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The Functional Equivalence Doctrine: A Judicial Exception That Violates NEPA and Undermines the National Environmental Policy

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ABSTRACT

The National Environmental Policy Act (NEPA) is the seminal environmental statute, providing the aspirational goal of a national environmental policy and a comprehensive environmental regulatory framework. Over the past five decades, however, Congress, the courts, and administrative agencies have limited NEPA with exemptions and exceptions. This paper evaluates the Functional Equivalence Doctrine and argues that this NEPA exception is contrary to the text, congressional intent, and goals of NEPA and is therefore illegal.

INTRODUCTION

The National Environmental Policy Act (NEPA) of 1970 is the seminal environmental statute, setting the stage for a series of laws that form our modern environmental legal regime. Considered by many as the “Magna Carta” of environmental law due to its sweeping language and broad vision, it continues to provide the aspirational goal of a comprehensive environmental statutory framework.¹ However, over the past five decades, Congress, the courts, and administrative agencies have limited NEPA with exemptions and exceptions. Environmentalists and legal commentators are concerned

¹ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321–4730h (1970); DANIEL R. MANDELKER, NEPA LAW & LITIGATION § 1.1 (2d ed. 1992).

by these developments and their impact on the future of the Act and environmental law in general.

This paper will evaluate one of these exceptions, the Functional Equivalence Doctrine, in light of statutory text, legislative history, and the Act's goals and objectives. Part I provides a brief history of NEPA, including legislative history and its goals and objectives. Part II tracks the development of exceptions to the Act and the impetus and reasoning behind those exemptions. Part III discusses the genesis of the Functional Equivalence Doctrine, its later expansion, and application to various statutes. Part IV analyzes the doctrine and argues that it is contrary to the text, congressional intent, and goals of NEPA and is therefore illegal. It also argues that the doctrine undermines the national environmental policy contemplated by Congress.

I

BACKGROUND

NEPA was signed into law by President Richard Nixon on January 1, 1970, heralding a new era of environmental protection. The Act is simple but powerful due to a broad statement of environmental policy and “action-forcing” procedures, which require each federal agency to consider the environmental impacts of its actions.² This straightforward prerequisite has forced agencies to change the way they do business and provides the opportunity for environmental groups, the public, and industry to participate in the environmental review process.³ However, NEPA's broad and aspirational language has predictably brought it into conflict with other environmental statutes. Congress and the judiciary have responded with a range of exemptions and exceptions. Unfortunately, the impacts of the judicial exemptions have not been evaluated in detail. This is necessary and long overdue, as their continued expansion has the potential to undermine Congress's national policy vision and environmental protections. To accurately evaluate the exceptions, it is essential to begin by understanding Congress's goals and objectives when it first passed the statute.

² 42 U.S.C. §§ 4331–4332; RICHARD. J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 68 (2004).

³ LAZARUS, *supra* note 2.

A. Congress Enacts a National Environmental Policy

The late 1960s and early 1970s represented a time of unusual bipartisanship with regard to environmental matters.⁴ Congress heard testimony from many quarters of society about the degradation of the environment and the need for a fundamental, comprehensive policy.⁵ Although both the White House and Congress agreed on the necessity of such a policy, the scope and method were the sources of heated debate.⁶ In the end, Congress chose to incorporate the policy into a new statute, NEPA, setting a very broad, general policy, which emphasized man's impact on the environment and the federal government's responsibility to coordinate activities in order to minimize that impact.⁷

The broad policy was aspirational in scope and set environmental concerns as a top priority for the federal government. However, it presented Congress with another fundamental issue: how to implement such a broad environmental policy in a way that permeates into the administrative machinery of federal agencies; therefore, influences its day-to-day decisions.⁸ Congress did not just want to introduce an environmental policy; it wanted to change the way federal agencies do business.⁹ Senator Henry Jackson, one of the primary sponsors of the bill, envisioned the Environmental Impact Statement (EIS) as the instrument for this change and the tool for implementing the comprehensive policy.¹⁰ He and several other congressmen felt that federal agencies did not factor environmental issues into their decision making because of a lack of environmental information and expertise.¹¹ Environmental Impact Statements resolved this problem by requiring federal agencies to affirmatively document and evaluate the environmental impacts of their actions, to publicize those impacts, and to base their decisions on the environmental information.¹²

⁴ Sam Kalen, *NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump?*, 50 ENV'T L. REP. 10398, 10400 (2020).

