SECTION 102(1) OF THE NATIONAL ENVIRONMENTAL POLICY ACT

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I. INTRODUCTION

The National Environmental Policy Act of 1969 ("NEPA") occupies a revered place in federal environmental law for several legitimate reasons. First, NEPA holds a position of primacy. Enacted on January 1, 1970, NEPA was the vanguard of the fleet of federal statutes enacted during the 1970s to protect the environment. Beyond that, NEPA crystallized an emerging political fervor. NEPA was anything but a sanitized tome reciting yet another adumbration of sterile mandates. Rather, unlike any other statutes, with the possible exception of the Wilderness Act of 1964, NEPA was a concise, explicit, indeed a soaring recitation of the philosophy underlying the environmental movement itself. NEPA was as much a tribute to the

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3. The pivotal political event that launched the environmental movement was Earth Day, which took place on April 22, 1970. When plans for Earth Day were originally announced in September 1969, Congress was considering the enactment of NEPA. The Conference Report prepared for the enactment of NEPA demonstrated Congress's awareness of this political awakening. Describing the environmental movement as "revolutionary," the Report commented on how broad sectors of society, and especially the nation's youth, were "taking up the banner of environmental awareness" and looking for "new environmental policies which reflect the full range of diverse values and amenities which man seeks from his environment." 115 Cong. Rec. 40,415, 40,417 (1969). As Congress considered enacting NEPA, it generated virtually no public opposition. H.R. Rep. No. 91-378, as reprinted in 1969 U.S.C.C.A.N. 2751, 2752.


5. See, e.g., 42 U.S.C. § 4331(b) (declaring the federal government to be "trustee of the environment for succeeding generations" and responsible for assuring "safe, healthful, productive, and aesthetically and culturally pleasing surroundings," and recognizing
virtues of environmental stewardship as it was a legislative proclamation. Finally, NEPA, with its dictate that the federal government must take environmental values into account across the vast spectrum of its activities, resonated as an ultimately sensible first legal expression of the then-nascent environmental movement. What better way to launch a national effort to protect the environment and conserve precious natural resources than by requiring the government to lead by example?6

For these reasons, and, it should be emphasized, for the reason of a judiciary that welcomed the statute with open arms,7 NEPA has in many ways realized its elevated purposes.8 NEPA has become a solid pillar in the world of environmental law,9 having dramatically altered the value of historic, natural and cultural resources). But see also 42 U.S.C. § 4331(c) (stopping short of announcing a statutory right in citizens to a clean and safe environment).


7. See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) (characterizing as a judicial duty the obligation of courts to assure NEPA is not disregarded by federal agencies).

8. In 1997, the Council Of Environmental Quality, the federal agency charged with oversight of NEPA, declared the statute's first twenty-five years to be a “success” because it both forced agencies to consider environmental factors and it brought the public into the decision making process. Council Of Environmental Quality, The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years (1997), http://www.nepa.gov/nepa/nepa25fn.pdf.

9. The United States Supreme Court has considered the statute fourteen times since its enactment. See Norton v. SW. Utah Wilderness Alliance, 542 U.S. 55 (2004) (determining supplementation of an EIS is necessary only if there remains some “major federal action” yet to occur); Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004) (declaring an EA need not consider environmental effects which the agency is powerless to prevent); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (stating NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or a duty to include a fully developed mitigation plan in an EIS; NEPA does not require “worst case” analysis); Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989) (deciding agency decision not to prepare supplemental EIS is reviewed under “arbitrary and capricious” standard of APA; courts must defer to informed discretion of agency on issues requiring high degree of technical expertise, but should independently review the record to assure that agency took the required “hard look”); Baltimore Gas & Electric Co. v. Natural Res. Defense Council, 462 U.S. 87 (1983) (stating while an agency must allow all significant environmental risks to be factored into a decision whether to undertake a proposed action, it may determine in a generic proceeding that a particular risk is insufficient to affect any individual decision, so long as that determination is not arbitrary and capricious); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) (providing contentions of psychological health damage caused by risk of accident at nuclear reactor are not cognizable under NEPA - for an effect to be cognizable there must be a reasonably close causal relationship between the effect and a change in the physical environment); Weinberger v. Catholic Action of Haw., 454 U.S. 139 (1981) (declaring since information relating to the storage of nuclear weapons is exempt from disclosure under the Freedom of Information Act, courts cannot require EIS on the possible storage of nuclear weapons at a facility; Ninth Circuit’s requirement of a “hypothetical EIS” in this situation is unsupported by the language of the statute); Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) (per
the way the government does business: consideration of environmental consequences has become a routine component of federal decision-making. That, in and of itself, was nothing short of a sea change.

