

COMMENTS

Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1)

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I. FROM WOODPECKERS TO ENVIRONMENTAL LAWS: DOES
“EXTINCT” ALWAYS MEAN EXTINCT?

A. *Story of an Ivory-Billed Woodpecker*

The ivory-billed woodpecker is about the size of a crow, with black and white plumage, and, as its name suggests, sports a creamy white beak.¹ Listed as an endangered species, it is widely considered to have become extinct from North American forests.² Indeed, the last documented sighting of an ivory-billed woodpecker in the United States was in 1944, when wildlife artist Don Eckelberry saw the bird in a hardwood forest near Tallulah in northeastern Louisiana.³

After such a long time since the last documented sighting, claiming to see the widely-thought-extinct species would be “a little like saying you’ve spotted Elvis or Bigfoot or a UFO.”⁴ Such a claim, however, is exactly what wildlife and forestry graduate student and hunter David Kulivan has made.⁵ Kulivan claims to have spotted a pair of ivory-billed woodpeckers while hunting turkey in the Pearl River Wildlife Management Area near Slidell, Louisiana, in April 1999.⁶ Unlike some other reported sightings, which are often dismissed as mistaken identifications of pileated woodpeckers, Kulivan’s sighting has been taken seriously by Louisiana’s Department of Wildlife and Fisheries, which has halted timber harvesting in the 34,000-acre wildlife management area while the search for the woodpeckers picks up steam.⁷ Finding out that something once thought extinct may have actually survived could be an important and exciting discovery, and can have powerful consequences.⁸

1. See Susan Langenhennig, *Knock on Wood*, TIMES-PICAYUNE (New Orleans), Feb. 16, 2000, at A1.

2. See *id.*

3. See *Hope Is a Thing with Feathers: A Personal Chronicle of Vanished Birds*, 247 PUBLISHERS WKLY. 78 (Feb. 28, 2000) (book review) (identifying Don Eckelberry as the last person to have a verified sighting of ivory-billed woodpecker); see also Langenhennig, *supra* note 1, at A1 (noting that location of last verified sighting of woodpecker was near Tallulah).

4. See Langenhennig, *supra* note 1, at A1 (quoting Van Remsen, curator of birds and a biology professor with the Louisiana State University Museum of Natural Sciences).

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.* (quoting Kulivan as remarking that the sighting is “like finding a needle in a haystack”).

B. Story of the National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA)⁹ begins with a promise that the conduct of the federal government will substantively change to conform with, as the Act's name suggests, a national policy of protecting the environment.¹⁰ This promise of substantive fidelity to environmental soundness is most directly embodied in the directive of Section 102(1) of NEPA, which directs 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."¹¹ This substantive mandate has disappeared, however, from the NEPA landscape, and is widely believed to have become extinct.¹² The last use of NEPA Section 102(1) as a source of substantive mandate and review was in 1979, at the end of the Act's first decade.¹³

After two more decades without the enforcement of Section 102(1)'s substantive mandate and review, the claim that such substantive force still resides in NEPA is even more phenomenal than a claimed sighting of an ivory-billed woodpecker.¹⁴ As the Act begins its fourth decade, however, such a claim is precisely the goal of this Comment. The "law to apply"¹⁵ for NEPA substantive review has merely been hibernating, and has not become extinct; indeed, the

9. 42 U.S.C. §§ 4321-4370(d)(1997).

10. See NEPA §§ 101, 102(1), 42 U.S.C. §§ 4331, 4332(1) (1997) (establishing a policy that all government actions should be environmentally sound, and mandating that all laws, policies and regulations of the federal government conform to that policy).

11. NEPA § 102(1), 42 U.S.C. § 4332(1) (1997) (emphasis added).

12. See, e.g., Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 220 (1992) ("[A]fter *Strycker's Bay*, NEPA requires nothing more of the agency than an adequate consideration of the environmental consequences of its decision."); William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 209 (1989); Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99, 113 (1994) (without questioning the wisdom of the result in light of Section 102(1), reporting that "the courts have not found [NEPA or its implementing regulations] require substantive mitigation").

13. See *Natural Resources Defense Council, Inc. v. Berkland*, 609 F.2d 553, 558-59 (D.C. Cir. 1979).

14. See generally Oliver A. Houck, "Is That All?", 10 DUKE ENVTL. L. & POL'Y J. (forthcoming Fall 2000) (reviewing LYNTON KEITH CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT, AN AGENDA FOR THE FUTURE*) (manuscript on file with author) [hereinafter Houck, "Is That All?"]. However, for a particularly well-articulated claim that NEPA Section 102(1) houses substantive review that has survived a dicta-chain accumulation of Supreme Court pronouncements that NEPA has no substantive force, see Nicholas C. Yost, *NEPA's Promise—Partially Unfulfilled*, 20 ENVTL. L. 533 (1990).

15. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971) (limiting the Administrative Procedure Act's exception from judicial review to those administrative actions that occurred where there was no "law to apply").

conclusion of this Comment is that the NEPA substantive review beast is quite healthy and not even endangered.

My own introduction to NEPA, as with most such introductions, ended with the disappointment that this potentially powerful environmental manifesto boils down to the mere procedural safeguard of the Environmental Impact Statement (EIS).¹⁶ This result is attributed to the premise that substantive review of agency actions had probably been foreclosed by the Supreme Court's decisions in *Robertson v. Methow Valley Citizens Council*, *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹⁷ In ultimately concluding that this premise has been hastily reached, this Comment will first examine the contours and development of NEPA prior to its encounters with the Supreme Court.¹⁸ Not only does NEPA's clear language and legislative history indicate that it was intended to accomplish substantive change in agency behavior,¹⁹ but in its first travels through the courts, NEPA acquired a coherent and cumulative body of federal common law acknowledging this substantive mandate and an attendant right of substantive review.²⁰ After analyzing these textual, historical, and jurisprudential underpinnings of NEPA Section 102(1)'s substantive mandate, this Comment will examine the premise that this substantive mandate was extinguished by the Supreme Court.²¹ The Court's NEPA substantive review decisions stem purely from the Court's evaluation of claims brought under the procedural provisions of Section 102(2). The analysis supporting the Court's rejection of substantive review under Section 102(2) does not support an implicit rejection of substantive review under Section 102(1);²² furthermore, the language that substantive review is unavailable under any NEPA sections is merely dicta, having not been properly before the Court in those cases.²³ Further, after rejecting the premise that the Supreme Court has

16. See Oliver A. Houck, *Environmental Law and the General Welfare*, 16 PACE ENVTL. L. REV. 1 (1998) (noting that the "disappointing" EIS is actually "remarkably curative").

17. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process.") (citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

18. See *infra* Part II.

19. See *infra* Part II.A.

20. See *infra* Part II.B.

21. See *infra* Part III.

22. See *infra* Part III.B.

23. See *infra* Part III.A.

foreclosed NEPA substantive review under Section 102(1), this Comment will examine what the “law to apply” is in Section 102(1).²⁴ I propose that Section 102(1) provides two layers of applicable law for review of federal actions: (a) NEPA-specific substantive review of agency actions using the Section 101(b) standards incorporated by the administration clause of Section 102(1);²⁵ and (b) NEPA-empowered review of agency actions taken pursuant to other statutes, using Section 102(1)’s interpretation clause as a mandatory rule of construction.²⁶ Because this Comment contends that Section 102(1) is still a vital part of the NEPA review process, it concludes by proposing that courts and environmental practitioners resume drawing on and building upon the body of NEPA common law that had matured around Section 102(1) in the first decade of NEPA’s existence.²⁷

II. PRE-DISAPPEARANCE NEPA SUBSTANTIVE REVIEW: THE BIRTH AND DEVELOPMENT OF SECTION 102(1) AS A SOURCE OF LAW TO APPLY

Before its troubled journey through the chambers of the U.S. Supreme Court, NEPA substantive review appeared on its way to becoming a fixture in the review process for federal agency actions. Section 102(1) was prominent as a guarantor of substantive review, both in the initial development of the concept of a federal environmental policy statute, as evidenced in the clear text of the statute and in its legislative history, and in the interpretation of the statute during its first decade in the lower federal courts.

A. *Section 102(1)’s Substantive Role—in the Statute’s Text and Legislative History*

The 1960s showcased a period of environmental awakening in the United States, an awakening reflected by the myriad environmentally protective measures passed by Congress prior to NEPA.²⁸ The pre-NEPA legislation that exhibited this rise in

24. See *infra* Part IV.

25. See *infra* Part IV.A.

26. See *infra* Part IV.B.

27. See *infra* Part V.

28. See Robert V. Percival, *Environmental Federalism: Historic Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1158 (1995) (observing that “[e]nvironmental interests began to prevail with some regularity . . . during the 1960s, when the growing popularity of outdoor recreation and concern over environmental damage caused by public works projects helped to produce landmark legislation”).

environmental consciousness and concern included the Multiple-Use Sustained-Yield Act,²⁹ the Wilderness Act of 1964,³⁰ the National Historic Preservation Act of 1966,³¹ and the Wild and Scenic Rivers Act³² in 1968. This period of environmental awakening was also evident in the courts when, in 1967, two formidable forces formed to challenge environmentally unsound actions by agencies and private entities: the Environmental Defense Fund and the Natural Resources Defense Council.³³ The grassroots backdrop for these developments in environmental legislation and litigation was embodied in the first celebration of Earth Day on April 22, 1970.³⁴ From the large throngs of celebrants on the mall in Washington, D.C., to smaller groups of activists across the country, an estimated 20 million people expressed their support for the environment in activities nationwide on what has become the first of many annual Earth Days.³⁵

Conceived of this crescendo of environmental concern, NEPA was born. NEPA's first task, in Section 101(a), was to recognize the concept that the protection of ecosystems is paramount to the prosperity of human society, and that such protection extends from vigilance over the effects of human activities on environmental quality.³⁶ Adopting this concept as a lens through which to view the conduct of government, Congress "declare[d] that it is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony."³⁷

To carry out this policy of promoting a sustainable and healthy environment, Congress enunciated a series of standards by which it was the "continuing responsibility" of the federal government to abide.³⁸ The government's responsibilities under these standards (the Section 101(b) standards) are:

29. 16 U.S.C. §§ 528-531 (1997) (passed in 1960).

30. 16 U.S.C. §§ 1131-1136 (1997).

31. 16 U.S.C. §§ 470-470(mm) (1997).

32. 16 U.S.C. §§ 1271-1287 (1997).