⁵ CHRISTOPHER BELL ET AL., ENVIRONMENTAL LAW HANDBOOK 584–85 (Thomas F.P. Sullivan ed., 20th ed. 2009).

⁶ See Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 DUKE ENV'T L. & POL'Y F. 113, 144–56 (2010).

⁷ 42 U.S.C. § 4331(a)–(b).

⁸ Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RES. J. 243, 246 (1976).

⁹ See *id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 251–56.

The EIS requirement was not in the House version of the bill but was incorporated into the final statute with two significant modifications.¹³ The first eliminated the requirement for an agency to provide a formal environmental impact *finding* regarding a particular action.¹⁴ Instead, the final statute stated that an agency would provide *a detailed statement* of environmental impacts for “major Federal actions significantly affecting the quality of the human environment”¹⁵ The second modification required agencies planning federal actions to consult with the environmental agencies in the development of the impact statement and make these documents public.¹⁶ This fundamental idea represented Congress’s distrust of federal agencies’ ability to police themselves.¹⁷ By requiring consultation and making assessments public, Congress enlisted other environmental agencies, environmental groups, and the public to help police the process.¹⁸

Finally, Congress created the Council on Environmental Quality modeled on the Council of Economic Advisors to implement NEPA and issue regulations.¹⁹ The Council falls under the purview of the executive office of the President and, similar to the Council of Economic Advisors, advises and assists the President regarding environmental matters.²⁰

Therefore, the final NEPA statute included five key aspects: 1) a broad, aspirational environmental policy set out in § 101, 2) the Environmental Impact Statement requiring agencies to assess and evaluate environmental issues in § 102, 3) a requirement for federal agency consultation with environmental agencies before acting, 4) a requirement for public disclosure of the environmental assessment information, and 5) the formation of the Council on Environmental Quality to counsel the President.²¹

¹³ *Id.* at 252.

¹⁴ *Id.*

¹⁵ 42 U.S.C. § 4332 (C); the detailed statement was later called the EIS in the regulations from the newly created Council on Environmental Quality (CEQ) promulgated after the statute was enacted. *See* 40 C.F.R. § 1502 (2020).

¹⁶ Dreyfus & Ingram, *supra* note 8, at 253.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 42 U.S.C. § 4341–4347; BELL ET AL., *supra* note 5, at 586.

²⁰ BELL ET AL., *supra* note 5.

²¹ 42 U.S.C. §§ 4321–4370h (1970).

Although President Nixon signed the bill into law on January 1, 1970, it was still not clear how the statute would work in practice. The broad aspirational policy in § 101 did not appear to provide consistent standards that could be applied in individual cases.²² It was also not clear what role the EIS would play in agency decisions or how it would be applied during judicial review.²³ At the outset, many federal agencies refused to cooperate with the new statute, and concerned citizens and organizations began to challenge agencies in court. It took the early D.C. Circuit *Calvert Cliffs* decision to give the Act teeth.²⁴

B. Calvert Cliffs: The D.C. Circuit Gives Power to NEPA

Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission was one of many cases to challenge nuclear power or limit its construction to more environmentally-friendly locations.²⁵ It quickly developed into a test case against the Atomic Energy Commission's (AEC) post-NEPA process of evaluating the environmental impacts of nuclear plants.²⁶ At the time, an AEC hearing board delegated environmental review to the utility and agency staff, who would develop a detailed report on environmental issues.²⁷ However, the Commission's hearing board did not have to consider the report when making the final licensing decision.²⁸ Environmental factors were considered only if outside parties or the staff affirmatively raised an environmental issue.²⁹ The plaintiffs felt NEPA mandated an affirmative duty on AEC to assess and consider environmental factors as part of its licensing decision.³⁰ This was the primary issue when the D.C. Circuit heard the case in 1971.³¹

²² See A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, in ENV'T L. STORIES 77, 96 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

²³ *Id.*

²⁴ See *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

²⁵ *Id.*; see also Tarlock, *supra* note 22, at 88.