The facilitating cause of this impressive impact is NEPA's procedural imperative. NEPA details a strict methodology for agencies to follow when they take actions that might significantly affect environmental quality. The tool NEPA established for these purposes is the environmental impact statement ("EIS"). An EIS is a document that, first and foremost, identifies environmental impacts anticipated to occur should the federal government proceed with a proposed course of action. The typical EIS also analyzes the gravity of those impacts and proposes alternatives that might serve to mitigate those im-

10. A clear indication of this impact is the frequency with which NEPA arises in litigation. A recent LexisNexis search in the federal courts library, using the search terms "National Environmental Policy Act," yielded more than 3000 citations (visited April 25, 2008). See also WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 817-18 (2d ed. 1994) (attesting to NEPA's production of "hundreds of injunctions, thousands of cases, tens of thousands of impact statements, hundreds of thousands of environmental assessments").

11. See, e.g., Methow Valley, 490 U.S. at 349 ("Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."). Note, however, that NEPA could have worked even a greater sea change than it has. The Methow Valley court characterized the statute as imposing no substantive obligations on federal agencies. Methow Valley, 490 U.S. at 351. See infra notes 67-78 and accompanying text.

13. Id.
The idea behind the EIS was a simple but profound one. Actions federal agencies take often affect environmental quality, and when they do, the effect is typically for the worse. Because of this, before an agency undertakes an endeavor that might degrade environmental quality, an agency ought to at least understand the environmental impacts its endeavor is likely to produce. Armed with that information, an agency can more rationally choose how to go forward with the proposed endeavor, if at all. And the agency's ultimate choice, whatever it may be, would be enriched by the decisionmaker's prior awareness of relevant environmental implications. EISs must accompany any agency proposal for legislation as well as any "major federal actions significantly affecting the quality of the human environment."

While the EIS requirement of section 102(2) of NEPA is the statute's most significant operational component, it is not its only one. NEPA sets forth a second imperative as well, in section 102(1) of the statute. Conceptually distinct and textually independent of the EIS provision of section 102(2), section 102(1) simply 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 . . . ." At first blush, this provision would seem to be of surpassing importance: by express terms, the section applies to any and all entities, including courts and federal agencies that engage in interpretation or administration of law or policy. Moreover, section 102(1) applies to each and every act of interpretation or administration of policies, regulations, and public law. As such, there should be literally thousands of occasions for the provision to play an important role. The role it plays, moreover, should be important because compliance with section 102(1) must be "to the fullest extent possible."

This latter injunction does not require perfection in how agencies fac-

14. Id.
15. See, e.g., Thomas v. Peterson, 753 F.2d 754, 760 (9th Cir. 1985) (stipulating that consideration of environmental impacts must take place "at the earliest possible time").
17. § 4332(1).
18. See, e.g., Montgomery v. Ellis, 364 F. Supp. 517, 533-34, (N.D. Ala. 1973) (commenting that the requirements of section 102(1) are "separate and additional" from those of section 102(2)(c)).
20. Id. In contrast, section 102(2), NEPA's EIS provision, applies only to federal agencies. § 4332(2).
21. § 4332(1).
But the history of NEPA demonstrates that section 102(1) has not been taken seriously. In the decades since NEPA became law, section 102(1) has been rarely invoked. Despite an early judicial testimonial to its virtues, the courts have welcomed this interpretive mandate with benign neglect, with lip service rather than serious regard. For one thing, the provision has never been the subject of a United States Supreme Court decision. By comparison, the Court has considered fourteen EIS cases. The circuit courts of appeal, moreover, have examined section 102(1) on only a smattering of occasions. At the dis-

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22. See, e.g., Envtl. Def. Fund v. Corps of Eng'rs of the U.S. Army (Envtl. Def. Fund I), 348 F. Supp. 916 (N.D. Miss. 1972), aff'd; 492 F.2d 1123 (5th Cir. 1974) ("If perfection were the standard, compliance would necessitate the accumulation of the sum total of scientific knowledge of the environmental elements affected by a proposal. It is unreasonable to impute to the Congress such an edict.").