33. See Percival, *supra* note 28, at 1159.

34. See Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459, 463 (1994); Percival, *supra* note 28, at 1159.

35. See Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws*, 9 DUKE ENVTL. L. & POL'Y F. 29, 51 (1998).

36. See NEPA § 101(a), 42 U.S.C. § 4331(a) (1997) ("recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man").

37. *Id.*

38. See NEPA § 101(b), 42 U.S.C. § 4331(b) (1997).

to use all practicable means . . . to improve 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.³⁹

Having proclaimed a new environmental policy for the nation in Section 101(a), and enunciated the standards by which that policy should be measured in Section 101(b)(1)-(6), Congress declared in Section 102(1) 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.”⁴⁰ NEPA Section 102(1) mandated, essentially, that the government could only act in accordance with the new national environmental policy of protecting a sustainable and healthy ecosystem, as enunciated in Section 101(a) and measured by the standards in Section 101(b). To facilitate compliance with this mandate, NEPA also included the procedural protections of Section 102(2), including the EIS requirement of Section 102(2)(C).⁴¹

This view that NEPA is a textually clear declaration of environmental policy backed by separate substantive and procedural mandates is supported in the Act's legislative history. In a report of the Senate Committee on Interior and Insular Affairs, the committee engaged in an exhaustive litany of the environmental problems facing

39. NEPA § 101(b), 42 U.S.C. § 4331(b) (1997).

40. NEPA § 102(1), 42 U.S.C. § 4332(1) (1997) (emphasis added).

41. See NEPA § 102(2), 42 U.S.C. § 4332(2) (1997). Because this Comment is concerned only with the neglected mandate of Section 102(1), it will not go into the myriad details and requirements of Section 102(2), other than to note that Section 102(2) is where NEPA's procedural requirements reside, specifically the EIS requirement of Section 102(2)(C). Note that Section 102(2)'s procedural mechanisms are not the only facilitators of the substantive mandate in Section 102(1), but that, to the extent that it provides law to apply, Section 102(1) is independently reviewable under the Administrative Procedure Act. See 5 U.S.C. §§ 701, 706 (1997). In Part IV, *infra*, this Comment will examine specifically the applicable law that resides in Section 102(1)'s mandate.

the United States, recognizing that these problems were in large part the price paid by the nation for policies and programs that were aimed primarily at enhancing capital productivity.⁴² Noting that “the [n]ation cannot continue to pay the price of past abuse,” the committee declared that “[t]hese problems must be faced while they are still of manageable proportions and while alternative solutions are still available.”⁴³ Read in the context of determining the substantive force of Section 102(1), this command that environmental “problems must be faced” is a clear statement of Congress’s intent to substantively reverse the damage being done by the policies and actions of the federal government. The Senate Report further implied that Section 102 of NEPA implements the policies of Section 101 in more ways than merely procedurally: “[I]f goals and principles are to be effective, they must be capable of being applied in action. [NEPA] thus incorporates certain ‘action-forcing’ provisions *and* procedures which are designed to assure that all [f]ederal agencies plan and work toward meeting the challenge of a better environment.”⁴⁴ In noting that Section 102 forced action via both “provisions *and* procedures,” the committee acknowledged that the policies in Section 101 were to be furthered through more than just the procedures prescribed by Section 102(2); hence, the committee certainly viewed 102(1) as carrying a separate, non-procedural, mandate.⁴⁵

42. See S. Rep. No. 91-296 (1969) (listing as problems “haphazard urban and suburban growth; crowding, congestion, and conditions within our central cities which result in civil unrest and detract from man’s social and psychological well-being; the loss of valuable open spaces; inconsistent and, often, incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species; faltering and poorly designed transportation systems; poor architectural design and ugliness in public and private structures; rising levels of noise; the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; [and] an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards”).

43. *Id.*

44. *Id.* (emphasis added).

45. See Richard S. Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Quality Act*, 3 E.L.R. 50028 (1973) (“Section 102(1) incorporates by reference not only the specifics of § 102(2), but also the more general substantive declarations of § 101.”); see also Andreen, *supra* note 12, at 206 (“Congress directed all federal agencies to apply their policies and the laws and regulations they administer in accordance with the broad national policy enunciated by NEPA.”); Lawrence R. Liebesman, *The Council on Environmental Quality’s Regulations to Implement the National Environmental Policy Act—Will They Further NEPA’s Substantive Mandate?*, 10 E.L.R. 50039 (1980) (“Section 102(1) ties the policy goals of § 101 with the action forcing provisions of § 102 by directing specifically that the laws and regulations of the United States be interpreted and administered in accordance with the policies set forth in the Act”); Weinberg, *supra* note 12, at 101 (“The wording of NEPA itself makes clear that the Act requires agencies to accomplish substantive environmental goals.”); Yost, *supra* note

This substantive mandate envisioned by the Senate committee and embodied in NEPA's text was also given life in the NEPA implementing regulations promulgated by the Council on Environmental Quality. Section 102(1) holds a distinct position in these regulations: "Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1). . . ."⁴⁶

B. Section 102(1)'s Substantive Role—Development of a NEPA Common Law of Substantive Review

In Justice Thurgood Marshall's dissent from the Supreme Court's opinion in *Kleppe v. Sierra Club*, he noted that the "vaguely worded" NEPA "seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA. To date, the courts have responded in just that manner and have created such a 'common law.' Indeed, that development is the source of NEPA's success."⁴⁷ Justice Marshall concluded that this development of a NEPA common law was necessary, to "give meaning to that language if there is to be anything in NEPA to enforce at all."⁴⁸ In seeking out that NEPA common law identified by Justice Marshall, a search through a database containing all federal and state decisions reveals that forty-five federal decisions have ever mentioned NEPA Section 102(1).⁴⁹ Of those decisions, twenty examine Section 102(1) as a possible source of substantive mandate and review.⁵⁰ Overwhelmingly, those

14, at 536 ("It is clear that the 'action-forcing' procedures include those of section 102—not only those . . . of section 102(2), but also the provisions of section 102(1) that link section 102 to section 101 and direct that all laws and regulations be interpreted and administered in light of section 101.").

46. 40 C.F.R. § 1502.2(d) (1999). Though this regulation clearly brings sections 101 and 102(1) to the attention of federal agencies (just in case they didn't get it when they read the statute), a search of all federal and state cases reveals only two cases that quote the language from 40 C.F.R. § 1502.2(d), and neither of those uses the language as a basis for any analysis of how sections 101 and 102(1) should be incorporated into the agency decisionmaking process. Search of Westlaw, Allcases Database (March 30, 2000) (using "40 C.F.R. § 1502.2" as search term, and eliminating all cases that did not specifically cite to 40 C.F.R. § 1502.2(d)).

47. 427 U.S. 390, 421 (1976) (Marshall, J., dissenting).

48. *Id.* at 421 (Marshall, J., dissenting).

49. Search of Westlaw, Allcases Database (February 19, 2000) (using "102(1) & NEPA 'National Environmental Policy Act'" as the search terms). Importantly, note that the search for cases even mentioning NEPA Section 102(1) reveals no U.S. Supreme Court cases.

50. See *Natural Resources Defense Council, Inc. v. Berklund*, 609 F.2d 553, 558-59 (D.C. Cir. 1979); *Natural Resources Defense Council, Inc. v. Securities and Exchange Comm'n*, 606 F.2d 1031, 1044-49 (D.C. Cir. 1979); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1301 (8th Cir. 1976) (*Sierra II*); *Citizens for Balanced Env't and Transp., Inc. v. Volpe*, 503 F.2d 601, 607 (2d Cir. 1974) (Winter, J., dissenting); *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d

decisions that examine the possibility of Section 102(1) substantive mandate and review favor that possibility, indicating a great promise for substantive review of environmentally predatory federal actions on their merits.⁵¹

The development of the body of NEPA common law began with the promise of substantive review in *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*.⁵² In sweeping language, Judge Skelly Wright noted that NEPA "attest[s] to the commitment of the Government to control, at long last, the destructive engine of material 'progress.'"⁵³ Judge Wright found that judicial review was necessary to ensure that the "important legislative purposes" of protecting the level of environmental quality crucial for human prosperity, "heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."⁵⁴ In determining the scope of that review, Judge Wright carefully parsed NEPA. He recognized that Section 102(1) clearly implies that Section 101's "substantive mandate" requires federal agencies to substantively consider environmental factors in their decisionmaking process.⁵⁵ "[P]urely mechanical compliance with the particular measures required in [Section] 102(2)(C) [and] (D) will not satisfy the Act if they do not amount to full good faith *consideration* of the

1123, 1129, 1139-40 (5th Cir. 1974) (EDF II); *Iowa Citizens for Envtl. Quality, Inc. v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1973); *Sierra Club v. Froehlke*, 486 F.2d 946, 952-53 (7th Cir. 1973) (Sierra I); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 294-99 (8th Cir. 1972) (EDF I); *Greene County Planning Bd. v. Federal Power Comm'n*, 455 F.2d 412, 417-24 (2d Cir. 1972); *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111-15 (D.C. Cir. 1971); *Duck River Preservation Ass'n v. Tennessee Valley Auth.*, 410 F. Supp. 758, 762 (E.D. Tenn. 1974); *McDowell v. Schlesinger*, 404 F. Supp. 221, 241-53 (W.D. Mo. 1975); *Concerned About Trident v. Schlesinger*, 400 F. Supp. 454, 481-84 (D.D.C. 1975); *National Wildlife Fed'n v. Morton*, 393 F. Supp. 1286, 1293 n.12 (D.D.C. 1975); *Sierra Club v. Froehlke*, 392 F. Supp. 130, 143 (E.D. Mo. 1975) (Sierra II, trial court); *Schicht v. Romney*, 372 F. Supp. 1270, 1271-72 (E.D. Mo. 1974); *Environmental Defense Fund, Inc. v. Tennessee Valley Auth.*, 371 F. Supp. 1004, 1013-15 (E.D. Tenn. 1973); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 786-88 (D. Me. 1973); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 348 F. Supp. 916, 925-27 (N.D. Miss. 1972) (EDF I, trial court).

51. See *NRDC v. SEC*, 606 F.2d at 1044; *Sierra II*, 534 F.2d at 1301; *Citizens for Balanced Env't*, 503 F.2d at 607 (Winter, J., dissenting); *Minnesota PIRG*, 498 F.2d at 1320; *EDF II*, 492 F.2d at 1129, 1139-40; *Iowa Citizens*, 487 F.2d at 851; *Sierra I*, 486 F.2d at 952; *EDF I*, 470 F.2d at 297-98; *Greene County*, 455 F.2d at 424; *Calvert Cliffs*, 449 F.2d at 1112 n.5, 1115; *Duck River*, 410 F. Supp. at 762; *McDowell*, 404 F. Supp. at 241, 244; *Concerned About Trident*, 400 F. Supp. at 481-83; *NWF v. Morton*, 393 F. Supp. at 1293 n.12; *Sierra II, trial court*, 392 F. Supp. at 143; *Schicht*, 372 F. Supp. at 1271; *EDF v. TVA*, 371 F. Supp. at 1013; *Citizens for Reid State Park*, 336 F. Supp. at 786.

52. 449 F.2d 1109 (D.C. Cir. 1971).

53. *Id.* at 1111.

