AEC's rules also provided that when a construction permit for a facility had been issued before NEPA compliance was required, the Commission would not formally consider environmental factors or require modifications in the proposed facility until the time of issuance of an operating license.<sup>64</sup>

Declaring that "the Commission's crabbed interpretation of NEPA makes a mockery of the Act,"<sup>65</sup> the D.C. Circuit emphatically rejected the regulations at issue. The court opined that even though the general substantive policy of the Act is a flexible one, which leaves room for a responsible exercise of discretion, NEPA's procedural provisions establish a "strict standard of compliance."<sup>66</sup>

With respect to the meaning of "to the fullest extent possible," the D.C. Circuit took a strong stance:

We must stress as forcefully as possible that this language does not provide an escape hatch for foot dragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.<sup>67</sup>

The D.C. Circuit went on to observe that

[c]ompliance to the "*fullest*" possible extent would seem to demand that environmental issues be considered at every important stage in the decision-making process concerning a particular action—at every stage where an overall balancing of environmental factors is applicable and where alterations might be made in the proposed action to minimize environmental costs.<sup>68</sup>

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<sup>61</sup> *Id.* at 1111–12 (framing the argument as being between petitioners claiming the new rules "fail to satisfy the rigor demanded by NEPA," and the Commission contending "the rules challenged by petitioners fall well within the broad scope of the Act").

<sup>62</sup> *Id.* at 1117.

<sup>63</sup> *Id.* at 1116–17 (noting that, under one rule at issue, "[a]lthough environmental factors must be considered . . . such factors need not be considered by the hearing board conducting an independent review of staff recommendations, unless affirmatively raised by outside parties or staff members," while under another rule at issue, "the hearing board is prohibited from conducting an independent evaluation and balancing certain environmental factors if other responsible agencies have already certified that their own environmental standards are satisfied by the proposed federal action").

<sup>64</sup> *Id.* at 1117.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1112.

<sup>67</sup> *Id.* at 1114.

<sup>68</sup> *Id.* at 1118.

The *Calvert Cliffs* early, strict view of the meaning of “to the fullest extent possible” has proved influential in judicial construction of NEPA’s EIS requirement.<sup>69</sup> The case’s implications for the interpretation of the NEPA interpretation requirement may be somewhat less clear. Nonetheless, at minimum, *Calvert Cliffs* does contain a firm indication that “to the fullest extent possible” is statutory language of considerable significance. It is a phrase that federal courts and agencies should not (and must not) ignore as they interpret NEPA.

In a decision handed down five years later, *Flint Ridge Development Co. v. Scenic Rivers Ass’n of Oklahoma (Flint Ridge)*,<sup>70</sup> the U.S. Supreme Court accepted *Calvert Cliffs*’s overall interpretation of “to the fullest extent possible” while adding a significant caveat. *Flint Ridge* concerned the question of whether the United States Department of Housing and Urban Development (HUD) was required to prepare an EIS whenever it receives a “statement of record” from a potential land developer pursuant to the Interstate Land Sales Full Disclosures Act.<sup>71</sup> Such a statement—which must contain various information needed by potential purchasers to prevent false and deceptive practices in the interstate sale of undeveloped tracts of land—will become automatically effective under that Act on the thirtieth day after filing, unless HUD determines that it is incomplete or materially inaccurate.<sup>72</sup>

The Court held that under these circumstances HUD was not required to prepare an EIS.<sup>73</sup> Citing NEPA’s legislative history, the Court implicitly accepted *Calvert Cliffs*’s notion that the “to the fullest extent possible” language of section 102 reflected a congressional mandate that had to be implemented in a serious and resolute manner:

NEPA’s instruction that all federal agencies comply with the impact statement requirement—and with all the other requirements of §102—“to the fullest extent possible” . . . is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuttle.<sup>74</sup>

At the same time, however, the Court concluded that NEPA must give way where there is a “clear and unavoidable statutory conflict.”<sup>75</sup> The Court reasoned that such a conflict existed in *Flint Ridge* since (as a practical matter) HUD could not actually comply with its statutory duty to allow statements of record to go into