23. The first circuit court case to discuss section 102(1) of NEPA was the famous decision Calvert Cliffs. See Calvert Cliffs, 449 F.2d at 1109. Decided in 1971, the Calvert Cliffs court focused predominantly on the issue of the role of the EIS in federal agency decision-making. But the case also offered some valuable commentary on section 102(1). As the Calvert Cliffs court put it, the section's greatest importance is that it plainly compels agencies to take environmental values into account. Id. at 1112. The decision went so far as to link section 102(1) with its counterpart, section 102(2), describing the latter section as a clarification of the section 102(1) obligation. Id. at 1112.

24. Many readers will recall the term, "benign neglect," which gained notoriety during the administration of President Richard Nixon. The President's urban affairs advisor, Daniel Patrick Moynihan, later a U.S. Senator representing the State of New York, had urged a political respite on the matter of race relations. As he stated it, "the issue of race could benefit from a period of benign neglect." The remark was seen, unfairly, as emblematic of a supposed administration policy to abandon the interests of members of the black community. Wikipedia.org, Benign Neglect, http://en.wikipedia.org/wiki/Benign_neglect (last visited Feb. 2, 2008).

25. See cases cited supra note 9.

26. This is not to say that the provision has not been frequently mentioned in circuit court judicial opinions. It does mean, however, that careful judicial examinations of the provision have been effectively absent. It also means that section 102(1) of NEPA has never been determinative of the outcome of a case. See, e.g., Calvert Cliffs, 449 F.2d at 1113; see also supra notes 13-25 and accompanying text (characterizing NEPA's EIS provision as a clarification of 42 U.S.C. § 4332(1)); Greene County Planning Bd. v. Fed. Power Comm'n., 455 F.2d 412, 426-27 (2d Cir. 1972) (acknowledging the idea that section 102(1) "buttressed[ed]" arguments in favor of interpreting agencies' organic authority broadly); Envtl. Def. Fund v. Corps of Eng'rs (Envtl. Def. Fund II), 492 F.2d 1123, 1139 (5th Cir. 1974) (speculating in dicta that the provision might provide the necessary "law to apply" so that the Administrative Procedure Act, 5 U.S.C. § 701 (2000), would authorize judicial review); Citizens for Balanced Env't. Transp. v. Volpe, 503 F.2d 601, 606 (2d Cir. 1974) (Winter, J., dissenting) (commenting that section 102(1) may be useful in determining when the question of whether an EIS is necessary under section 102(2)(c) is a close one); Natural Res. Def. Council v. Berklund, 609 F.2d 553, 558 (D.C. Cir. 1979) (rejecting the notion that section 102(1) authorizes federal agencies to deny a lease application in circumstances where the agency's organic law mandated the lease be issued). The 1980s brought two more circuit court decisions, both decided in 1988. See Natural Res. Def. Council v. EPA, 859 F.2d. 156 (D.C. Cir. 1988); Romer v. Carlucci, 847
strict court level, the results have been similar: eight cases in the 1970s, one in the 1980s, three in the 1990s, and none in the first seven years of the new century (to date). Federal agencies have blithely ignored the provision as well . . .

The issues to be discussed in this Article are two. First, is it appropriate that section 102(1) has largely been ignored? Second, if not, how ought section 102(1) operate? Having examined these matters, the Article will discuss a couple of prototypical instances where use of the provision could have yielded results significantly more environmentally protective than was actually produced without benefit of the provision.

II. SHOULD SECTION 102(1) HAVE FORCE AND EFFECT?

At the outset, this must seem to be a curious question. The normal educated attorney would say, "of course statutes must have force and effect, or what is a statute for?" The situation with section 102(1) seems different, however. This provision is not a regulatory dictate in the conventional sense. It does not specify the parameters of a structured regulatory program nor does it create rights in persons to resist governmental interference. Instead, section 102(1) is "softer" in that it merely guides interpreters and administrators of law and policy in their function of extracting meaning from law or policy itself. Perhaps this is the reason for the provision's atrophy. But, if so, this feature of section 102(1) in no way justifies an abject disregard. A statute is by definition a legally effective mandate, and the duty to comply with a statute does not dissipate based on the content of the mandate itself. Courts have honored provisions of this sort in other circumstances, and there is no reason that courts should not honor section 102(1) in the same manner.27

Some might suggest that separation of powers' considerations warrant this judicial disregard. Separation of powers is the principle of the federal Constitution stipulating that legislative power shall be located in the legislative branch of the federal government, executive power in the executive branch, and judicial power in the judicial

27. See, e.g., Town of Henrietta v. Dep't of Envtl. Conservation of N.Y., 430 N.Y.S.2d 440 (1980) (citing N.Y. ENVTL. CONSERV. LAW § 8-0103(6) (McKinney 2005)). The court gave force and effect to a provision almost identical to 42 U.S.C. § 4332(1) (2000). Id. at 449. The provision stipulated that "It is the intent of the legislature that to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in this article." N.Y. ENVTL. CONSERV. LAW § 8-0103(6) (McKinney 2005).
The purpose of the separation of powers doctrine is to assure each branch remains supreme within its designated area of function. Accordingly, the Supreme Court has been quick to disallow intrusions by one branch into the legitimate operations of another.