²⁶ Tarlock, *supra* note 22, at 90.

²⁷ *Id.* at 93.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 96.

The court's opinion focused on the procedural aspects of the Act, although it did not ignore the substantive.³² The court held that NEPA should make "environmental protection a part of the mandate [for] every federal agency. . . ."³³ To affect that mandate, § 102 required a "careful and informed decisionmaking [sic] process," reviewable by courts.³⁴ The court also emphasized that Congress intended agencies to *affirmatively* consider environmental factors when making their decisions.³⁵ Therefore, the Environmental Impact Statement was more than just a paperwork drill; it required the agency to proactively gather and assess the environmental impact of its actions and incorporate that into any final decision.³⁶ The court also addressed the mitigating language in § 102 that agencies should comply with NEPA procedures "to the fullest extent possible."³⁷ The court stated that this was not an "escape hatch" for agencies or an excuse not to comply.³⁸ Quoting from the congressional record, the court noted that the "to the fullest extent possible" language meant that an agency should comply with NEPA procedures unless its implementing statute *expressly* prohibited compliance or made full compliance impossible.³⁹ Finally, in response to AEC's delay in implementing NEPA, the court stated that the Act required agencies to review their procedures, note any inconsistencies and deficiencies that would prevent full compliance, and report these to the President with proposed solutions by July 1, 1971.⁴⁰ This section appears to reinforce Congress's intention that all agencies fully comply with NEPA and if they cannot, they must provide options for presidential review and approval.

The overall impact of *Calvert Cliffs* was immediate and dramatic.⁴¹ It stopped nuclear power plant licensing for eighteen months while AEC assessed its procedures eventually resulting in a fundamental

³² See *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

³³ *Id.* at 1112.

³⁴ *Id.* at 1115.

³⁵ *Id.* at 1117–18.

³⁶ See *id.*

³⁷ 42 U.S.C. § 4332.

³⁸ *Calvert Cliffs*, 449 F.2d at 1114.

³⁹ *Id.* at 1114–15 (citing 115 CONG. REC. 40417–40418 (1969) and 115 CONG. REC. 39702–39703 (1969)).

⁴⁰ *Id.* at 1119–20.

⁴¹ See Tarlock, *supra* note 22, at 101–02.

change to AEC licensing.⁴² It forced federal agencies to review environmental impacts and incorporate them into their decisions and opened the door for citizens to challenge the adequacy of agency environmental assessments and statements.⁴³ It also put power behind congressional policy intentions by providing judicial review of the environmental assessment process.⁴⁴ The Court's opinion appears to imply that NEPA procedures apply to all federal agencies, which are exempt only when their implementing or enabling statute expressly prohibits compliance. It also interpreted the Act to require federal agencies to review their enabling statutes and report issues that would prevent compliance to the President.⁴⁵ This served as a proactive requirement to prevent the need for exemptions or exceptions. However, soon after the D.C. Circuit rendered its opinion, Congress, the courts, and agencies began formulating exceptions.

II

THE DEVELOPMENT OF NEPA EXCEPTIONS

Shortly after NEPA was signed into law, both industry and environmental groups began using it to challenge agency decisions. NEPA's broad mandate, coupled with uncompromising EIS procedural requirements, made it ideal for these challenges and prompted Congress to eventually provide express NEPA exemptions for the next two environmental statutes it passed.