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<sup>69</sup> The *Calvert Cliffs* decision has been followed by four United States Courts of Appeals and a United States District Court. *See, e.g.,* Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971); Greene County Planning Bd. v. Fed. Power Comm’n, 455 F.2d 412, 420 (2nd Cir. 1972); Davis v. Morton, 469 F.2d 593, 596–98 (10th Cir. 1972); Shiffler v. Schlesinger, 548 F.2d 96, 100–01 (3rd Cir. 1977); Save Our Sound Fisheries Ass’n v. Callaway, 387 F. Supp. 292, 309 (D.R.I. 1974). It was most recently cited with approval in an administrative decision of the Nuclear Regulatory Commission. Dominion Nuclear N. Anna, L.L.C., 65 N.R.C. 539, 558–59, 602, 614–16 (2007).

<sup>70</sup> 426 U.S. 776 (1976).

<sup>71</sup> *Id.* at 778 (Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701–1720 (2006)).

<sup>72</sup> *Id.* at 781.

<sup>73</sup> *Id.* at 791.

<sup>74</sup> *Id.* at 787.

<sup>75</sup> *Id.* at 788.

effect within thirty days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare EISs on proposed developments.<sup>76</sup>

If one accepts the premise that subsection 102(1) must be taken at face value, as a clear directive that federal courts and administrative agencies construe federal public laws consistent with NEPA's environmental policies to the fullest extent possible, what guidance, if any, do these decided cases provide for its future application?

Certainly *Calvert Cliffs* and the NEPA EIS cases that followed, along with the Supreme Court's opinion in *Flint Ridge*, make clear that the words "to the fullest extent possible" are far from empty rhetoric. They are, as the *Flint Ridge* Court opined, a "deliberate command" that is "neither accidental nor hyperbolic."<sup>77</sup> At the same time, however, "to the fullest extent possible" appears to mean something less than "under all circumstances and notwithstanding all other considerations." Where another statute imposes a conflicting duty that makes it simply *impossible* to implement NEPA's policies without effectively voiding that other statute's mandate, the other statute must take precedence.<sup>78</sup> Presumably, such situations will arise infrequently. Nonetheless, in circumstances where a statutory conflict is "clear and unavoidable," NEPA must give way.

#### VI. HOW NEPA'S INTERPRETATION MANDATE MAY APPLY IN ENVIRONMENTAL CASES: *NATIONAL ASS'N OF HOME BUILDERS V. DEFENDERS OF WILDLIFE* AS AN EXAMPLE

Assuming, as I have suggested above, that federal courts as well as agencies must apply NEPA's policies to the fullest extent possible when they interpret and administer federal public laws, federal judges will be called upon to apply those policies as they discern the meanings of particular pieces of federal legislation and the specific ways in which the requirements of various federal statutes relate to one another. As we have noted, neither previous judicial analyses of the NEPA interpretation requirement, nor the statute's brief legislative history, provide more than a highly limited basis for predicting how the courts will approach that task. It is thus difficult to state with any certainty how its application will affect the future course of statutory interpretation. Nonetheless, the plain language of the provision does appear to at least allow for some educated speculation and surmise.

Given its facial breadth, disputes requiring the application of subsection 102(1) may certainly arise in a plethora of areas. However, one context in which judicial implementation of the provision seems particularly likely to be called for is with respect to the construction of federal *environmental* legislation.<sup>79</sup> Federal

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<sup>76</sup> *Id.* at 791.

<sup>77</sup> *Id.* at 787.

<sup>78</sup> *Id.* at 787-88 (quoting 115 CONG. REC. 39,703 (1969)).

<sup>79</sup> Questions of statutory interpretation have arisen in several contexts in environmental law. In *Lignite Energy Council v. U.S. Environmental Protection Agency*, the United States Environmental Protection Agency was found to have acted within its authority under section 111 of the Clean Air Act in establishing new nitrogen oxide standards as directed by subsection 407f(c)(1) of the Clean Air Act. 198 F.3d 930, 932 (D.C. Cir. 1999) (per curiam) (interpreting 42 U.S.C. §§ 7411, 7651f(c)(1) (1994)). *Redwing Carriers, Inc. v. Saraland Apartments* contrasted the nature of cost recovery liability under subsection 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act

environmental statutes often emerge from congressional committees with varying jurisdictions, and most of them focus specifically on environmental issues that concern discrete environmental media or problems (e.g., water quality, hazardous waste, air quality, protection of endangered species, etc.). Moreover, such statutes often reflect compromises between and among competing interests and policy considerations. They are thus, at times, opaque and ambiguous—and their respective mandatory features are sometimes in conflict.