54. *Id.*

55. See *id.* at 1112 n.5.

environment.”⁵⁶ Indeed, Judge Wright found that NEPA had two distinct standards that must be followed, one procedural and one substantive.⁵⁷ He concluded by holding that reviewing courts could reverse a substantive decision on the merits if they found “that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.”⁵⁸

The Eighth Circuit elaborated on this notion of substantive mandate and review in *Environmental Defense Fund, Inc. v. Corps of Engineers*.⁵⁹ The Eighth Circuit first emphasized the substantive mandate of NEPA. “In enacting NEPA,” wrote the court, “Congress ‘resolved that it will not allow federal agencies nor federal funds to be used in a predatory manner so far as the environment is concerned.’”⁶⁰ After emphasizing that Section 102(2)(C) was only one among several Section 102 provisions meant to force the actions prescribed in Section 101,⁶¹ the court found that the statutory language and legislative history “ma[d]e . . . clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking.”⁶² The court expressly held that Section 102(1) mandated these substantive changes, while Section 102(2) contained separate procedural mandates that were “not ends in themselves.”⁶³ Not only did the court find that Section 102(1) created this distinct substantive mandate for environmentally sound federal agency action, but it held that “courts have an obligation to review substantive agency decisions on the merits.”⁶⁴ It noted that review of the merits of agency action is available pursuant to the Administrative Procedure Act (APA) sections 701 and 706, with only a narrow exception for actions committed by law to agency discretion.⁶⁵ The court concluded that the standard of review for

56. *Id.* (emphasis in original); *see also id.* at 1114 (“Congress did not intend the Act to be such a paper tiger.”).

57. *See id.* at 1114 n.10.

58. *Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

59. 470 F.2d 289 (8th Cir. 1972).

60. *Id.* at 293-94 (quoting *Named Individual Members of the San Antonio Conservation Soc’y v. Texas Hwy. Dep’t*, 400 U.S. 968, 978 (1970) (Douglas, J., dissenting from denial of certiorari)).

61. *See id.* at 294 & n.8.

62. *Id.* at 297.

63. *Id.* at 297-98; *see also id.* at 298 (“The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.”).

64. *Id.* at 298.

65. *See Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 298 n.14 (8th Cir. 1972).

NEPA cases was two-pronged. First, reviewing courts would examine the procedural compliance with NEPA by determining “if the agency reached its decision after a full, good faith consideration and balancing of environmental factors.”⁶⁶ Second, a court should examine the substantive decision of the agency on its merits by determining, “according to the standards set forth in [sections] 101(b) and 102(1) of the Act, whether ‘the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.’”⁶⁷ According to this standard of substantive review, if a court determines that an agency has fully complied with NEPA’s procedural requirements, it must then turn to NEPA’s substantive mandate of Section 102(1), measuring the agency’s final decision against the standards demanded by Section 101(b).

The Eighth Circuit’s *Environmental Defense Fund* decision, building upon the D.C. Circuit’s *Calvert Cliffs* decision, formed the beginnings of a continuity in NEPA substantive review jurisprudence. The Eighth Circuit, after an independent analysis of the substantive nature of Section 102(1)’s mandate and its attendant reviewability, borrowed the *Calvert Cliffs* language in its formulation of the standard of substantive review.⁶⁸ This continuity grew stronger as several courts and decisions began to use the standard of substantive review exactly as it was enunciated in the Eighth Circuit’s *Environmental Defense Fund* decision. It appeared in subsequent decisions rendered by courts in the Eighth Circuit,⁶⁹ the Seventh Circuit,⁷⁰ the Fourth Circuit,⁷¹ the District of the District of Columbia,⁷² the Eastern District of Tennessee,⁷³ the Western District of Missouri,⁷⁴ and the Eastern District of Missouri.⁷⁵

66. *Id.* at 300.

67. *Id.* (quoting *Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971)).

68. *See id.* (holding that the standard of NEPA substantive review was, “according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether ‘the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values’”) (quoting *Calvert Cliffs*, 449 F.2d at 1115)).

69. *See Sierra Club v. Froehlke*, 534 F.2d 1289, 1301 (8th Cir. 1976); *Iowa Citizens for Envtl. Quality v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1973).

70. *See Sierra Club v. Froehlke*, 486 F.2d 946, 952 (7th Cir. 1973).

71. *See Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973).

72. *See Concerned About Trident v. Schlesinger*, 400 F. Supp. 454, 483-84 (D.D.C. 1975).

73. *See Duck River Preservation Ass’n v. Tennessee Valley Auth.*, 410 F. Supp. 758, 762 (E.D. Tenn. 1974); *Environmental Defense Fund, Inc. v. Tennessee Valley Auth.*, 371 F. Supp. 1004, 1014 (E.D. Tenn. 1973).

The continuity in NEPA substantive review decisions was not restricted to the adoption of the express enunciation of the standard of substantive review from *Environmental Defense Fund* and *Calvert Cliffs*. Courts also rendered a string of opinions independently affirming the existence of the right to substantive review under NEPA due to Section 102(1).⁷⁶ In perhaps the strongest expression of that right of substantive NEPA review, the Fifth Circuit held that “Section 101 of NEPA (together with Section 102(1)) provides ‘law to apply’ standards governing the substance of the agency decision[,] . . . and that an agency’s ecological decisions under NEPA are not beyond APA scrutiny.”⁷⁷ The continuity of result among the different courts indicated that, steadily, a body of NEPA common law recognizing and favoring a right of substantive review under NEPA was maturing.

Concurrently, a body of law regarding the nature of Section 102(1)’s substantive mandate was also maturing. For there to be anything for courts to substantively review, of course, the statute must contain some sort of substantive mandate for a particular course of agency action. Specific examples of how that mandate for particular substantive agency action can be found in the discussion at Part IV.A, *infra*, but it’s appropriate at this point to acknowledge that NEPA’s early common law development laid the foundation for this mandate in the courts.⁷⁸ *Calvert Cliffs* had found such a mandate in Section 102(1)’s instruction “that all laws and regulations be ‘interpreted and administered’” according to the policies set forth in Section 101.⁷⁹ The Eighth Circuit’s *Environmental Defense Fund* decision recognized such a mandate emanating from the partnership of sections 101 and 102(1).⁸⁰ The continuity of this recognition of a substantive

74. See *McDowell v. Schlesinger*, 404 F. Supp. 221, 253 (W.D. Mo. 1975).

75. See *Sierra Club v. Froehlke*, 392 F. Supp. 130, 143 (E.D. Mo. 1975); *Schicht v. Romney*, 372 F. Supp. 1270, 1271 (E.D. Mo. 1974).

76. See, e.g., *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973) (“[W]e feel compelled to hold that an agency’s decision should be subjected to a review on the merits to determine if it is in accord with the substantive requirements of NEPA.”); *Concerned About Trident*, 400 F. Supp. at 481 (“In the substantive NEPA review context, the [c]ourt must examine particularly whether the Trident decisions were made without due concern for the substantive environmental considerations outlined in Section 101(b). . . .”); *Environmental Defense Fund, Inc. v. Tennessee Valley Auth.*, 371 F. Supp. 1004, 1013 (E.D. Tenn. 1973) (concluding that “NEPA gives plaintiffs the right to challenge” an agency’s decision to continue with a project).

77. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1139-40 (5th Cir. 1974).

78. See *infra* Part IV.A.

79. *Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1112 n.5 (D.C. Cir. 1971)(quoting NEPA § 102(1), 42 U.S.C. § 4332(1) (1997)).

80. See *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 297 (8th Cir. 1972).

mandate continued in other courts. The Fifth Circuit held that NEPA requires more than mere “formalistic paper shuffling between agency desks.”⁸¹ The Second Circuit held that Section 102(1) created a duty for all federal agencies to “rethink encrusted, entrenched positions.”⁸² The District of Columbia Circuit held that Section 102(1) added a substantive mission even to such a nonenvironmentally oriented agency as the Securities and Exchange Commission.⁸³ In *Concerned About Trident v. Schlesinger*, the United States District Court for the District of Columbia found that, “[c]learly, NEPA was intended to effect substantive changes in the [f]ederal agency decision-making process.”⁸⁴ In another case, the D.C. district directed that the Bureau of Land Management could not be excused from complying with the substantive requirements of sections 101(b) and 102(1).⁸⁵ The district court for the District of Maine noted that, “[i]n essence, Section 102 requires every federal agency . . . to minimize adverse environmental effects, before undertaking any activity.”⁸⁶ In *McDowell v. Schlesinger*, the district court for the Western District of Missouri found that “NEPA’s requirements are specifically designed . . . to effectuate substantive changes in the agency decision making process.”⁸⁷ The lower federal courts were quickly creating the federal NEPA common law that would give life to NEPA’s promise of substantive review, and they were finding the authority for that promise in the text of Section 102(1) and its place within the overall statutory scheme of NEPA. Thus, the NEPA common law recognized two distinct mechanisms in NEPA for achieving the policy of environmental health: the procedural provisions of Section 102(2) and, independently, the substantive command of Section 102(1).

Though the body of law that matured around NEPA’s Section 102(1) recognized a clear substantive mandate for environmentally sound agency decisionmaking, and an equally clear right of substantive review of the merits of agency decisions, agencies were not left at the whims of courts or environmental litigation groups.

81. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1129 (5th Cir. 1974).

82. *Greene County Planning Bd. v. Federal Power Comm’n*, 455 F.2d 412, 417 n.12 (2d Cir. 1972); *see also id.* at 419 (“[C]ompliance is required not only with the letter, but the spirit of the Act.”).

83. *See Natural Resources Defense Council, Inc. v. Securities and Exchange Comm’n*, 606 F.2d 1031, 1045 (D.C. Cir. 1979) (“Congress, in NEPA, made environmental considerations part of the SEC’s substantive mission.”).

84. 400 F. Supp. 454, 481 (D.D.C. 1975).

85. *See National Wildlife Fed’n v. Morton*, 393 F. Supp. 1286, 1293 n.12 (D.D.C. 1975).

86. *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 786 (D. Me. 1973).

87. 404 F. Supp. 221, 241 (W.D. Mo. 1975).

The NEPA common law developed in the courts incorporated two primary safeguards against overreaching. First, the environmental mandate of Section 102(1) could not require actions beyond the substantive scope of existing statutes, specifically the agencies' organic statutes.⁸⁸ Second, the right of substantive review could not eclipse the lawful discretion of the agency.⁸⁹ These safeguards were ensured by an overall safeguard that substantive review would be limited to the boundaries for review prescribed by the Supreme Court in *Overton Park*.⁹⁰

Prior to the maturing of the NEPA common law into a body of law recognizing NEPA's substantive mandate and review, however, a few decisions indicated an unwillingness to review agency actions on their merits. An early case from the Northern District of Mississippi, reviewing the decision of the Corps of Engineers to proceed with the Tennessee-Tombigbee Waterway project, illustrates this lack of consensus.⁹¹ The court held that it could "not sit to decide the substantive merits or demerits of a federal undertaking under NEPA, but only to make certain that the responsible federal agency . . . makes

88. See *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) (Starr, J., authoring relevant section of opinion) ("NEPA does not expand an agency's substantive powers."); *Natural Resources Defense Council, Inc. v. Berklund*, 609 F.2d 553, 558-59 (D.C. Cir. 1979) (holding that "the limit of [the 102(1)] directive is reached when the NEPA policies conflict with an existing statutory scheme," and that "not even the policies of NEPA, which are of the utmost importance to the survival of our environment, can rewrite [section] 201(b) [of the Mineral Lands Leasing Act] to undermine the property rights of prospecting permittee lease applicants"); *Natural Resources Defense Council, Inc. v. Securities and Exchange Comm'n*, 606 F.2d 1031, 1045 (D.C. Cir. 1979) ("[W]e do not believe that NEPA goes so far as to require the SEC to promulgate specific rules.").