Because section 102(1) directs Article III courts, among other decisionmakers, to interpret the law in a single preferred fashion, it might be argued that the subsection represents a legislative infringement on judicial power. (Recall in this regard Chief Justice Marshall’s unambiguous declaration, “[I]t is emphatically the province and duty of the judicial department to say what the law is.”29) But legislation of this sort has been held not to violate the separation of powers doctrine. Legislatures, including Congress, frequently instruct courts on how to glean meaning from statutes, regulations, and policies, and courts have typically received these instructions without objection. For example, section 27 of the Federal Power Act,30 provides that “[N]othing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”31 This statutory provision is a clear instruction to interpreters on how to “construe” statutory terms. Yet the courts have honored this provision without objection.32

This judicial acquiescence is no surprise, given the propensity of courts to tolerate quite intrusive legislative interferences with the judicial function. A cardinal proof of this propensity is the Supreme Court’s failure to ever complain of section 706(2) of the federal Administrative Procedure Act (“APA”).33 That provision, in its six specific parts, instructs federal courts on how to review federal agencies’ decisions. For example, the provision tells courts, for some decisions, to affirm agency determinations if there exists “substantial evidence” supporting the agency’s determination.34 In other circumstances, it calls for courts to conduct their review function de novo,35 and in still others it stipulates agency determinations must survive judicial re-

31. § 821.
34. § 706(2)(E).
35. § 706(2)(F).
view unless “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The statutory mandate of section 706(2) is exceedingly more intrusive than NEPA’s section 102(1). The latter provision merely instructs courts and agencies on which values to promote when reading statutes. Section 706(2), by contrast, commandeers the core of the judicial process by specifying precisely how courts must fulfill their crucial duty of determining the legitimacy of executive decisionmaking. Despite all of this, the Supreme Court has not objected to section 706(2). It has chosen instead to transact its affairs in light of the provision, on some occasions taking care to follow section 706(2) precisely and on others subtly ignoring it.

If APA’s section 706(2) has force and effect, NEPA’s section 102(1) should also have force and effect.

A second theory that might doom section 102(1) to legal irrelevancy has been pushed, surprisingly, by none other than the Council on Environmental Quality (“CEQ”), the administrative agency that NEPA created for the purpose of propelling the statute to life. As an arm of the Executive Office of the President, CEQ’s functions include advising the President on environmental matters, coordinating the implementation of NEPA across the federal agencies, and developing appropriate environmental policies. One would suppose that CEQ would be a prominent force in support of a NEPA of high impact. Indeed, that supposition happens to be entirely true with respect to NEPA’s EIS provisions in that CEQ’s regulations implementing the EIS process are binding and detailed, setting forth an array of obligations designed to assure the vital and effective incorporation of environmental considerations into agency decisionmaking.

But, curiously, CEQ’s approach to implementing section 102(1) has been entirely opposite. CEQ’s regulations pay but fleeting attention to section 102(1), beginning with a reference to section 101 and then promptly shifting attention to section 102(2). Emblematic of this breezy omission is the introductory provision of CEQ’s regulations,

36. § 706(2)(A).
41. 40 C.F.R. §§ 1500.1-1500.6 (2007).
wherein CEQ baldly proclaims that "[T]he regulations that follow implement section 102(2)."  

Why would CEQ acquiesce to the atrophy of section 102(1)? Asked about this by the author on one occasion, a high ranking official within CEQ termed the provision a dead letter, its effective use a "long shot." The official's view was that the Supreme Court's declaration that section 102(2) was procedural stripped section 102(1) of any substantive validity it might have had. This flippant discard of section 102(1) is entirely unpersuasive. Because section 102(2) is independent of section 102(1), the legal significance of one should not bear on the legal significance of the other. The terms of section 102(1), moreover, expressly call for action of designated substantive content. As such, the language cannot intelligently be read as procedural, meaningless, or precatory.  