In the remainder of this Article, I will examine a recent decision of the U.S. Supreme Court, *National Ass'n of Home Builders v. Defenders of Wildlife* (*Home Builders*),<sup>80</sup> a case in which the Court was called upon to discern the meaning of two apparently conflicting pieces of federal environmental public law: the Clean Water Act<sup>81</sup> and the Endangered Species Act.<sup>82</sup> Although the *Home Builders* decision was controversial—it gave rise to a five to four split among the Justices—I will not attempt to assay the relative merits of the Court's majority and dissenting opinions. Instead, I will analyze how a reasoned application of NEPA's interpretation mandate might have affected the opinion of the Court in that case, and—quite possibly and logically—its ultimate outcome.

The issue of statutory interpretation raised in *Home Builders* was, as Justice Alito stated in his majority opinion, “a question that requires us to mediate a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands.”<sup>83</sup> Subsection 402(b) of the Clean Water Act provides that the United States Environmental Protection Agency (EPA) shall approve a state's application to administer the National Pollution Discharge Elimination System (NPDES) permit program in that state unless the agency determines that each of nine criteria set forth in the statute have not been satisfied.<sup>84</sup> However, subsection 7(a)(2) of the Endangered Species Act directs that federal agencies shall insure that their actions do not jeopardize endangered species.<sup>85</sup>

In *Home Builders*, Arizona officials applied to EPA for authorization to administer their state's NPDES program.<sup>86</sup> Upon receipt of that application, pursuant to the Endangered Species Act, EPA initiated a consultation with the United States Fish and Wildlife Service (FWS) to determine whether EPA approval of Arizona's application would jeopardize the continued existence of any

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(CERCLA) with the nature of contribution liability under subsection 113(f) of CERCLA. 94 F.3d 1489, 1496 n.7, 1512–14 (11th Cir. 1996) (contrasting 42 U.S.C. §§ 9607(a), 9613(f) (1994 & Supp. IV 1998)). *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.* held that, under deferential review, EPA was not prohibited by subsection 301(f) of the Clean Water Act from issuing fundamentally different factory variances for pollutants listed as toxic under the Act. 470 U.S. 116, 134 (1985) (interpreting 33 U.S.C. § 1311(1) (1994)). See generally Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 279 (1996).

<sup>80</sup> 127 S. Ct. 2518 (2007).

<sup>81</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

<sup>82</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

<sup>83</sup> *Home Builders*, 127 S. Ct. at 2531. In his dissent, Justice Stevens described the case as presenting “a problem of conflicting ‘shalls.’” *Id.* at 2538 (Stevens, J., dissenting).

<sup>84</sup> 33 U.S.C. § 1342(b) (2000).

<sup>85</sup> 16 U.S.C. § 1536(a)(2) (2006).

<sup>86</sup> *Home Builders*, 127 S. Ct. at 2526.

endangered or threatened species.<sup>87</sup> The regional FWS office that EPA contacted expressed concern that transferring NPDES authority to the State of Arizona could result in the issuance of more permits to discharge water pollutants (and consequently more development) without any consideration or mitigation of the possible adverse effects of those actions on certain endangered upland species.<sup>88</sup> EPA disagreed however, taking the view that the potential harm to endangered species that might result from the transfer of permitting authority to Arizona was “attenuated.”<sup>89</sup> The Agency argued that it lacked any legal authority to disapprove a state’s transfer request where the requesting state had satisfied all of the criteria for state permit authorization set forth in the Clean Water Act.<sup>90</sup>

The interagency dispute was referred to the agencies’ national offices for resolution and, in the context of an Endangered Species Act “biological opinion,” the FWS altered its position, opining that EPA’s continuing oversight of Arizona’s NPDES permit program would adequately protect listed species and their habitats after the proposed transfer took place.<sup>91</sup> EPA approved Arizona’s application and the Defenders of Wildlife brought suit, alleging that EPA’s approval did not comply with the standards of the Endangered Species Act.<sup>92</sup>