89. See, e.g., *Concerned About Trident v. Schlesinger*, 400 F. Supp. 454, 483 (D.D.C. 1975) ("It is not for this Court to second-guess the wisdom of th[e] selection [of the Trident missile system] when those officials entrusted with the decision acted within their discretionary authority.").

90. 401 U.S. 402, 416 (1971) ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."). This *Overton* safeguard was built into the standard of substantive review used by many NEPA courts. See, e.g., *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 300 (8th Cir. 1972) (quoting *Overton Park's* admonition against the court substituting its judgment for that of an agency); *Duck River Preservation Ass'n v. Tennessee Valley Auth.*, 410 F. Supp. 758, 762 (E.D. Tenn. 1974) ("[T]his Court limits the standard of its review within these perimeters and specifically does not substitute its judgment . . . for that of the TVA."); *Concerned About Trident*, 400 F. Supp. at 483 (delineating that substantive review of agency decisions under NEPA must take place "[w]ithin the *Overton Park* framework"); *Sierra Club v. Froehlke*, 392 F. Supp. 130, 143 (E.D. Mo. 1975) ("[T]his Court is not empowered to substitute its judgment for that of the [a]gency."); *Environmental Defense Fund, Inc. v. Tennessee Valley Auth.*, 371 F. Supp. 1004, 1015 (E.D. Tenn. 1973) ("[T]his [c]ourt cannot substitute its judgment for that of [the] TVA. . . .").

91. See *Environmental Defense Fund, Inc. v. Corps of Engineers*, 348 F. Supp. 916 (N.D. Miss. 1972).

full disclosure of environmental consequences to the decisionmakers.”⁹² Moreover, the court found that, not only did NEPA not provide for substantive review, but that it did not contain a substantive mandate.⁹³ Though this decision was soon overshadowed by the maturing body of NEPA jurisprudence to the contrary, it foreshadowed what was to become of Section 102(1) once the Supreme Court turned to the question of substantive review under NEPA.⁹⁴ Although the Supreme Court never expressly held that Section 102(1) was not a vehicle for substantive review, dicta in its decisions restricting the procedural mechanisms required under Section 102(2) effectively ended attempts at Section 102(1) review.⁹⁵ The reason those Section 102(2) Supreme Court decisions have closed Section 102(1) inquiry is partially evident in a series of ominous passages that wound their way through the heart of what had been developing into an otherwise 102(1)-friendly NEPA common law.

In *Calvert Cliffs*, for instance, though acknowledging in a footnote that Section 102(1) must not be read out of the statute, the court examined only the mechanisms of Section 102(2) in expounding on the ways in which NEPA gives effect to the policy goals of Section 101.⁹⁶ Though this does not contravene the otherwise strong statement by the court that NEPA has a substantive import for the actions of federal agencies that is reviewable, it does give short shrift to Section 102(1) by attributing substantive action-forcing to Section 102(2). In doing so, the Supreme Court’s eventual foreclosure of substantive review under Section 102(2) more easily became interpreted as foreclosing all substantive NEPA review.

Similarly, a court in the District of Maine, in reviewing the Navy’s proposal to conduct combat exercises on a beach in a state park, referred to the Navy’s compliance “with the *procedural* requirements of Sections 102(1), 102(2)(A), (B) and (D) of NEPA.”⁹⁷ Referring to Section 102(1) as a repository of “procedural requirements” deviates from the otherwise substantive characterization of that section. The confusion created by such a misstatement portended the eventual disappearance of Section 102(1) as a tool of review in the wake of Supreme Court decisions holding

92. *Id.* at 925.

93. *See id.*

94. *See infra* Part III.

95. *See infra* Part III.

96. *Compare* *Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1112 n.5 (D.C. Cir. 1971) *with id.* at 1113.

97. *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 788 (D. Me. 1973) (emphasis added).

that there may be no substantive review under NEPA's procedural provisions. This confusion is again evident in the otherwise substantive-review-friendly Eighth Circuit opinion of *Iowa Citizens for Environmental Quality, Inc. v. Volpe*.⁹⁸ After adopting the standard of substantive review from the court's earlier *Environmental Defense Fund* decision, the court noted that "the policies of NEPA enunciated in Section 101 must be considered and implemented in the policies, regulations, and public laws of the United States 'to the fullest extent possible' through the procedural requirements of Section 102(2)."⁹⁹ Though relying on a standard of review from a decision explicitly recognizing Section 102(1)'s distinct role in ensuring the substantive effect of Section 101's policies, and even while quoting directly from Section 102(1) ("to the fullest extent possible"), the court nonetheless connected the Section 101 policies to the procedures of Section 102(2). By minimizing the distinction between the guarantees afforded by sections 102(1) and 102(2), these opinions began early to erode Section 102(1)'s ability to independently survive the Supreme Court's eventual limitations on the power of Section 102(2) review.

III. THE TEXT, LEGISLATIVE HISTORY, AND COMMON LAW OF NEPA SECTION 102(1) IN THE U.S. SUPREME COURT: THE DISAPPEARANCE OF SUBSTANTIVE REVIEW FROM THE NEPA LANDSCAPE

During NEPA's first decade, the lower federal courts had taken its text, as supported by its legislative history, and found a statutory command to federal agencies to make their actions substantively conform to a national policy of environmental protection. In the course of four decisions over a thirteen-year period beginning in 1976, the Supreme Court eroded this jurisprudence through a campaign of dicta. By the end of the thirteen years, NEPA substantive review was widely acknowledged as having become extinct.¹⁰⁰ The Supreme Court eliminated substantive review, however, not by confronting the body of common law that had developed in the lower federal courts regarding Section 102(1), and not even by evaluating

98. 487 F.2d 849, 851 (8th Cir. 1973).

99. *Id.*

100. See, e.g., Ferester, *supra* note 12, at 220 ("[A]fter *Strycker's Bay*, NEPA requires nothing more of the agency than an adequate consideration of the environmental consequences of its decision."); Andreen, *supra* note 12, at 209; Weinberg, *supra* note 12, at 113 (without questioning the wisdom of the result in light of Section 102(1), reporting that "the courts have not found [NEPA or its implementing regulations] require substantive mitigation").

Section 102(1) itself, but in the course of reviewing Section 102(2)'s procedural requirements.¹⁰¹ As such, insofar as the Court was only concerned with the scope of Section 102(2)'s procedural requirements, its analysis regarding substantive NEPA review isn't applicable to an inquiry into the scope of Section 102(1)'s distinct substantive mandate.

A. *NEPA Substantive Review Never Properly Before the Supreme Court*

The first case in the Court's four-case progression toward an elimination of NEPA substantive review was *Kleppe v. Sierra Club*.¹⁰² In *Kleppe*, the plaintiffs were seeking to enjoin the issuance of mining leases in an area known as the Northern Great Plains region until the Department of Interior and other agencies responsible for issuing the leases had completed a programmatic EIS evaluating the environmental consequences of mining throughout the region.¹⁰³ The sole question requiring the Court's answer was whether Section 102(2)(C) required an EIS for the whole region.¹⁰⁴ No question of the availability of substantive review under any section of NEPA was before the Court.¹⁰⁵

Nonetheless, the majority offered a formulation of NEPA substantive review. After observing in the abstract that a comprehensive EIS may be required for consideration of the cumulative impacts of several proposed actions, the Court added in a footnote that it could not substitute its judgment for the agency's regarding the environmental impacts of agency actions, and that courts could only ensure that agencies take a "hard look" at those impacts without interjecting themselves into the agencies' areas of discretion.¹⁰⁶ The appearance of this language is puzzling, as the

101. See *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

102. 427 U.S. 390 (1976).

103. See *id.* at 394.

104. See *id.* at 398.

105. Indeed, the Court expressly acknowledged that its concern was with the "procedural duty imposed upon agencies by [Section 102(2)]" and with eliminating agency uncertainty about the scope of the procedural duty imposed by this section. See *id.* at 405-06 (emphasis added).

106. See *id.* at 410 & n.21. Though the language in the Court's footnote merely restates two of the safeguards being developed in the body of law favorable to Section 102(1) substantive review—the *Overton Park* safeguard and the discretion safeguard—puzzlingly, it did not cite *Overton Park* as the source of the safeguard. See *id.* at 410 n.21 (citing *Scenic Hudson*

Court had not been called upon to, nor had it indicated that it would, review the merits of the leasing of mineral rights in the Northern Great Plains region. The Court had no reason to announce safeguards for the exercise of substantive review where it was merely determining whether the agency had complied procedurally with NEPA. Doing so, however, revealed that the Court was eager to dispense with the body of law favorable to substantive review that had matured in the lower federal courts.¹⁰⁷

The second case in the Court's progression toward eliminating Section 102(2) NEPA substantive review was *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹⁰⁸ In *Vermont Yankee*, the Court was reviewing, *inter alia*, the court of appeals' finding that the rulemaking procedures of the Atomic Energy Commission that led to the issuance of two construction permits for nuclear facilities were insufficient to accord with the procedural requirements of NEPA Section 102(2)(C).¹⁰⁹ Reversing this finding of the court of appeals, the Court quoted its dictum from *Kleppe* that "[n]either [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions," and held that it is "clear that the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review."¹¹⁰ The Court, therefore, limited the procedures that NEPA required of an agency; in the Court's view, though an agency may decide on its own to expand its own rulemaking procedures above and beyond that required by law, courts could not impose upon those agencies procedures that were not actually required by NEPA.¹¹¹ Notably, the authority for the Court's holding—the language in *Kleppe* regarding the scope of substantive review (not

Preservation Conference v. Federal Power Comm'n, 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972)).

107. The maturing body of substantive-review-friendly NEPA law in the lower courts was not lost on all the members of the Court. Recall that it was in *Kleppe* that Justice Marshall dissented, based on the successful development of a NEPA common law in the federal courts to determine the scope and availability of substantive review under NEPA. *See id.* at 421 (Marshall, J., dissenting).

108. 435 U.S. 519 (1978).

109. *See id.* at 527, 552-55. Note that the Atomic Energy Commission had transferred its authority to the Nuclear Regulatory Commission by the time of the Court's decision, but this had no effect on the proceedings. *See id.* at 526 n.2.

110. *Id.* at 555 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

111. *See id.*

the scope of NEPA's procedural requirements)—had not been formulated to address any actual controversy at issue in that case.