Notably, as mentioned earlier, NEPA itself counsels that section 102(1) should be complied with "to the fullest extent possible." This modifying phrase was not intended to serve as one more rhetorical flourish. On the contrary, the language was added to assure NEPA would be a player in federal environmental law. As the conferees warned, "it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means to avoiding compliance with the directives set out in section 102." The Supreme Court ratified this view, commenting in a section 102(2) case that the "fullest extent possible" language precluded discretionary noncompliance. The only legitimate excuse for failure to

42. 40 C.F.R. § 1500.1(a). Note that the regulations at one point recite the text of section 102(1) of NEPA but go no further. 40 C.F.R. § 1500.2(a). In addition, the regulations later direct agencies to implement procedures under section 102(2) to implement both NEPA sections 101 and 102(1). 40 C.F.R. § 1505.1(a)(2007). If section 102(1) is to be implemented, it ought to be implemented even in situations not involving NEPA's other provisions. The Council on Environmental Quality's web page contains no information indicating agencies have met their obligations to implement such procedures. See The White House, Council on Environmental Quality, http://www.whitehouse.gov/ceq (last visited on Oct. 2, 2007).  
44. The Senate attended to this language carefully. An early draft of the legislation had fastened this descriptive phrase only to NEPA's section 102(1), not to section 102(2). 115 CONG. REC. 40,415, 40,418 (1969). But conferees thereafter determined to conform the sections by requiring compliance with each to the fullest extent possible. Id. In conjunction with the decision to apply the qualifying clause to both sections 102(1) and 102(2), the conferees agreed to remove alternative language in the House bill, to wit, "nothing in this Act shall increase, decrease or change any responsibility or authority of any Federal official or agency created by other provision of law." Id.  
45. Id.
comply with the mandates of NEPA is a showing that extant law other than NEPA makes compliance impossible.\textsuperscript{46}

Importantly, actually allowing section 102(1) to have force and effect would not revolutionize the judicial process. For example, section 102(1) does not amend other laws and thereby authorize agency action otherwise prohibited by law.\textsuperscript{47} Additionally, section 102(1) does not apply to agency actions compelled by statute where the agency has no discretion.\textsuperscript{48} By the same token, while there exists some authority to the contrary,\textsuperscript{49} section 102(1) does not supplement the organic

\textsuperscript{46} Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776 (1976) (providing NEPA's "to the fullest extent possible" modifier is "a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle").

\textsuperscript{47} See, e.g., Natural Res. Def. Council v. Berklund, 609 F.2d 553 (D.C. Cir. 1979). The case presented the question of whether section 102(1) of NEPA might authorize a decision by the U.S. Department of Interior to deny a mineral lease application. Berklund, 609 F.2d at 557, 558. The agency's organic authority, the Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181-287 (2000), on its own terms mandated the issuance of the lease, but the argument was made that section 102(1) authorized the agency's disregard of that mandate. Id. at 558. The court had no difficulty rejecting the argument, holding that NEPA did not so modify the MLA. Id. Both "the plain meaning of the [MLA] as well as undisturbed administrative practice for nearly 60 years" convinced the court to reject the contention. Berklund, 609 F.2d at 558. Unfortunately, the Berklund court did not engage this issue as fully as it should have. The court's reference to the "plain meaning" of the MLA did not resolve the larger issue of whether a later-enacted provision, NEPA, might have changed what "plain meaning" was. See id. Similarly, the court's reference to "undisturbed administrative practice" of long duration is inapposite as well, since that long practice took place in large part before NEPA was enacted. Id. at 558. Note in this regard general commentary of the Supreme Court one year before Berklund, to the effect that NEPA altered slightly the statutory balance. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 551 (1978) (referring to the statute's EIS provisions).

\textsuperscript{48} See, e.g., Flint Ridge, 426 U.S. at 790; Vt. Yankee, 435 U.S. at 548; see also, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 694 (1975) ("NEPA was not intended to repeal by implication any other statute.").