The Ninth Circuit accepted the Defenders of Wildlife’s position.<sup>93</sup> With one judge dissenting, that court held that EPA’s approval of the transfer had been arbitrary and capricious because EPA had relied upon legally contradictory positions regarding its Endangered Species Act duties.<sup>94</sup> In the court’s view, that Act provides EPA with an affirmative grant of authority to protect threatened and endangered species, and in effect adds a criterion to those specified in the Clean Water Act for the transfer of NPDES permit authority to a state.<sup>95</sup>

After granting certiorari, the U.S. Supreme Court reversed.<sup>96</sup> The Court rejected the Ninth Circuit’s conclusion that EPA’s transfer of permit authority decision was arbitrary and capricious.<sup>97</sup> It also reasoned that the purported inconsistency in FWS’s position amounted to no more than a mere change of mind—something that agencies are entitled to do so long as they follow the proper procedures.<sup>98</sup>

Turning to the substantive question regarding the interplay of the legislative commands of the Clean Water Act and the Endangered Species Act, the Court noted that the Endangered Species Act had been enacted later than the Clean Water Act, and that while a later-enacted statute can sometimes operate to amend or repeal an earlier-enacted statutory provision, repeals by implication are not favored

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2527.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Defenders of Wildlife v. EPA*, 420 F.3d 946, 950 (9th Cir. 2005), *rev’d sub nom.* *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 959.

<sup>95</sup> *Id.* at 967.

<sup>96</sup> *Home Builders*, 127 S. Ct. at 2525.

<sup>97</sup> *Id.* at 2529.

<sup>98</sup> *Id.* at 2528–32.



and will not be presumed absent a clear and manifest legislative intent that Congress so intended.<sup>99</sup> As the Court saw it, reading the Endangered Species Act to engraft an additional criterion for the transfer of NPDES authority onto the criteria specifically mandated by the Clean Water Act would amount to a repeal by implication of Clean Water Act subsection 402(b).<sup>100</sup>

The Court went on to cite a Department of Interior/Department of Commerce regulation, 50 C.F.R. § 402.03, which provides that “[Endangered Species Act] §7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.”<sup>101</sup> Finding EPA’s transfer of NPDES permitting authority to be mandatory, as opposed to a discretionary act, the Court reasoned that subsection 7(a)(2)’s nonjeopardy duty did not attach.<sup>102</sup> It thus deferred to the “expert interpretation” of the implementing agency, describing it as reasonable in light of the statute’s text and the overall statutory scheme, and therefore entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron)*.<sup>103</sup>

Finally, the Court dismissed the contention that its prior decision in *Tennessee Valley Authority v. Hill*<sup>104</sup> supported a conflicting view.<sup>105</sup> Even though the Court had stated in *Hill* that the ordinary meaning of section 7 of the Endangered Species Act contained no exceptions, and that section 7 represented a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies, here the Court distinguished *Hill* on the basis that it had been decided prior to the adoption of 50 C.F.R. § 402.03.<sup>106</sup> The Court also opined that *Hill* had involved a nonmandatory federal action (the construction of a dam).<sup>107</sup> Thus, it concluded that *Hill* “supports the position, expressed in § 402.03, that the ESA’s no-jeopardy mandate applies to every *discretionary* agency action—regardless of the expense or burden its application might impose. But that case did not speak to the question whether § 7(a)(2) applies to *non-discretionary* actions, like the one at issue here.”<sup>108</sup>

Justice Stevens, joined by Justices Ginsburg, Souter, and Breyer, dissented. In Stevens’s view, the Court’s ruling in *Hill* that the Endangered Species Act has first priority over other federal actions was “unequivocal,” and nothing in that earlier case had stated or suggested that a federal agency’s section 7 obligations do not apply to mandatory agency actions that would threaten the extinction of an endangered species.<sup>109</sup> Stevens read 50 C.F.R. § 402.03 as not limiting the scope of subsection 7(a)(2), which he believes is applicable to *all* federal actions, whether or not they are mandatory or discretionary.<sup>110</sup> In his opinion, Endangered Species Act

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<sup>99</sup> *Id.* at 2532.

<sup>100</sup> *Id.* at 2533.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 2536.