After resolving the issue properly before it, whether Section 102(2)(C) required any heightened rulemaking procedures, the Court traveled on a tangential tirade that extended beyond the scope of the EIS requirement. The Court found that the examination of the policy issues surrounding the reliance on nuclear energy should be left to state and federal agencies without the intrusion of NEPA-inspired environmental policies.¹¹² Despite Section 101(a)'s declaration of a national environmental policy, the substance given to that policy by Section 101(b), and the mandate behind the policy in Section 102(1), the Court found that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."¹¹³ This question of whether NEPA contained a substantive mandate in addition to its procedural provisions was not necessary to the Court's decision in the case. As a result, it did not examine the full scope of NEPA (i.e., it did not cite to or examine Section 102(1), but limited its discussion to Section 102(2)(C)), and arrived at a fundamentally flawed conclusion.¹¹⁴

The third case in the Court's progression was *Strycker's Bay Neighborhood Council, Inc. v. Karlen*.¹¹⁵ In *Strycker's Bay*, the Court reviewed whether the Department of Housing and Urban Development's (HUD) decision to build a low-income high-rise housing project had been reached arbitrarily; the Court's analysis centered on whether NEPA Section 102(2)(E) allowed courts to review the substantive decision of an agency on the merits, or whether that section instead only prescribed a procedure for agencies to use in arriving at a decision.¹¹⁶ The Court itself framed the discussion in the case as one centered on the force of one of NEPA's procedural provisions, not on Section 102(1)'s substantive mandate. In its analysis, the Court proceeded straight to its dictum from *Vermont Yankee* that NEPA's requirements were "essentially procedural."¹¹⁷

112. *See id.* at 557-58.

113. *Id.* at 558.

114. *See infra* discussion in Part III.B, regarding the inapplicability of the Court's analysis to the question of NEPA Section 102(1) substantive review.

115. 444 U.S. 223 (1980).

116. *See id.* at 223-27. NEPA Section 102(2)(E) requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1997).

117. *Id.* at 227 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

Accordingly, the Court held that “*Vermont Yankee* cuts sharply against the . . . conclusion that an agency . . . must elevate environmental concerns over other appropriate considerations. . . . [O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences.”¹¹⁸ With little additional analysis, the Court found that Section 102(2)(E) required HUD only to consider alternatives, and nothing more.¹¹⁹ In the course of a string of dicta, the Court appeared to shut the door on substantive review, without so much as mentioning the section of NEPA that provided for that review—Section 102(1).

The final case in the Court’s stealth progression against Section 102(1) substantive review was *Robertson v. Methow Valley Citizens Council*, wherein the Court affirmed the direction it had taken in *Strycker’s Bay*.¹²⁰ In *Methow Valley*, the Court reviewed the issuance of a permit by the Forest Service to a developer of an alpine ski resort at Sandy Butte in the Okanogan National Forest.¹²¹ The EIS drafted for the permit had been challenged by the plaintiffs as not having adequately fulfilled NEPA’s procedural requirements for developing mitigation measures and examining worst-case scenarios.¹²² The Court resolved this issue that was actually before it by determining that Section 102(2)(C)’s requirements that mitigation be discussed did not require an actual mitigation plan to be formulated and by determining that the EIS’s discussion of environmental impacts need not include a worst-case analysis.¹²³ On its way to this conclusion, however, the Court detoured to an issue that was not properly before it—whether the Section 102(2)(C) EIS procedure held a requirement for a particular substantive outcome to the agency decisionmaking process.¹²⁴ The Court observed that, “[a]lthough these procedures are almost certain to affect the agency’s substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”¹²⁵ The Court concluded this

118. *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

119. *See id.* at 228.

120. 490 U.S. 332 (1989).

121. *See id.* at 337; *see also* WILLIAM H. RODGERS, ENVIRONMENTAL LAW 863 (2d ed. 1994) (noting that “[t]he plans effectively drop a new town (big enough to accommodate 8200 skiers) on a fragile and pristine mountainside”).

122. *See id.* at 345-46.

123. *See id.* at 353.

124. *See id.* at 350.

125. *Id.* (citing *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

unnecessary discussion of whether NEPA provides a substantive mandate by stating, “NEPA merely prohibits uninformed—rather than unwise—agency action.”¹²⁶

The *Methow Valley* decision appeared to have nailed the final nail in the coffin encasing Section 102(1) substantive review.¹²⁷ However, the Court, in each of the four decisions along its progression, had never been called on to examine whether NEPA as a whole permitted substantive review. The questions necessary for judgment in each of the cases revolved around the scope of the procedural requirements of either section 102(2)(C) or (E). The Court’s pronouncements that there is no substantive review under NEPA were unnecessary to the resolution of questions regarding the procedural requirements of the statute. Moreover, the Court never so much as mentioned Section 102(1) in its decisions, nor did it confront the analysis that had developed in the lower federal courts regarding the substantive mandate and review contained in Section 102(1).

Where the language of the Court is not necessary to its decision, then that language has been characterized as “classic dicta.”¹²⁸ Accusing the Court of trying to eliminate Section 102(1) via dicta alone is more than grouching, “Harumph! Nobody asked you!” Indeed, the Court itself has long accepted the doctrine that a pronouncement in a case that is unnecessary for the decision of the case (i.e., dictum) should have no force of law when applied in subsequent cases.¹²⁹ The reason for adhering to this principle is more

126. *Id.* at 351.

127. With only one exception, the commentators have acquiesced in the Supreme Court’s foreclosure of Section 102(1) substantive review. See Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA’s Progeny*, 16 HARV. ENVTL. L. REV. 207, 220 (1992) (“[A]fter *Strycker’s Bay*, NEPA requires nothing more of the agency than an adequate consideration of the environmental consequences of its decision.”). Like the Court, Ferester never looks to Section 102(1) as a separate source of substantive review from the Section 102(2) provisions at issue in *Strycker’s Bay*. Other commentators similarly report the refusal of courts to engage in substantive review, without questioning whether such a refusal is contrary to the plain language of Section 102(1). See Andreen, *supra* note 12, at 209; see also Weinberg, *supra* note 12, at 113 (without questioning the wisdom of the result in light of Section 102(1), reporting that “the courts have not found [NEPA or its implementing regulations] require substantive mitigation”). But see Yost, *supra* note 12, at 540 (observing that the Supreme Court had been “led . . . astray,” carried away by its reliance on its own “unduly restrictive dicta,” and acknowledging that the Court indeed had never ruled against the use of Section 102(1) for substantive review).

128. *New York v. United States*, 505 U.S. 144, 202 (1992) (White, J., dissenting).

129. See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”).

than mere formalism, but calls to the forefront the principle that Article III courts can only properly review an actual case or controversy, because only within the contours of a concrete dispute may the court fully examine a question's legal implications.¹³⁰ Thus, in its four decisions along the progression toward eliminating NEPA substantive review, the Court often relied on dicta.¹³¹ Moreover, the Court never explicitly mentioned Section 102(1) when it declared that NEPA provided no means for substantive review, because the question was never properly before it. Hence, declaring that substantive review resided nowhere in NEPA was dicta insofar as such a statement extended beyond the sections of the Act that were before it (i.e., sections 102(2)(C) and (E)); indeed, it was dicta even regarding those sections where the issue before the Court was the extent of those sections' procedural requirements and not their substantive import. Accordingly, as dicta, the Court's pronouncement of no substantive review has no force of law in subsequent cases relying on Section 102(1).

B. Section 102(1) Substantive Review Never Implicitly Rejected by the Supreme Court

Even if the Supreme Court's holding that NEPA does not contain substantive review is merely dicta regarding Section 102(1), that fact alone is not sufficient to resurrect Section 102(1)'s substantive mandate and right of substantive review. If the Court's analysis of substantive review in dicta in the four-case progression from *Kleppe* through *Methow Valley* is logically valid and applicable to Section 102(1), then Section 102(1) substantive review would have been implicitly foreclosed. The great 102(1) resurrection would be short-lived, waiting for a sure-death at the hands of a Court that had already formulated the analysis needed for the killing. Such is not the case,

130. See *id.* at 399-400 ("The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.").

131. See *Robertson v. Methow Valley Citizens Council, Inc.*, 490 U.S. 332, 350 (1989) (citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)) (relying on dicta from previous cases for the holding); *Stryker's Bay*, 444 U.S. at 229 (Marshall, J., dissenting) (recognizing that the passages cited by the majority to support the conclusion that NEPA provided no substantive review were dicta and without authority); see also *Darr v. Burford*, 339 U.S. 200, 214 n.38 (1950) (noting "that obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases") (internal quotation marks omitted).

however. The focus of the Court's substantive review analysis was limited to concerns about whether the Section 102(2) procedural provisions mandated a particular substantive result to agency decisionmaking. In analyzing the scope of specific procedural provisions, the Court's analysis never approached the distinct issues inherent in determining the scope of Section 102(1)'s substantive command.

As noted above, in *Kleppe*, the Court was determining solely whether Section 102(2)(C) required the preparation of a cumulative EIS for an entire coal-leasing region.¹³² The plaintiffs in *Kleppe* had never even raised Section 102(1)-based claims, having only raised claims based on Sections 102(2)(A), (C), and (D).¹³³ In finding that the coal activity in the region of concern in the case did not require a regional EIS, the Court concentrated its analysis on whether the regional coal activities constituted a "federal action" for purposes of Section 102(2)(C).¹³⁴ The Court's analysis then turned to the question of when the EIS requirement was triggered, and in doing so again evaluated the text of Section 102(2)(C).¹³⁵ The Court's admonition that, even in cases where a comprehensive EIS may be required, courts should not replace their judgment for that of the agency, was in a footnote in the Court's discussion about the scope of the Section 102(2)(C) EIS requirement.¹³⁶ In that discussion, the Court looked to NEPA's legislative history in an attempt to determine Section 102(2)(C)'s scope, and found that the intent of Congress in establishing the EIS requirement was to ensure adequate consideration of environmental impacts.¹³⁷

In finding that the EIS requirement's concern for ensuring consideration of the environment did not require substantive review, the Court may have been correct, but this finding does not address the distinct requirement and intent behind Section 102(1). As discussed in Part II.A, NEPA's text and legislative history support a reading of the Act that it harbors two separate mechanisms for implementing the

132. See *Kleppe v. Sierra Club*, 427 U.S. 390, 398-99 (1976) (observing that the question they had to resolve was "whether NEPA requires petitioners to prepare an environmental impact statement on the entire Northern Great Plains region," and finding that petitioners' "rel[iance] squarely upon the . . . language of § 102(2)(C) of NEPA" was "well placed").

133. See *id.* at 398 n.9; see also *Sierra Club v. Morton*, 514 F.2d 856, 867 (D.C. Cir. 1975) (observing that plaintiffs' sole claims were based on Section 102(2)), *rev'd sub nom.* *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

134. See *Kleppe*, 427 U.S. at 399-402.

135. See *id.* at 405-06.

136. See *id.* at 410 n.21.

137. See *id.* at 409-10.

national environmental policy. The procedural mechanisms of Section 102(2) facilitate that policy by ensuring that consideration of environmental factors is institutionalized in the agency decisionmaking process. As the Court observed in *Kleppe*, this is not the locus of NEPA substantive review. Once a court has determined that a federal action has been accompanied by a proper consideration of environmental factors, however, it has the separate Section 102(1)-based obligation to review whether the substance of the action comports with the environmental policy established in Section 101.¹³⁸ This requirement resides in a section of NEPA not examined by the *Kleppe* Court, and the intent of Congress to impart this substantive requirement is found in sections of the legislative history likewise not examined by the *Kleppe* Court. The Court's analysis that the sole intent of Congress in requiring a Section 102(2)(C) EIS was to ensure consideration of the environment does not foreclose a reading of Section 102(1) that would require that such consideration result in an agency decision that furthered the environmental policy of Section 101.