A. NEPA Statutory Exceptions

Congress enacted the modern Clean Water Act (CWA) in 1972 and included an express exemption from NEPA in § 511(c).⁴⁶ The exemption mandates that NEPA does not apply to most of the actions EPA takes under the CWA, "[e]xcept for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281" and "the issuance of a permit . . . for the discharge of any pollutant by a new source as defined in section 1316"⁴⁷ The Conference Report stated that the exemption served to clarify the relationship between the CWA

⁴² *Id.* at 101.

⁴³ *Id.* at 102.

⁴⁴ *See id.* at 101–02.

⁴⁵ *Calvert Cliffs*, 449 F.2d at 1120.

⁴⁶ 33 U.S.C. § 1371(c).

⁴⁷ *Id.*

and NEPA, noting that “[i]f the actions of the Administrator under this Act were subject to the requirements of NEPA, administration of the Act would be greatly impeded.”⁴⁸ Congress provided detailed guidance to EPA in the CWA to regulate discharge of pollutants into waters of the United States.⁴⁹ Congress felt that requiring EPA to comply with NEPA on top of its CWA obligations would lead to additional litigation and delay implementation of pollution controls undermining CWA intent.⁵⁰ It also recognized that NEPA, which was meant to incorporate environmental information into agency decisions in order to improve the environment, could be used by industry to delay or impede the environmental protections of other statutes.⁵¹

Similar concerns also resulted in a NEPA exemption to the Clean Air Act (CAA). Congress enacted the Energy Supply and Environmental Coordination Act in 1974, which includes provision 15 U.S.C. 793(c)(1) stating: “No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.”⁵² The Senate record explains the exception in more detail. It states:

Without exception, the Clean Air Act actions will not be subject to the National Environmental Policy Act. This provision should reduce the potential for litigation and delay associated with the development and implementation of clean air regulations. It should improve the certainty and finality which the Congress sought in 1970 when it wrote the Clean Air Act. And, most importantly, it should end the effort of those who would use NEPA as a mechanism to compromise the statutory mandate for clean air.⁵³

The record makes clear that Congress was concerned NEPA could be used to thwart implementation of the CAA. The statutory exemption ended these challenges and showed that Congress was monitoring NEPA implementation and its relationship to other environmental statutes and would amend NEPA if it were misused. However, the

⁴⁸ H.R. Rep. No. 92-1465, at 149 (1972) (Conf. Rep.).

⁴⁹ *Id.*; see 33 U.S.C. §§ 1251-1388.

⁵⁰ S. Rep. No. 92-1236, at 3826 (1972) (Conf. Rep.).

⁵¹ *See id.*

⁵² 15 U.S.C. § 793(c)(1).

⁵³ 120 CONG. REC. 18956 (1974).

courts began to create judicial exemptions as they continued to receive NEPA-based challenges.

B. Initial Judicial Exceptions

1. Flint Ridge: The Fundamental and Irreconcilable Conflict Exception

Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma was only the third NEPA case the Supreme Court had heard on the merits.⁵⁴ The United States Department of Housing and Urban Development (HUD) appealed a Tenth Circuit decision holding that the Agency was required to file an EIS before it allowed a property disclosure statement, filed in accordance with the Interstate Sale Full Disclosure Act, to become effective.⁵⁵ The disclosure statements were informational in nature, and the HUD Secretary, under the terms of the Disclosure Act, did not have the power to comment on the developer proposal, only to evaluate whether the statement was complete.⁵⁶ The statement would automatically take effect after thirty days unless the Secretary notified the developer.⁵⁷ The government had two primary arguments.⁵⁸ First, it argued that allowing the disclosure statement to become effective was not a “major federal action” under NEPA since HUD did not have the power to consider environmental issues.⁵⁹ It alternatively argued that if the disclosure statement was a “major federal action,” then HUD was exempt from NEPA, since it could not comply with both the EIS requirement and the Disclosure Act’s thirty-day requirement.⁶⁰

The Court did not address the first, more expansive argument but instead based its holding on the second.⁶¹ The Court found that the Secretary could not comply with the disclosure statement review and prepare an EIS in the thirty-day period without it being incomplete or

⁵⁴ Kyle Robisch, *The NEPA Implied Exemption Doctrine: How a Novel and Creeping Common Law Exemption Threatens to Undermine the National Environmental Policy Act*, 16 VT. J. OF ENV'T L. 173, 182 (2014).