<sup>103</sup> 467 U.S. 837, 843 (1984); *Home Builders*, 127 S. Ct. at 2525.

<sup>104</sup> 437 U.S. 153 (1978).

<sup>105</sup> *Home Builders*, 127 S. Ct. at 2536.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 2537.

<sup>109</sup> *Id.* at 2439–41 (Stevens, J., dissenting).

<sup>110</sup> *Id.* at 2541–43 (Stevens, J., dissenting).

subsection 7(a)(2) and Clean Water Act subsection 402(b) could be reconciled through the mandated consultation process, which may result in a finding that no listed species will be affected by a proposed transfer of permit grating authority or that such an action will not jeopardize a species' continued existence—or which may allow for a “reasonably and prudent alternative” to the proposed permit authority transfer that will avoid statutory conflict.<sup>111</sup> Stevens viewed the Memorandum of Agreement, requiring states to work with the EPA before receiving NPDES permit authorization, as a second way to harmonize the conflicting statutory mandates.<sup>112</sup>

Moreover, as Stevens saw it, EPA's authority to transfer permitting authority under subsection 402(b) is actually discretionary, rather than mandatory, since the Clean Water Act requires EPA to exercise judgment in determining whether a state has demonstrated that it will satisfy the requisite criteria for receiving authorization to issue permits.<sup>113</sup> Thus, he stated that “because EPA's approval of a State application to administer an NPDES program entails significant—indeed, abounding—discretion, I would find that § 7(a)(2) of the ESA applies even under the Court's own flawed theory of these cases.”<sup>114</sup>

Notwithstanding its strongly arguable applicability, neither the majority opinion nor either of the dissenting opinions in the *Home Builders* case mentioned NEPA's interpretation mandate. Nonetheless, it is interesting to consider the role that subsection 102(1) *might* have played in the decision if the Supreme Court Justices had chosen to apply it.

In that regard, at least three possibilities seem possible. First, the Court might have referred to the NEPA interpretation provision in passing, yet ruled that it has no applicability to *either* federal agencies or federal courts. For the reasons already expressed, such a reading would be a significant distortion of the text of NEPA and a failure to respect prior judicial interpretations of subsection 102(1). It would also disregard the statute's legislative history.

Second, the Court might have ruled that NEPA's interpretation requirement applies *only* to federal agencies but *not* to judges. As noted previously, this reading too would appear to fall, short of what the words of the statute demand.<sup>115</sup> Nonetheless, as explained below, even that unduly minimalistic reading of NEPA's interpretation mandate would seem likely to change profoundly the reasoning of the *Home Builders* case.

In applying NEPA subsection 102(1) to the facts in *Home Builders*, it must first be noted that NEPA's enactment (in 1969) preceded the passage of both the Clean Water Act and the Endangered Species Act. Therefore, if one applies the principle, cited by Justice Alito in *Home Builders*, that repeals by implication are disfavored, and will not be presumed unless it is clear that was Congress's intention, neither the Clean Water Act nor the Endangered Species Act can be deemed to supersede NEPA's interpretation mandate.

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<sup>111</sup> *Id.* at 2544–46 (Stevens, J., dissenting).

<sup>112</sup> *Id.* at 2547–48 (Stevens, J., dissenting).

<sup>113</sup> *Id.* at 2548–50 (Stevens, J., dissenting).

<sup>114</sup> *Id.* at 2550 (Stevens, J., dissenting).

<sup>115</sup> *See supra* notes 27–59 and accompanying text.

Quite clearly, NEPA subsection 102(1) is not negated by the Clean Water Act's NEPA exemption provision, subsection 511(c), which declares:

(c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act, and the issuance of a permit under section 402 of this Act for the discharge of any pollutant by a new source as defined in section 306 of this Act, no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

(2) Nothing in the National Environmental Policy Act of 1969 shall be deemed to –

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this Act.<sup>116</sup>

Although (with some exceptions) subsection 511(c) obviously exempts EPA from the NEPA EIS requirement, this provision makes no mention whatsoever of subsection 102(1) of NEPA. It is thus evident that, by implication, Congress intended for the NEPA interpretation requirement to apply to EPA, in its administration of Clean Water Act programs, as fully as that mandate applies to other federal agencies.