The Court's decision in *Vermont Yankee* similarly does not provide analysis that may implicitly foreclose Section 102(1) substantive review. In *Vermont Yankee*, the controversy at issue revolved around what rulemaking procedures should have been used by the Atomic Energy Commission in granting licenses to build or expand nuclear energy facilities.¹³⁹ The Court searched NEPA for any requirement of procedures beyond those required by Section 4 of the APA, and concluded that the only procedures required by NEPA were those explicitly set out in NEPA Section 102(2).¹⁴⁰ The Court then examined the scope of the Section 102(2)(C) requirement that the EIS contain a "detailed statement . . . on . . . alternatives to the proposed action."¹⁴¹ The Court held that notions of "feasibility" and "common sense" delineated the scope of this alternatives requirement and of the EIS requirement of Section 102(2)(C).¹⁴² The Court's analysis on

138. See text accompanying notes 68 and 69, *supra*, observing that the two-pronged review under NEPA required that, after it examines an agency's compliance with the procedural mechanisms, a court should examine the substantive decision of the agency on its merits by determining, "according to the standards set forth in [sections] 101(b) and 102(1) of the Act, whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 300 (8th Cir. 1972) (internal quotation marks omitted).

139. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 528-29 (1978).

140. See *id.* at 548.

141. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1997).

142. *Vermont Yankee*, 435 U.S. at 551.

these issues in controversy is inapplicable to whether the decision resulting from the agency's decisionmaking process could be substantively reviewed by the courts. Even limiting the EIS procedure to one bounded by notions of feasibility and common sense, the decision resulting from such a limited process must still be held up against the substantive mandate of Section 102(1). Limiting the procedural requirement, as the Court's analysis supports, does not by implication eliminate the substantive command.

It is the *Vermont Yankee* majority's final paragraph of analysis that discusses NEPA's substantive reach.¹⁴³ As discussed in Part III.A, however, this part of the Court's analysis is dictum; even the majority recognizes that its discussion is only "of *some* relevance to th[e] case."¹⁴⁴ The uselessness of dicta is perhaps best illustrated by the inapplicability of the majority's diatribe against NEPA substantive review in *Vermont Yankee*. The Court was not confronted with the question of whether it could review the merits of the Atomic Energy Commission's rulemaking decision; as a result, it did not analyze NEPA substantive review in a fully developed case or controversy, which led to a flawed and futile analysis. The Court observed that administrative decisions could be set aside for "substantive reasons as mandated by statute."¹⁴⁵ However, the Court also observed that NEPA's mandate was "essentially procedural."¹⁴⁶ Perhaps because the Court was not analyzing the question of NEPA's substantive power in the context of a fully briefed and argued actual controversy, its analysis regarding the nature of NEPA was exclusively policy-based, contending that it would not be right for a court to be able to reverse an agency decision it disagreed with when an agency had arrived at that decision through extensive proceedings.¹⁴⁷ Because its analysis was not framed by an actual controversy, the Court did not fully examine NEPA's text and legislative history; if it had, it would have recognized that substantive review was, indeed, mandated by the statute, in the distinct command of Section 102(1). The Court itself recognized that its policy-based concerns about substantively reviewing an agency decision would be trumped by a statutory mandate of substantive review. Hence, even though the language of

143. *See id.* at 557-58.

144. *Id.* at 557.

145. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

146. *Id.*

147. *See id.*

the Court is that NEPA does not allow substantive review, its actual analysis supports exactly the opposite conclusion.

The inapplicability of the Court's Section 102(2) analysis to questions of Section 102(1) substantive review continued in *Strycker's Bay*. The Court was presented by the Second Circuit court of appeals with a golden opportunity to directly confront the question of substantive review as presented by the partnership of sections 101(b) and 102(1).¹⁴⁸ The court of appeals had determined that HUD's selection of a site for a high-rise low-income housing unit, based on its EIS consideration of alternatives, should have been informed by NEPA Section 101(b)(1).¹⁴⁹ Though the court of appeals did not specifically invoke Section 102(1) as the authority for applying Section 101(b)'s standards in a substantive review of the merits of HUD's decision, it was clear that the court felt such authority could be found other than in Section 102(2)'s requirements to consider environmental factors; the court observed that "'consideration' is not an end in itself."¹⁵⁰

The court of appeals had pitched the ball of Section 102(1) NEPA review to the Supreme Court, albeit inelegantly; the Supreme Court, however, struck out. The Court saw the ball coming, as, in restating the position of the court below, it acknowledged the lower court's pronouncement that mere consideration was not the end-goal of NEPA.¹⁵¹ The Supreme Court, however, though acknowledging the lower court's contention that NEPA required more than consideration of environmental factors, did not cite to that part of the lower court opinion that looked to Section 101(b) for a source of what else NEPA might require. Indeed, a reading of the Supreme Court's opinion in the case, without reading the Second Circuit's opinion, leads to the mistaken belief that the only NEPA section at issue is Section 102(2)(E).¹⁵² Accordingly, the Court's per curiam opinion became a mechanical exercise of applying its "precedent" from *Vermont*

148. See *Karlen v. Harris*, 590 F.2d 39 (2d Cir. 1978), *rev'd sub nom.* *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

149. See *id.* at 44.

150. *Id.* (quoting NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1997)). An examination of the reported decisions rendered in the course of the protracted litigation reveals that this was the first intimation that a substantive review of the HUD action could result from a section of NEPA other than Section 102(2). See *Trinity Episcopal Sch. Corp. v. Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd in part, rev'd in part*, *Trinity Episcopal Sch. Corp. v. Romney*, 523 F.2d 88 (2d Cir. 1975), *on remand sub nom.* *Trinity Episcopal Sch. Corp. v. Harris*, 445 F. Supp. 204 (S.D.N.Y. 1978), *rev'd sub nom.* *Karlen v. Harris*, 590 F.2d 39 (2d Cir. 1978).

151. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 226-27 (1980).

152. See *id.* at 225.

Yankee.¹⁵³ Never mind that the language from *Vermont Yankee* relied upon by the Court was nonauthoritative dictum, but, presented with a genuine opportunity to analyze whether NEPA substantive review may extend from sections other than 102(2), the Court added no new analysis. Though it states flatly that *Vermont Yankee*'s policy-based, statutorily irrelevant dictum "cuts sharply against" the lower court's reading of NEPA, the Court does not explain how or why that dictum should apply to the court of appeals' application of Section 101(b) and, arguably, Section 102(1).¹⁵⁴ Presented with an opportunity to expand its policy arguments against the substantive mandate of NEPA, in the context of an actual case and controversy, the Court failed. With no new analysis on the issue of whether substantive review could reside in NEPA's opening sections, the Court's rejection of Section 102(2)(E) substantive review cannot act to implicitly deny Section 102(1) substantive review.

Searching for analysis in *Methow Valley* that would support an implicit rejection of Section 102(1) substantive review proves equally fruitless. In *Methow*, the Court's relevant concerns were with determining whether the Section 102(2)(C) procedures required that possible mitigation measures in the EIS be in the form of a concrete mitigation plan or if a simple listing of possible mitigation measures would suffice, and whether Section 102(2)(C) and its implementing regulations required the EIS to incorporate a discussion of worst-case scenarios.¹⁵⁵ The Court restricted its analysis to the scope of what was required by Section 102(2)(C).¹⁵⁶ In ultimately concluding that the EIS need not contain a concrete mitigation plan or a worst-case discussion, the Court analyzed the purpose of Section 102(2)(C) within the NEPA framework. It observed that the EIS was intended to ensure that agencies had a full appreciation of the environmental factors while making decisions, and that the public had opportunities for disclosure and input into agency decisions.¹⁵⁷

153. See *id.* at 227.

154. See *id.*

155. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 335-36 (1989); see also *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 814 (9th Cir. 1987) (citing as part of the relevant statutory analysis NEPA Section 102(2)(E), in addition to Section 102(2)(C)), *rev'd sub nom.* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

156. See *Methow Valley*, 490 U.S. at 348-49. Notably, the Court's discussion of the scope of Section 102(2)(C) was prefaced by the comment that the EIS requirement was one "among other measures" required in Section 102. *Id.* at 348. Although, in light of the Court's later reliance on *Strycker's Bay*, this comment probably was not intended to signal that Section 102(1) was still a viable avenue for substantive review, semantically the Court does leave that door open.

157. See *id.* at 349-50.

Up to this point in the Court's analysis, it was not inconsistent with the scheme of substantive review that had developed in the lower courts' NEPA common law. Recall that the Eighth Circuit's *EDF v. Corps of Engineers* NEPA inquiry involved two parts: In the first part, an agency's compliance with the Section 102(2) procedural provisions was examined; the second, separate, part of the inquiry asked whether the decision reached via those procedures was, "according to the standards set forth in [sections] 101(b) and 102(1) of the Act, . . . arbitrary or clearly gave insufficient weight to environmental values."¹⁵⁸ The *Methow Valley* Court's holding that the EIS procedure didn't require an actual mitigation plan or worst-case discussion, thereby limiting NEPA's procedural provisions, was only applicable to the first part of the inquiry. Granted, to a certain degree, limiting the information required by the EIS procedure may limit a court's evaluation of whether the decision reached pursuant to that EIS was arbitrary and capricious according to the Section 102(1)/101(b) standards. However, limiting the procedure does not eliminate the requirement of compliance with those standards, nor does it eliminate a review for that compliance.

Following the *Methow Valley* Court's analysis regarding the scope of Section 102(2)(C)'s procedural requirements, it added a section of analysis very similar to the tangential dictum-diatribes that ended the majority opinion in *Vermont Yankee*. The Ninth Circuit had not attempted to review the Forest Service's decision to issue a special use permit on its merits, but had only remanded to the district court on the grounds that NEPA's procedural provisions had not been fully met.¹⁵⁹ Nevertheless, after holding that the court of appeals had overstated the procedures required by NEPA, the Supreme Court proceeded to discuss whether NEPA mandated particular substantive agency decisions.¹⁶⁰ Though the Court had expanded its inquiry from the procedural requirement of NEPA to its substantive force, it did not expand the base of its inquiry from the procedural sections of 102(2) to the substantive sections of 102(1) and 101(b). Instead, it relied on

158. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 300 (8th Cir. 1972) (quoting *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971)).

159. *See Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 816-20 (9th Cir. 1987) (finding inadequate the Forest Service's discussion of alternatives, the Forest Service's omission of a worst-case discussion, the Forest Service's discussion of air quality impacts, and the Forest Service's discussion of mitigation measures, and remanding for a more developed EIS on these deficient issues), *rev'd sub nom. Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

160. *See Methow Valley*, 490 U.S. at 350-51.

the inapplicable and nonauthoritative dictum from *Vermont Yankee* and *Strycker's Bay* to find that "NEPA . . . simply prescribes . . . necessary process."¹⁶¹ Just like the dictum from *Vermont Yankee*, the Court's failure to look to the statute led to a blatantly flawed analysis lacking in any contribution to the interpretation of Section 102(1). The Court acknowledged that environmental "statutes may impose substantive environmental obligations on federal agencies," but, without examining Section 102(1), found that NEPA wasn't a source of such obligations.¹⁶² Again the Court created dictum that, in addition to being of no authoritative value, provided no analysis applicable to the interpretation of Section 102(1). Whether the substantive review provided by Section 102(1) is wise as a policy matter was a political question either answered or avoided in the proper place—Congress—at the time of NEPA's passage. The Court's concern should be with the meaning of the language in NEPA, not with the wisdom of including the language in the Act.¹⁶³ Because the Court's analysis of NEPA's substantive force in *Methow Valley* was grounded in the policy discussion in *Vermont Yankee*, it is inapplicable to the text-interpretation question of the force of Section 102(1), and cannot implicitly reject substantive review pursuant to that section.¹⁶⁴

161. *Id.* at 350.