⁵⁵ *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 778 (1976).

⁵⁶ *Id.* at 781.

⁵⁷ *Id.*

⁵⁸ *Id.* at 786–87.

⁵⁹ *Id.* at 786.

⁶⁰ *Id.* at 787.

⁶¹ *Id.* at 785–92.

inaccurate.⁶² Therefore, there was a “clear and fundamental conflict of statutory duty.”⁶³ The Court held that where there was a “clear and unavoidable conflict” between NEPA and an agency’s authorizing statute, NEPA must give way.⁶⁴ The Court went on to say this did not mean environmental concerns were irrelevant to the Disclosure Act and that the Secretary had the authority to require the developer to provide that type of information if desired.⁶⁵

Although the Court provided an exception to NEPA, it was a narrow one, applying only to situations where an irreconcilable conflict prevented the agency from performing NEPA duties under its authorizing statute.⁶⁶ Some commentators have argued that the holding is so narrow that it has almost no precedential effect.⁶⁷

2. Public Citizen: *The Impossibility Exception*

The Supreme Court did not return to the first argument in *Flint Ridge* until 2004, when it heard *Department of Transportation v. Public Citizen*.⁶⁸ *Public Citizen* involved the Federal Motor Carrier Safety Administration (FMCSA) and the cross-border operations of Mexican domiciled motor carriers.⁶⁹ The FMCSA published a proposal for a rule for these carriers, as well as an Environmental Assessment (EA).⁷⁰ In the EA, the Agency did not consider the environmental impact of increased traffic that might be caused by the carriers.⁷¹ Various citizen

⁶² *Id.*

⁶³ *Id.* at 791.

⁶⁴ *Id.* at 788.

⁶⁵ *Id.* at 792.

⁶⁶ *Id.* at 785–92.

⁶⁷ Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1540 (2012). Prof. Lazarus makes the point that Justice Marshall went out of his way to make *Flint Ridge* a narrow holding and fill the opinion with language and dicta favorable to environmentalists.

⁶⁸ See *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

⁶⁹ *Id.* at 756.

⁷⁰ An Environmental Assessment (EA) is prepared by an agency when an action or proposed action is not likely to have significant effects or when the effects are unknown. See 40 C.F.R. 1501.5 (2020). If the agency determines, based on the EA, that the action will have no significant impact, then it can prepare a Finding of No Significant Impacts (FONSI). See 40 C.F.R. 1501.6 (2020).

⁷¹ *Pub. Citizen*, 541 U.S. at 761.

groups sued, arguing the EA was in violation of NEPA, because it did not consider these effects.⁷²

The Court found that FMCSA was responsible for motor carrier safety and registration but had no authority to exclude Mexican motor carriers from the United States regardless of their environmental impact.⁷³ Under the FMCSA, the Agency lacked the discretion to restrict Mexican motor carriers for increased emissions; therefore, NEPA could not require FMCSA to evaluate the environmental effects of those emissions.⁷⁴ Based on this, the Court held that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁷⁵ In those situations, the agency need not consider the effects when determining whether its action is a “major Federal action.”⁷⁶ Basically, when an agency lacks the discretion in an authorizing statute to act on an EIS even if it prepares one, the agency need not consider the environmental effects, and NEPA does not apply.⁷⁷

While both *Flint Ridge* and *Public Citizen* had an effect on NEPA application and environmental law, their narrow holdings and unique circumstances make them limited in scope. The Functional Equivalence Doctrine presents a risk for a wider impact.

III

THE GENESIS AND DEVELOPMENT OF THE FUNCTIONAL EQUIVALENCE DOCTRINE

The Functional Equivalence Doctrine developed as a result of NEPA challenges to the CAA.⁷⁸ Even though subsequent statutory exemptions preempt some of these cases, they are important to review because they reveal the judiciary’s initial grappling with NEPA’s impact on other environmental statutes and the reasoning that led to the development of the doctrine. Their review also shows how the courts attempted to give

⁷² See *id.* at 762.