After disposing of these threshold issues, one would presume that in applying NEPA subsection 102(1), the *Home Builders* Court would turn to the substantive policies of NEPA themselves to determine precisely how they must be applied “to the fullest extent possible” to the apparently conflicting provisions of the Clean Water Act and the Endangered Species Act that were an issue in *Home Builders*. Clearly some of the policies set forth in NEPA, for example establishing a Council on Environmental Quality, enriching the understanding of the ecological systems and natural resources important to the Nation, and approaching the maximum attainable recycling of depletable resources,<sup>117</sup> have no bearing on the *Home Builders* dispute. On the other hand, however, it is equally evident that encouraging “productive and enjoyable harmony between man and his environment,” creating and maintaining “conditions under which man and nature can exist in productive harmony,” and fulfilling “the responsibilities of each generation as trustee of the environment for succeeding generations,” are quite pertinent to the statutory conflict in issue in *Home Builders*.<sup>118</sup>

The question which then arises is whether the interpretation given by EPA and the FWS to subsection 402(b) of the Clean Water Act and subsection 7(a)(2) of the

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<sup>116</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1371(c) (2000).

<sup>117</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331(b)(6), 4342 (2000).

<sup>118</sup> *Id.* §§ 4321, 4331(a), 4331(b)(1).

Endangered Species Act is consistent with those NEPA policies to the fullest extent possible. At least in my view, the answer is no.

Undoubtedly, the express objectives, purposes, policies and goals of *both* of the statutes in question are fully consistent with NEPA's substantive policies.<sup>119</sup> Nonetheless, a mere comparison of those policies does little to assist a court in resolving the "problem of conflicting shalls" that the *Home Builders* case presented.

A more fruitful approach, I submit, is to compare the specific conflicting statutory provisions at issue in order to determine the relative extent to which each of them comports with NEPA's declared policies. Clean Water Act subsection 402(b), while an important procedural mandate, does not directly further productive harmony between man and nature, nor does it squarely further NEPA's policy of fulfilling the responsibility of each generation as an environmental trustee. At best, subsection 402(b) is intended to create a set of orderly procedures in which the responsibility for implementing the Clean Water Act's NPDES program is delegated from EPA to individual states in an evenhanded, environmentally sound fashion.<sup>120</sup> Subsection 402(b) establishes a means of dividing responsibility for permit administration between federal and state officials. Nonetheless, compliance with its commands is not *clearly* linked with protecting and improving environmental quality.

In contrast, subsection 7(a) of the Endangered Species Act establishes an interagency consultation and opinion preparation process that *squarely* aims at preventing federal governmental actions which will "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species."<sup>121</sup> In view of its clear and direct relationship with the environmentally protective purposes of the Endangered Species Act—and thus with the policies of NEPA that federal agencies are mandated to apply to the fullest extent possible—subsection 7(a) appears discernibly more "in accordance with the policies set forth in NEPA" than is the procedurally-focused subsection 402(b) of the Clean Water Act.

A final issue that the Court would have to face, if it adopted the premise that NEPA subsection 102(1) applies to agencies exclusively and not to courts, is the

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<sup>119</sup> It seems beyond dispute, for example, that the "objective" of the Clean Water Act is in accord with NEPA's policies of creating productive harmony between man and nature and fulfilling the trust responsibilities of each generation towards succeeding generations. 33 U.S.C. § 1251(a) (2000) (stating "the objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"); *see also supra* note 11 and accompanying text. The Clean Water Act's goals of eliminating the discharge of pollutants into navigable waters; protecting and propagating fish, shellfish and wildlife; and prohibiting the discharge of toxic pollutants in toxic amounts are also in accord with these NEPA policies. *See* 33 U.S.C. § 1251(a)(1)–(3) (2000) (stating CWA's goals). Similarly, NEPA's productive harmony and generational trust responsibility policies seem on all fours with both the stated "[p]urpose" of the Endangered Species Act "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species," and that Act's "[p]olicy" which, in relevant part, states that "all Federal departments and agencies shall seek to conserve endangered species and threatened species, and shall utilize their authorities in furtherance of the purposes of [the Endangered Species Act]." Endangered Species Act of 1973, 16 U.S.C. § 1531(b), 1531(c)(1) (2006).