An additional though perhaps unavailing argument is that NEPA should be read to supplement agency power, which is found in National Environmental Policy Act (NEPA) of 1969 § 105, 42 U.S.C. § 4335 (2000). Entitled "Efforts supplemental to existing authorizations," the section provides, in total, as follows: "The policies and goals set forth in this [Act] are supplementary to those set forth in existing authorizations of Federal agencies." While the text of this provision might prompt a reader to conclude
that NEPA indeed might supplement agency organic authority, the Supreme Court has made it clear the provision does nothing of the sort. In its view, section 105 of NEPA is merely a Congressional declaration indicating NEPA does not repeal other statutes by implication. *SCRAP*, 412 U.S. at 694; see also Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983). The Supreme Court’s reading is tenable, as section 105 states only that NEPA’s “policies and goals” are supplemental to existing authorizations. It does not say NEPA constitutes additional empowerment for agencies.

50. See, e.g., Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3d Cir. 1983). *Cape May* involved an effort by the U.S. Environmental Protection Agency to stop construction in a floodplain by denying putative residents permission to hook up to a sewage treatment plant. *Cape May*, 698 F.2d at 181. The agency purported to have this authority by virtue of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251-1387 (2000 & Supp. V 2005). *Cape May*, 698 F.2d at 187. But the court determined otherwise, determining the CWA did not authorize land use, as compared to water pollution controls. *Id.* at 188, 189. In reaching this conclusion, the court rejected the EPA’s argument that NEPA supplemented the agency’s power. *Id.* at 188. The court determined that “[t]he National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute . . . and the Supreme Court has characterized ‘[NEPA’s] mandate to the agencies [as] essentially procedural.’” *Id.* at 188 (quoting Vt. Yankee, 435 U.S. at 558) (citing Gage v. Atomic Energy Comm’n, 479 F.2d 1214 (D.C. Cir. 1973); Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972)). The court further stated, “Thus, [NEPA] provides little, if any, support for an agency taking substantive action beyond that set forth in its enabling act.” *Id.* at 188. The decision did not expressly identify the provision in NEPA with which it was dealing, but it would seem to have been section 102(1) because of the obvious applicability of that section to the issue at hand and because the case did not involve EIS-related injuries. Accord *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 571 (D. Mass. 1987); Havasupai Tribe v. United States, 752 F. Supp. 1471, 1492 (D. Ariz. 1990), aff’d, 943 F.2d 32 (9th Cir. 1991) (commenting that NEPA does not expand the authority of the U.S. Forest Service).

See also *Natural Res. Def. Council v. EPA (NRDC)*, 859 F.2d 156 (1988). At issue in *NRDC* was the validity of the EPA regulations to implement the National Pollution Discharge Elimination System under the CWA. *NRDC*, 859 F.2d at 164. In this case, as in *Cape May*, the EPA argued that it could impose conditions in permits for reasons not contemplated by the CWA itself. *NRDC*, 859 F.2d at 169; *Cape May*, 698 F.2d at 186. Its argument was a bit stronger here, since the CWA declared that the EPA’s regulation promulgation qualified as “major federal action” under section 102(2)(c). *NRDC*, 859 F.2d at 167, 169. In the EPA’s view, this express Congressional assertion- that the EPA’s regulations would be subject to NEPA’s EIS requirements- meant that the agency’s powers under its organic law were enlarged by NEPA. *Id.* at 169. The court rejected this claim as fundamentally misapprehending NEPA. *Id.* The court was very clear that NEPA does not “expand the range of final decisions an agency is authorized to make.” *Id.* Rather the court stated, “[a]ny action taken by a federal agency must fall within the agency’s appropriate province under its organic statute(s).” *Id.*

This “anti-supplementation” interpretation enjoys additional support from another provision of section 103 of NEPA. National Environmental Policy Act of 1969 § 103, 42 U.S.C. § 4333 (2000). The provision stipulates that “agencies of the Federal Government shall review their present authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.” *Id.* Section 103 offers as its premise the notion that Congress did not envision NEPA as affirmatively supplementing agency authority. *Id.* If NEPA were to play such a role, there would have been no reason for agencies to review existing authorities with a view toward conforming them with the intent, purposes, and procedures of NEPA.
Finally, according section 102(1) legal force and effect would not disturb the regime of judicial review the Supreme Court established in its seminal decision in *Chevron, U.S.A v. Natural Resources Defense Council.*51 *Chevron* is the Court's major statement on judicial review of agency "lawmaking" activity. *Chevron* maintains, *inter alia,* that when a court reviews an agency's interpretation of a statute, the court must defer to the agency's interpretation if that interpretation qualifies as "permissible" (the exception being if the statute is so clear in its meaning that no deference is sensible). The use of section 102(1) would not upset this judicial construct. Section 102(1) merely would inform the determination of what represents a "permissible" interpretation.