⁷³ *Id.* at 766.

⁷⁴ *Id.*

⁷⁵ *Id.* at 770.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); see also Barry S. Neuman, *Implementation of the Clean Air Act: Should NEPA Apply to the Environmental Protection Agency?*, 3 *ECOLOGICAL L.Q.* 597 (1973).

effect to both NEPA and other initial environmental statutes such as the CAA and CWA while deconflicting specific provisions.

A. Portland Cement:

The D.C. Circuit Introduces the Functional Equivalence Doctrine

An industry challenge heard in the same timeframe as *Flint Ridge, Portland Cement Association v. Ruckelshaus* questioned EPA's stationary-source standards for new and modified Portland cement plants.⁷⁹ The petitioners claimed that EPA had failed to comply with NEPA, since the agency had not completed an EIS prior to promulgating the new standards.⁸⁰ At least on its face, NEPA appeared to require an EIS. As noted above, NEPA states that "all agencies of the Federal Government shall . . . C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on" EPA is a federal agency, so the text certainly appeared to indicate that Congress intended for NEPA to apply to it.⁸¹ There also wasn't a statutory exemption, since the CAA exemption would not be passed until the following year.⁸²

Judge Leventhal, writing the opinion for the D.C. Circuit, recognized the dilemma. NEPA's broad mandate was a double-edged sword that could be used both to advance efforts to protect the environment, but also to slow down or delay those efforts. If EIS requirements applied each time EPA attempted to promulgate new air quality standards, then groups opposed to these regulations could endlessly delay their implementation. The court's solution was pragmatic. It first reviewed the time schedules required by the CAA, which were precise and exacting and stated that these might put the CAA and NEPA in direct conflict.⁸³ The court determined that this was not, in itself, enough to conclude that NEPA did not apply to CAA, but it was evidence that Congress intended something other than universal

⁷⁹ See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 378 (D.C. Cir. 1973). Portland cement is the most common type of cement used around the world, manufactured by using limestone and clay with smaller amounts of gypsum.

⁸⁰ *Id.*

⁸¹ *Portland Cement*, 486 F.2d at 381–85.

⁸² 15 U.S.C. § 793(c)(1).

⁸³ *Portland Cement*, 486 F.2d at 380–81.

application.⁸⁴ The court next addressed whether NEPA should apply at all to environmental agencies, such as EPA, since it is in the business of environmental protection.⁸⁵ It noted that CWA provided EPA with an express NEPA exemption for certain actions.⁸⁶ However, after reviewing the legislative history and text, the court concluded that Congress did not intend for there to be a blanket exemption for any agency, including EPA.⁸⁷

The court next reviewed the CAA procedures and noted that they required EPA to include a statement of environmental considerations with all proposals and a cost analysis directly reviewable by a court.⁸⁸ This was very similar in both procedure and intent to the NEPA EIS. Therefore, it concluded, the CAA § 111 represented the “functional equivalent” of NEPA’s procedural requirements.⁸⁹ Importantly, the court determined that this was a narrow exception that did not apply to the entire Act but only to § 111.⁹⁰ Finally, it acknowledged that CAA did not have all the advantages of the structured process of NEPA, but struck a “workable balance between the advantages and disadvantages of full application of NEPA.”⁹¹

There are a number of key takeaways from the court’s clear and concise analysis. It felt that the EIS procedures were duplicative of those required by the CAA.⁹² Additionally, it appears the court was concerned that NEPA was being used to thwart the environmental improvement and pollution control objectives of the CAA.⁹³ Using the Act in this way could undermine the aspirational environmental policy and congressional intentions of NEPA as well.⁹⁴ To counter these issues without minimizing the impact and scope of NEPA, the court decided on a very narrow exception, which applied to only one section of the CAA.⁹⁵ The court also documented in the holding that it made its decision after a careful and detailed comparison of the requisite

⁸⁴ *Id.*

⁸⁵ *Id.* at 382.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 385.