<sup>120</sup> *See* 33 U.S.C. § 1342(b) (setting out the guidelines for state permit programs).

<sup>121</sup> 16 U.S.C. § 1536(a)(2).

extent to which *Chevron* compels the Court to defer to the interpretation of the Clean Water Act and the Endangered Species Act made by the EPA and challenged by the plaintiffs in *Home Builders*. In *Chevron*, the Supreme Court upheld a set of regulations promulgated by EPA under the Clean Air Act<sup>122</sup> that permitted states to treat all pollution-emitting devices within the same industrial grouping as though they were encased within a single “bubble.”<sup>123</sup> The Court ruled that in fashioning its “bubble policy” EPA had made a reasonable and permissible construction of the Clean Air Act.<sup>124</sup>

*Chevron* established the general principle that when a court reviews an agency’s construction of the statute the agency administers, the court must first ask whether Congress has directly spoken to the precise question at issue.<sup>125</sup> If so, the reviewing court and the agency “must give effect” to Congress’s “expressed intent.”<sup>126</sup> However, if the reviewing court determines that “Congress has not directly addressed the precise question at issue,” that court must defer to the agency’s statutory interpretation so long as the agency’s interpretation is reasonable and based upon “a permissible construction of the statute.”<sup>127</sup>

Particularly when viewed in light of NEPA subsection 102(1), the EPA statutory interpretation that was at issue in *Home Builders* seems an especially poor candidate for *Chevron* deference. NEPA’s interpretation mandate provides an unambiguous indication of Congress’s intention with respect to how federal agencies are to interpret public laws like the Clean Water Act and the Endangered Species Act. In subsection 102(1), Congress made plain that NEPA’s policies are to provide the substantive foundation for federal agency construction of those laws. Federal courts and agencies are thus duty-bound to “give effect” to Congress’s intentions in that regard.

Moreover, as noted by Justice Stevens in his dissenting opinion in *Home Builders*, EPA was not charged with administering the Endangered Species Act.<sup>128</sup> EPA’s interpretation of that statute is thus not entitled to deference under *Chevron* as that case itself defined the parameters of the *Chevron* doctrine.

Lastly, as noted above, the Court might have ruled that subsection 102(1) applies to *both* federal courts and federal agencies. In *Home Builders*, that approach would probably have resulted in an analysis substantially similar to the one presented above (i.e., premised on the notion that subsection 102(1) applies only to agencies and not directly to courts). To the extent that NEPA’s interpretation provision is binding on federal courts as well as agencies, judicial applications of NEPA policies in interpreting the apparently conflicting statutory provisions in question in *Home Builders* would seem to be all the more appropriate and necessary. Conversely, the argument that a reviewing court is bound to defer to EPA’s interpretation of Clean Water Act subsection 402(b) and Endangered Species Act subsection 7(a) would appear all the more specious and unsupportable.

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<sup>122</sup> 42 U.S.C. §§ 7401–7671q (2000).

<sup>123</sup> 467 U.S. 837, 859 (1984).

<sup>124</sup> *Id.* at 866.

<sup>125</sup> *Id.* at 842.

<sup>126</sup> *Id.* at 842–43.

<sup>127</sup> *Id.* at 843.

<sup>128</sup> *Home Builders*, 127 S. Ct. 2518, 2543–44 (2007) (Stevens, J., dissenting).

## VII. CONCLUSION

Subsection 102(1) of NEPA is indeed the “forgotten man” of that important environmental statute. Despite the emphatic clarity of its language, this brief subsection has been ignored by lawyers and federal judges in countless disputes in which it could have been—and arguably should have been—invoked, interpreted, and applied.

Nonetheless, the NEPA interpretation mandate may not be overlooked forever. As the U.S. Supreme Court’s decision in the *Home Builders* case illustrates, subsection 102(1) is rich in potential as the basis for a principled and harmonious elucidation of our nation’s statutory laws—particularly in respect to environmental legislation. In a time when the United States is faced with serious and pressing environmental challenges—some of them entirely domestic and others shared with the world at large—the forgotten directive of NEPA’s interpretation mandate may yet take its rightful place among the most influential precepts of U.S. environmental law.