162. *Id.* at 351; *cf.* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (finding that an agency's substantive decisions may be set aside for statutorily created substantive reasons, but finding—without analyzing NEPA's full text—that NEPA did not create a substantive mandate).

163. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.")

164. Never confronting Section 102(1)'s language directly, the Supreme Court instead inserted poison pills in its analyses of Section 102(2), and attempted to kill off Section 102(1) substantive review quietly. Why would the Court engage in such a silent murder? Was it a product of a result-oriented bias against environmental statutes dating back to the ramifications of the Court's earlier decision that the snail darter could stop the construction of the ninety-percent-complete dam at the Tellico Reservoir? *See generally* *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Did the Court simply not want the responsibility of having to interpret yet another statute as putting a stop to federal projects? The answer to these questions is bigger than this Comment. For an examination of the Court's bias and hostility to NEPA, generally see Houck, "Is That All?", *supra* note 14, manuscript at 18 (observing that "[i]t is hard to imagine a venue more hostile to NEPA—to any aspect of NEPA—than the Supreme Court has proven to be"); David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENV'T'L.L. 551 (1990).

IV. WHAT THE SUPREME COURT NEVER TALKED ABOUT: FINDING NEPA'S SUBSTANTIVE "LAW TO APPLY"

If Section 102(1) has indeed survived the Supreme Court's pronouncements that NEPA does not provide for substantive review, because those pronouncements are mere dicta and do not rely on analysis that can be applied to the interpretation of Section 102(1), then one question remains: What would Section 102(1) review look like? Broken into subquestions, this inquiry asks how a Section 102(1) review would have differed from that used by the Supreme Court in reviewing under Section 102(2), and—ultimately—what is the NEPA “law to apply.” This “law to apply” mantra extends from the Supreme Court's analysis of the APA in *Overton Park*.¹⁶⁵ The APA allows for review of any agency actions to determine if they were taken arbitrarily or capriciously, except, inter alia, where “agency action is committed to agency discretion by law.”¹⁶⁶ In *Overton Park*, the Court found that this exception was “very narrow[,] . . . applicable in those *rare instances* where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”¹⁶⁷ The thrust of any argument that Section 102(1) falls within this narrow exception is that the standards that it implements—the Section 101(b) standards—are too vaguely worded to provide reviewing courts with a concrete standard.¹⁶⁸ Though this argument is sensible given the largely aspirational wording in much of Section 101(b), it does not take into account the full strength of the relationship between sections 102(1), 101(a), and 101(b), focusing instead just on section 101(b). Not only can NEPA law to apply be found in this relationship between sections 102(1), 101(a), and 101(b) via Section 102(1)'s administration clause, but it can also be found in the role of Section 102(1) as a rule of construction for non-NEPA statutes via Section 102(1)'s interpretation clause.

A. *Section 102(1)'s Administration Clause as “Law to Apply”*

Section 102(1) requires all federal laws, policies, and regulations to be “interpreted and administered” so as to accord with the national

165. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

166. 5 U.S.C. §§ 701(a)(2), 706(2)(A) (1997).

167. *Overton Park*, 401 U.S. at 410 (quoting S. REP. NO. 79-752 (1945)) (emphasis added).

168. See, e.g., Houck, “*Is That All?*”, *supra* note 14, manuscript at 9-10 (“Motivational as [the Section 101(b) standards] may be, they lack the precision that would allow someone—in our system, ultimately, a reviewing court—to say, ‘this is over the line.’”).

environmental policy.¹⁶⁹ Each of these duties breaks into a separate clause, an administration clause and an interpretation clause, carrying separate powers. Recall from the discussion in Part II.A, that the Congressional declaration of the environmental policy of NEPA was founded on the recognition of human impact on natural ecosystems.¹⁷⁰ Recall also that the Congressional policy based on this recognition and on the recognition of the importance of protecting and rehabilitating the environment, is to protect the natural environment.¹⁷¹ The standards in Section 101(b) are provided “[i]n order to carry out the policy set forth” in Section 101(a).¹⁷²

To the extent that some of the Section 101(b) standards may be vague, this vagueness is remedied by referring to the standard’s purpose to carry out the policy of environmental protection. For instance, in his recent critique of the lack of precision in Section 101(b), Professor Oliver A. Houck observed that Section 101(b)(3)’s declaration that agency actions “attain the widest range of beneficial uses of the environment” would allow any number of actions, from “damming the Colorado River (to provide electricity for Los Angeles), [to] leaving it alone (for the benefit of tourists and rafters) . . . [to] removing the existing Glen Canyon Dam.”¹⁷³ Initially note that the Section 101(b)(3) standard of attaining a wide range of uses of the environment is modified by the caveat, “without degradation.”¹⁷⁴ Moreover, a reviewing court of such proposed actions for the Colorado River would be constrained in their reading of what actions were allowed by the 101(b)(3) standard by the fact that the standard must be read as carrying out the Section 101(a) policy of environmental protection. To that end, a reviewing court would be able to ascertain that an agency action to, for instance, dam the Colorado River crossed the line of allowable conduct because such a use—though arguably “beneficial”—would not be in

169. NEPA § 102(1), 42 U.S.C. § 4332(1) (1997).

170. See NEPA § 101(a), 42 U.S.C. § 4331(a) (1997) (“[R]ecognizing the profound impact of man’s activity on the interrelations of all components of the natural environment.”).

171. See *id.* (“[I]t is the continuing policy of the Federal Government . . . to create and maintain conditions under which man *and nature* can exist in productive harmony.”) (emphasis added).

172. NEPA § 101(b), 42 U.S.C. § 4331(b) (1997).

173. Houck, “*Is That All?*”, *supra* note 14, manuscript at 9. In an earlier draft of this Comment, the discussion of NEPA substantive review was phrased in terms of a conversation between this author and Professor Houck. Though this author chose to forego this rhetorical device, the conversation is still quite real. This Comment is merely a published continuation of an actual conversation regarding NEPA’s substantive force that has been ongoing between this author and Professor Houck for the past year.

174. NEPA § 101(b)(3), 42 U.S.C. § 4331(b)(3) (1997).

furtherance of the policy of protecting the natural environment. To clear up any doubt on this matter of interpretation, Section 102(1)'s interpretation clause mandates that Section 101(b)'s standards be interpreted so as to promote the policy of environmental protection.¹⁷⁵ It would, therefore, be impermissible for a court to interpret an agency's environmentally predatory action as comporting with the Section 101(b) standards.¹⁷⁶

Combining Section 102(1)'s administration clause with the fully integrated policy/standards of sections 101(a) and 101(b) (as integrated using Section 102(1)'s interpretation clause) provides for a substantive review of agency actions that is much different from what the Supreme Court rejected in *Vermont Yankee*, *Strycker's Bay*, and *Methow Valley*. In those cases, as discussed in Part III, the Court inquired whether Section 102(2)'s various procedural provisions compelled a particular substantive agency decision.¹⁷⁷ The inquiry of whether an agency decision made pursuant to those procedures substantively comports with sections 101 and 102(1), however, is a separate inquiry, distinct from the inquiry into the force of NEPA's procedural provisions.¹⁷⁸

If such a substantive inquiry were properly before the Court in those cases, the results compelled may have been far different from those actually obtained. In a *Vermont Yankee*-type scenario, a court reviewing the decision to grant construction permits for nuclear facilities would have to confront the merits of the plaintiffs' arguments regarding energy conservation. The procedural inquiry concerned whether Section 102(2)(C) required promotion of energy conservation measures to be a considered alternative to nuclear

175. See NEPA § 102(1), 42 U.S.C. § 4332(1) (1997).

176. Even Section 101(b)'s most aspirational standards can be clarified when understood as being interpreted so as to further the policy of environmental protection. "[P]leasing surroundings," "beneficial uses," "undesirable and unintended consequences," "important . . . aspects," "variety," and "high standards of living," for instance, are all very subjective standards when read in the abstract. NEPA § 101(b)(2)-(5), 42 U.S.C. § 4331(b)(2)-(5) (1997). However, when read as being required to carry out and accord with a policy of environmental and ecosystem protection, their possible interpretations are narrowed to a more objective set of applicable standards.

177. See *supra* Part III (particularly Part III.A, noting that even these inquiries of substantive force regarding the procedural sections of NEPA were not properly before the Court).

178. See *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 300 (8th Cir. 1972) (observing that the two-pronged review under NEPA required that, after a court examines an agency's compliance with the procedural mechanisms, it should examine the substantive decision of the agency on its merits by determining, "according to the standards set forth in [sections] 101(b) and 102(1) of the Act, whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values") (internal quotation marks omitted).

energy.¹⁷⁹ The substantive inquiry would ask not whether the procedures compelled such consideration, but whether the actual decision resulting from those procedures to build nuclear facilities instead of promoting energy conservation violated NEPA's mandate to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."¹⁸⁰ Of course, the onus would be on the concerned parties to get the issue of energy conservation in front of the agency, because a later substantive review of the agency decision can only inquire into whether the decision was arbitrary and capricious in light of the information developed in the administrative record.¹⁸¹ However, insofar as energy conservation appears on the record of decision, Section 102(1)'s mandate to administer laws in accordance with the Section 101(a) policy of protecting the environment—as measured by the Section 101(b)(6) standard of enhancing renewable resources and recycling depletable ones—would allow a reviewing court to determine if choosing to build nuclear facilities instead would violate NEPA.

Similarly, in *Strycker's Bay*, if the merits of HUD's decision to build a low-income high-rise housing complex in a neighborhood of already-concentrated poverty had been properly before the courts, Section 102(1)-mandated substantive review may have compelled a different result from that obtained. After resolving the issue of what consideration of alternatives was required by the procedures in Section 102(2), a reviewing court would then turn to whether, measured against the section 102(1)/101 mandate, HUD's decision to proceed was arbitrary and capricious. Several of the Section 101(b) standards would apply to a review of HUD's decision. Would constructing the new low-income high-rise and contributing to the concentration of poverty violate the standard of "assur[ing] for all

179. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549-50 (1978).

180. NEPA § 101(b)(6), 42 U.S.C. § 4331(b)(6) (1997). For another case that presents facts that more directly implicate the standard of Section 101(b)(6), see *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 669 (1973). Though better known for its holding regarding standing, this suit was brought by environmental groups protesting the Interstate Commerce Commission's continuation of a surcharge on the shipping of scrap materials on the basis that the surcharge discouraged the use of recycled materials. See *id.*; see also Houck, "Is That All?", *supra* note 14, manuscript at 9 n.20.