III. HOW SECTION 102(1) COULD HAVE MADE A DIFFERENCE

As noted earlier, section 102(1) could have played a role in literally thousands of occasions. A look at a couple of these occasions proves the point.

One occasion where section 102(1) could have produced a significantly different result was in the decision of *Southwest Center for Biological Diversity v. Babbitt.*52 In *Southwest Center,* the United States Court of Appeals for the District of Columbia Circuit examined the responsibilities of federal agencies under the federal Endangered Species Act ("ESA").53 Described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," the ESA sets forth a sturdy protection regime for endangered and threatened species of plants and animals.54 To begin the process, either the Department of Interior (for terrestrial species) or the Department of Commerce (for aquatic species)55 "lists" those individual species that qualify for statutory protection.56 The ESA specifies that listing decisions must be made "solely on the basis of the best scientific and commercial data available to [the Secretary]."57 Once listed, both the species and its critical habitat are virtually off-limits to any harmful human activity whatsoever.58

52. 215 F.3d 58 (D.C. Cir. 2000).
56. § 1533.
57. § 1533(b)(1)(A).
Because listing is the essential prerequisite for any species to secure protection under the ESA, how the listing process operates is pivotal. The court in *Southwest Center* reviewed a decision of the Fish and Wildlife Service ("FWS") of the Department of Interior not to list as endangered or threatened the Queen Charlotte goshawk, an impressive bird that resides exclusively in old-growth forests in Alaska and British Columbia. On initial review, the district court concluded the data was not sufficient to warrant a listing of the goshawk.\(^5\) Accordingly, the district court ordered the agency to take what might be thought of as a reasonable step, to count the goshawk population.\(^6\) On subsequent review, however, the D.C. Circuit was of a different mind. The D.C. Circuit reversed the district court, tersely commenting that "[t]he ‘best available data’ requirement [of the ESA] makes it clear that the Secretary has no obligation to conduct independent studies."\(^6\) The D.C. Circuit declined to impose an obligation to find "any information that is arguably susceptible to discovery," and, indeed, went further by asserting that courts have absolutely no authority, regardless of circumstances, to require an agency to seek better data.\(^6\)

The decision in *Southwest Center* is extremely significant for the obvious reason: a jeopardized species that remains unlisted faces a heightened risk of extinction. Despite this potentially lethal consequence, the court read the ESA as imposing no independent data retrieval obligation on agencies. Resort to section 102(1) of NEPA could have produced a different outcome. With section 102(1) in mind, the court could have characterized information as "available" for purposes of the ESA if that information was readily retrievable in scientific literature or was otherwise *reasonably* susceptible to discovery. Following this path, the court might well have determined that counting goshawks within portions of its habitat was indeed a reasonable agency pursuit. This interpretation of the ESA would have honored and implemented the express purposes of both the ESA and NEPA.\(^6\) This interpretation also would have set the ESA on a trajectory far more protective of species. The D.C. Circuit’s decision in *Southwest Center* has been followed in other circuits.\(^6\)

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60. *Id.*
61. *Id.* at 60.
62. *Id.* at 60-61.
64. *See, e.g.*, Heartwood, Inc. v. U.S. Forest Serv., 380 F.3d 428 (8th Cir. 2004); Kern County Farm Bureau v. Allen, 450 F.3d 1072 (9th Cir. 2006). The story of the
Another instance where section 102(1) of NEPA could have made a dramatic difference is the extremely significant United States Supreme Court decision in *Robertson v. Methow Valley Citizens Council.* Methow Valley, for reasons that follow, is likely the most important judicial proclamation on the meaning of NEPA because of its unequivocal pronouncement that EISs are only advisory, informational documents.

The dispute in *Methow Valley* involved a proposal to construct a ski resort on Sandy Butte mountain in the Okanogan National Forest in the State of Washington. The Forest Service of the U.S. Department of Agriculture, the agency charged with decisionmaking authority regarding the forest, needed to determine whether to allow this commercial venture to go forward, and if so, at what intensity of development. More intensive development would mean more recreational opportunity for skiers, but it would also mean an increased threat to the large mule deer population indigenous to the area. At the conclusion of administrative proceedings, the Forest Service issued a “special use permit” to the applicant, which authorized the development at a relatively intensive level. On review, the Supreme Court affirmed the agency’s action. Justice Stevens, writing for a unanimous Court, resolutely proclaimed the Forest Service could do essentially anything it wanted to do. The Court intoned, “[i]n this case . . . it would not have violated NEPA if the Forest Service, after complying with the Act’s procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd.” In sum, the Court stated, “[o]ther statutes may impose substantive environmental obli-

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68. *Id.* at 344.
69. *Id.* at 350-51.