⁸⁹ *Id.* at 384.

⁹⁰ *Id.*

⁹¹ *Id.* at 386.

⁹² *Id.* at 385–86.

⁹³ *Id.* at 386–87.

⁹⁴ *Id.* at 381–85.

⁹⁵ *Id.* at 387.

NEPA and CAA procedures, ensuring that compliance with the CAA process was virtually identical to NEPA and would fulfill Congress's intent for that statute.⁹⁶ It is also clear that conflicts between the two statutes did not justify a blanket exemption for EPA from NEPA and that Congress did not intend for EPA or any agency to have such an exemption.⁹⁷

Congress responded to these challenges by amending the CAA the following year.⁹⁸ The amendment provided EPA with a blanket exemption to NEPA, similar to the one in the CWA.⁹⁹ Although this ended the application of the Functional Equivalence Doctrine to the CAA, courts continued to apply it to other environmental statutes.

B. Env't Def. Fund, Inc. v. EPA:

The D.C. Circuit Applies Functional Equivalence to FIFRA

Shortly after the decision in *Portland Cement*, the D.C. Circuit had the opportunity to evaluate the Functional Equivalence Doctrine as it related to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *Env't Def. Fund, Inc. v. EPA* involved EPA's withdrawal of registration for the problematic pesticide DDT.¹⁰⁰ The court closely followed *Portland Cement's* reasoning.¹⁰¹ It began with the threshold question of whether NEPA applied to the cancellation of a pesticide registration, since it was not clear whether this was a minor or major federal action.¹⁰² The court held that cancelling registration was a major federal action and significantly affected the quality of the human environment; therefore it implicated NEPA.¹⁰³ It then broke down its analysis into two separate questions that were argued by the petitioners: 1) is EPA subject to NEPA when it undertakes environmental actions, and 2) has EPA complied with the statute, despite the lack of a formal EIS?¹⁰⁴ The court analyzed the second question first.

⁹⁶ *Id.* at 385–86.

⁹⁷ *Id.* at 384.

⁹⁸ 15 U.S.C. § 793(c)(1).

⁹⁹ *Id.*

¹⁰⁰ *Env't Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1249 (D.C. Cir. 1973).

¹⁰¹ *Id.* at 1256.

¹⁰² *Id.* at 1254–55.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1255.

The court noted that FIFRA procedures used for the withdrawal of DDT provided the opportunity for a full and thorough evaluation of the environmental issues associated with the decision.¹⁰⁵ It determined that EPA held extensive and lengthy hearings during the process, which included public comment and discussion of the environmental aspects of the withdrawal of registration of the particular pesticide.¹⁰⁶ Based on these detailed procedures, the court held that “where an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient.”¹⁰⁷

Only after this holding did the court answer the first question raised by the petitioners. In doing so, the court clearly stated it was not formulating a broad exemption from NEPA for all environmental agencies nor for environmentally protective regulatory actions of those agencies.¹⁰⁸ Instead, as in the court findings for *Portland Cement*, it emphasized that this was a narrow exception applicable to these facts.¹⁰⁹

It is important to recognize the similarities in reasoning and basis for decision between *Portland Cement* and *Env't Def. Fund, Inc.* Both cases were based on a detailed comparison of the procedures of the implementing statute and NEPA.¹¹⁰ Both holdings were narrow, providing EPA with an exemption for only part of the implementing statute.¹¹¹ And finally, both courts declined to provide a blanket exemption for EPA.¹¹² However, other circuits deviated from this reasoning, as they began dealing with conflicts between NEPA and other environmental issues and statutes.

¹⁰⁵ *Id.* at 1256.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1257.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973); *Env't Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973).

¹¹¹ See *Portland Cement*, 486 F.2d at 384; *Env't Def. Fund, Inc.*, 489 F.2d at 1257.