181. See *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("In applying [APA Section 706's arbitrary and capricious standard], the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). This standard makes sense, especially in the context of the far-reaching substantive review proposed by this Comment. Otherwise, administrative action may become paralyzed as one challenge after another was raised in the courts after the administrative record of decision was complete.

Americans safe [and] productive . . . surroundings?”¹⁸² Would it violate the responsibility to “attain the widest range of beneficial uses of the [urban] environment without degradation, risk to health or safety, or other undesirable and unintended consequences?”¹⁸³ Information on the record that concentrating poverty would lead to increases in crime and would perpetuate the economic straits of the residents may have provided a reviewing court with the authority to find that HUD had crossed the line.¹⁸⁴

Perhaps more applicably, when reviewed substantively, HUD’s decision based on the record before it would likely fail to meet the standards that its actions “preserve important historic [and] cultural . . . aspects . . . , and maintain, wherever possible, an environment which supports diversity and variety of individual choice;”¹⁸⁵ and that its actions “achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities.”¹⁸⁶ A reviewing court could determine whether the construction of the high-rise would destroy the historical and cultural heritage of the neighborhood. Also, the reviewing court could examine whether the concentration of low-income residents, as opposed to an integration of different income-level residents, would decrease standards of living, information regarding which was specifically on the administrative record in *Strycker’s Bay*.¹⁸⁷ In conducting this review, the court would be empowered by APA Section 706 and NEPA Section 102(1)’s administration clause to find unlawful the HUD decision if it was made in violation of the mandate to administer federal laws in accordance with the NEPA Section 101 policy and standards.

Methow Valley provides another example of the difference the availability of such substantive review would make. After deciding the procedural questions of whether a mitigation plan and worst-case discussion should be a part of an EIS, if the merits of the Forest Service’s permitting decision were properly before it, the reviewing court could separately determine whether the decision to grant the permit was an administration of federal law in violation of NEPA Section 101. Where the merits of the Forest Service’s decision were

182. NEPA § 101(b)(2), 42 U.S.C. § 4331(b)(2) (1997).

183. NEPA § 101(b)(3), 42 U.S.C. § 4331(b)(3) (1997).

184. See *Karlen v. Harris*, 590 F.2d 39, 43-44 (2d Cir. 1978), *rev’d sub nom.* *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

185. NEPA § 101(b)(4), 42 U.S.C. § 4331(b)(4) (1997).

186. NEPA § 101(b)(5), 42 U.S.C. § 4331(b)(5) (1997).

187. See *Karlen v. Harris*, 590 F.2d 39, 45 (2d Cir. 1978), *rev’d sub nom.* *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

not properly before the Court, Justice Stevens wrote that “it would not have violated NEPA if the Forest Service . . . 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 fifteen percent, fifty percent, or even 100 percent of the mule deer herd.”¹⁸⁸ However, if the merits of the decision were properly before the Court, and it had appropriately looked to the full language of NEPA for a source of law to apply to the substantive decision, it may have very well reached a different conclusion. If 100 percent of the mule deer herd would be lost (or even fifty or fifteen percent) by the Forest Service’s administration of federal laws and regulations, the policy of environmental protection embodied in the standard that “the responsibilities of each generation as trustee of the environment for succeeding generations” be fulfilled would surely be violated.¹⁸⁹ It is difficult to conceive of the argument that would plausibly find the elimination of a 30,000-strong deer herd to not be a violation of the Section 101(b)(1) trust relationship. It is even more difficult in light of the fact that ambiguities in the Section 101(b) standards must be interpreted in favor of the policy of environmental protection in Section 101(a).¹⁹⁰

B. Section 102(1)’s Interpretation Clause as “Law to Apply”

Not only does Section 102(1) provide law to apply to substantive review of agency decisions via its command that federal laws, regulations and policies be administered in accordance with the Section 101, but it is also applicable law as a command that those laws, regulations and policies be interpreted in accordance with Section 101.¹⁹¹ The power of the interpretation clause of Section 102(1) doesn’t just aid in applying the Section 101(b) standards to a review of agency actions taken pursuant to NEPA.¹⁹² Section 102(1)’s language does not limit its interpretation clause to issues of interpretation of NEPA, but applies to all “policies, regulations, and public laws of the United States.”¹⁹³

188. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

189. NEPA § 101(b)(1), 42 U.S.C. § 4331(b)(1) (1997).

190. *See* NEPA § 102(1), 42 U.S.C. § 4332(1) (1997).

191. *See id.*

192. *See supra* Part IV.A; *see also* *Citizens for Balanced Env’t and Transp., Inc. v. Volpe*, 503 F.2d 601, 607 (2d Cir. 1974) (Winter, J., dissenting) (finding Section 102(1) to function as a “rule of decision” for courts confronted with close definitional questions regarding other provisions within NEPA).

193. NEPA § 102(1), 42 U.S.C. § 4332(1) (1997).

Although by 1979 courts had ceased examination of Section 102(1) as a potential fount of substantive mandate, opinions continued to examine the role of Section 102(1) as a mandatory rule of interpretation.¹⁹⁴ Section 102(1)'s admonition to interpret and administer all federal policies, laws, and regulations in accordance with the policy and standards established in Section 101 has been found to act as a "Congressionally mandated rule of construction" for resolving doubt as to how to interpret other statutes.¹⁹⁵ When the interpretation of a statute could lead to several possible meanings, differences "should be resolved in favor of the policies expressed in NEPA."¹⁹⁶

The roots of the idea of looking to NEPA Section 102(1)'s interpretation clause run to the first germination of NEPA in the courts.¹⁹⁷ Soon after the Act's passage, the Fifth Circuit held that, considering NEPA together with the Fish and Wildlife Coordination Act, the Rivers and Harbors Act could be interpreted to allow the Corps of Engineers to refuse to grant a permit on conservation grounds.¹⁹⁸ An early decision from the Western District of Tennessee also acknowledged that Section 102(1)'s interpretation clause affected the interpretation of other statutes. The court noted that, "in the light of the requirement of NEPA . . . that the [Fish and Wildlife Coordination] Act of 1958 be interpreted and administered in accordance with NEPA and . . . that all Federal plans and programs be improved to attain environmental objectives, . . . the Act of 1958 must be interpreted to require the Corps to submit a new plan of mitigation to Congress before it proceeds further" with plans to enlarge and channelize the Obion and Forked Deer rivers.¹⁹⁹ This application of Section 102(1) as a rule of statutory interpretation has never been addressed by the Supreme Court, even in dicta.²⁰⁰

194. See, e.g., *Romer v. Carlucci*, 847 F.2d 445, 467 (8th Cir. 1988) (en banc) (Arnold, J., concurring in part and dissenting in part).

195. *Id.* at 468.

196. *Id.*

197. See *Zabel v. Tabb*, 430 F.2d 199, 211-14 (5th Cir. 1970); *Akers v. Resor*, 339 F. Supp. 1375, 1380 (W.D. Tenn. 1972).

198. See *Zabel*, 430 F.2d at 214.

199. *Akers*, 339 F. Supp. at 1380.

200. *But cf.* *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, 859 F.2d 156, 169 & n.7 (D.C. Cir. 1988) (relevant section of opinion drafted by Starr, J.) (rejecting EPA's contention that NEPA Section 102(1) compels EPA to "evaluate all the environmental impacts and alternatives concerning the planning, design, construction and location of new sources" when issuing permits pursuant to the Clean Water Act). Though the court's holding in *NRDC v. EPA* seems to reject the interpretive application of Section 102(1), a closer examination of the court's analysis reveals that the rejection was strictly limited to the particulars of the case. In rejecting EPA's 102(1)-based argument, the court held that "NEPA does

V. SEARCHING FOR WOODPECKERS: CHALLENGING THE PROFESSION TO BRING BACK SECTION 102(1)

When David Kulivan reported his sighting of a pair of ivory-billed woodpeckers to state wildlife officials, and was able to provide information lending credence to his claim, he set off a flurry of activity.²⁰¹ State wildlife officials and U.S. Fish and Wildlife endangered species experts began a series of expeditions into the state wildlife management area where Kulivan made the sighting.²⁰² The sighting of intact NEPA substantive review reported in this Comment hopefully can inspire the same flurry of activity in the legal profession.

The evaluation of NEPA Section 102(1) in this Comment was aimed at revealing the vitality of that section, and of the substantive mandate and review consequent to that section. Substantive change in agency conduct was the intention of Congress in drafting NEPA, especially Section 102(1). The resulting text of the statute plainly mandated that substantive change. The federal courts developed a NEPA common law enforcing that substantive change through judicial review. Because the Supreme Court has never addressed the force of Section 102(1), either expressly or implicitly via its dicta regarding Section 102(2) review, it did not foreclose the ability of courts to review agency actions for the substantive change mandated by Section 102(1).

What's left intact is that Section 102(1) mandates that the federal government, in all its actions, act so as to protect the environment, out of a recognition for the importance of ecosystem health. To guide courts in review of actions that may cross this line, Section 102(1) also acts as an interpretive guide regarding the content of the standards in Section 101(b). Finally, Section 102(1) also remains as a viable interpretive guide to resolve conflict in interpretations of other statutes in favor of those interpretations supporting the Section 101(a) policy of environmental protection.

The review force of Section 102(1), embodied in its administration and interpretation clauses, remains bounded by the

not expand an agency's substantive powers." *Id.* at 169. Use of Section 102(1) as a rule of interpretation does not expand substantive powers of an agency, which are defined by the agency's organic statutes; rather, it can resolve conflicts in interpretation of the agency's organic statute. Where, however, the court interpreted the Clean Water Act to prescribe a clear set of limits on EPA's permitting power, no interpretive conflict existed to which to apply NEPA Section 102(1). Therefore, the rejection of the 102(1) interpretation mechanism in this one instance was not a rejection of that mechanism on a broader scale.

201. See Langenhennig, *supra* note 1, at A1.

202. See *id.*

safeguards developed in the NEPA common law prior to *Kleppe*. Section 102(1) review cannot result in a court requiring actions beyond those authorized by the substantive scope of existing statutes, specifically the agencies' organic statutes. Note, however, that any ambiguity in the scope of actions authorized by statute must be resolved in favor of any environmentally protective interpretation, according to Section 102(1)'s interpretation clause. Second, to the extent that an agency action is taken within the range of available actions permitted by NEPA's environmental mandate, a court's review may not replace the agency's decision to choose that action.

Though the analysis in this Comment indicates that there is no reason not to expect NEPA Section 102(1) to have survived its hibernation as a healthy beast of substantive review, it is still in danger. Time may be its undoing. The substantive potential of NEPA has remained unused for the past two decades of its existence; from disuse, it may be difficult to revive. Which leads me to conclude with this challenge: scholars, reignite the dialogue of NEPA's substantive potential; practitioners, put Section 102(1) back into your NEPA litigation bag of tricks; judges, give honest consideration to the contention that Congress long ago demanded a change in how we are to govern ourselves and our environment, and to the idea that you are permitted—indeed, mandated—by NEPA to review for that change.

Sometimes, "extinct" does not mean extinct.