Queen Charlotte goshawk goes on. The Southwest Center for Biological Diversity has continued its efforts to protect this “uncommon, secretive, forest-dwelling raptor.” Alaska Department of Fish & Game, Northern (Queen Charlotte) Goshawk, http://www.adfg.state.ak.us/special/esa/goshawk_northern/n_goshawk.php (last visited February 2, 2008). In 2004, the organization succeeded in convincing the District Court for the District of Columbia to issue an order requiring the FWS to determine whether Vancouver Island is a part of the goshawk’s habitat, and, if so, whether the species is endangered or threatened at that location. See *Sw. Ctr. for Biological Diversity v. Norton,* No. 98-0934, 2002 U.S. Dist. Lexis 13661 at *1, *2 (D.D.C. 2002). The idea was that this information was “available,” in the *Southwest Center* Court’s understanding of the term, but the agency had not considered the information. At the time of this writing, the goshawk was not listed under the ESA.
gations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.\textsuperscript{70}

Thus, the Court stripped EISs of any legally mandatory dimension. The Court could have—and should have—concluded that the EIS provision of NEPA, section 102(2)(c), imposed some substantive obligation on agencies. In other words, the Court could well have concluded that the recommendations of EISs play a substantive as well as an informational role for agencies. The Court had at least three good reasons to do so. First was precedent. The Court could have looked back to the well-regarded decision in Calvert Cliffs,\textsuperscript{71} wherein the D.C. Circuit asserted that “NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy . . . .”\textsuperscript{72} Second, the Court could have looked to section 102 itself, which calls for compliance with its mandates “to the fullest extent possible.” Surely, that phrase justifies a holding that EISs should do more than inform an agency for a snapshot in time and then wilt promptly on the administrative vine.\textsuperscript{73} Third, the Court could have invoked section 102(1). If section 102(1) is ever to have legal force, it would have to be with respect to its sister provision, section 102(2)(c). If section 102(1) is irrelevant within the statutory section of which it is a part, it is truly doomed.

Section 102(1) might not have precluded selection of intensive development options of its own force, but it surely would have increased the agency’s burden of persuasion when it did so. Given the fact that thousands of EISs are prepared annually, had the Court in Methow Valley increased the agency’s burden of persuasion, the decision would have transformed the EIS process foundationally.

As a separate matter, the Court could also have employed section 102(1) when it considered the legitimacy of the Forest Service’s own regulations. In Methow Valley, the agency was operating under the authority of its own regulations, which required special use permits authorizing development in national forests to include “measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project.”\textsuperscript{74} Forest Service regulations further provided that “[e]ach special use authorization . . . contain . . . terms and conditions which will . . . minimize damage to scenic and esthetic values and fish and wild-

\textsuperscript{70} Id.
\textsuperscript{71} See supra notes 23-26 and accompanying text.
\textsuperscript{72} Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971).
\textsuperscript{73} See supra notes 43-46 and accompanying text.
\textsuperscript{74} Methow Valley, 490 U.S. at 357 (quoting 36 C.F.R. § 215.54(e)(4) (1988)).
life habitat and otherwise protect the environment." In *Methow Valley*, the Court found "no basis for concluding that the Forest Service’s own regulations must . . . be read in all cases to condition issuance of a special use permit on consideration (and implementation) of off-site mitigation measures." Thus, the Court authorized the Forest Service to issue permits without requiring permittees to take any action whatsoever to minimize environmental harms. Might not section 102(1) have produced a different result? Indeed, if the Court had taken seriously its obligation to interpret the Forest Service’s regulations—to the fullest extent possible—to promote NEPA’s environmental goals, including the goal to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,” the Court could well have concluded the Forest Service’s own regulations, irrespective of NEPA, imposed some pro-environment duty on the agency.

IV. CONCLUSION

It remains a mystery why section 102(1) is effectively moribund in the law. What is necessary is for a court to step up to the plate and invoke section 102(1) to resolve a legal dispute. A single decision using the provision to alter a single judicial outcome could vitalize the provision and position it to be significant in environmental law.

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76. *Methow Valley*, 490 U.S. at 338.
77. 42 U.S.C. 4331(b)(3) (emphasis added).