¹¹² See *Portland Cement*, 486 F.2d at 384; *Env't Def. Fund, Inc.*, 489 F.2d at 1257.

**C. State of Wyoming v. Hathaway: The Tenth Circuit Departs
from D.C. Circuit Analysis and Broadens the Doctrine**

In the 1975 case *Wyoming v. Hathaway*, the Tenth Circuit also had the opportunity to address the conflict between NEPA and FIFRA.¹¹³ The court reviewed a district court decision, enjoining EPA from enforcing an order that cancelled registration of three pest control chemicals.¹¹⁴ The district court based its holding, in part, on EPA's failure to publish an EIS before promulgating the order to withdraw the registration.¹¹⁵ This made the case very similar to *Env't Def. Fund, Inc.* However, in making its decision, EPA relied on a single report from the University of Michigan and several petitions from conservation groups, which meant that the record was not as extensive and the procedures not as complete as in the *Env't Def. Fund, Inc.* case.¹¹⁶ The 10th Circuit broke the case down into two issues: 1) whether the EPA was required to file an EIS prior to cancelling chemical toxicant registrations, and 2) whether EPA's registration cancellation procedures substantially complied with NEPA.¹¹⁷

The court answered the first question by relying on a prior opinion in *Anaconda Co. v. Ruckelshaus*.¹¹⁸ It reasoned that since EPA's sole mission was improvement of the environment, it was not required to submit an EIS.¹¹⁹ This is a significant departure from both *Portland Cement* and *Env't Def. Fund, Inc.* where the D.C. Circuit determined that the statute did not justify a blanket exemption for EPA.¹²⁰ The court also held that NEPA's legislative history established that Congress had this same intention, citing *Portland Cement* in support of this premise.¹²¹ However, as discussed above, this ruling is directly opposite of the court's conclusion in *Portland Cement*.¹²²

¹¹³ See *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975).

¹¹⁴ *Id.* at 67.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 68–69.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 71; see also *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973).

¹¹⁹ *Wyoming v. Hathaway*, 525 F.2d 66, 71 (10th Cir. 1975); see also *Anaconda Co.* 482 F.2d at 1305–06.

¹²⁰ *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973); *Env't Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

¹²¹ *Hathaway*, 525 F.2d at 71.

¹²² *Portland Cement*, 486 F.2d at 381–85.

The court attempted to bolster its holding with several other arguments. First, it stated that EPA was not organized when NEPA was enacted, implying the Act should not apply to the Agency.¹²³ It also argued that the substance of NEPA itself exempted EPA from the Act.¹²⁴ The court's substance argument involved downplaying NEPA's EIS requirement, stating that it is "merely an implement devised by Congress to require government agencies to think about and weigh environmental factors before acting."¹²⁵ It then argued that an EIS would slow EPA down and actually result in a decrease in environmental protection activity.¹²⁶

The court resolved the second issue in the case with very little discussion. It listed the EIS requirements in NEPA and then simply stated that the "study and factual development which the Administrator pursued satisfied the standards of the Act of Congress."¹²⁷ It held that in its view, this was "substantially equivalent" to the impact statement.¹²⁸ This sharply contrasted with the detailed comparison of CAA environmental analysis requirements and NEPA EIS procedures in *Portland Cement* and the FIFRA requirements in *Env't Def. Fund, Inc.*¹²⁹

The opinion departed from the detailed reasoning and narrow holding of *Portland Cement* and *Env't Def. Fund, Inc.* The court based its opinion primarily on a broad determination that EPA should be exempt from NEPA, since its sole responsibility is improvement of the environment and cited *Portland Cement* and NEPA legislative history as support.¹³⁰ The opinion also lacked the detailed comparison of the authorizing statute and NEPA EIS procedures as in *Portland Cement* and *Env't Def. Fund, Inc.*, which formed the basis for those opinions.¹³¹ It also broadened EPA's FIFRA exemption to include the entire Act and downplayed the EIS requirement, which *Calvert Cliffs* determined

¹²³ *Hathaway*, 525 F.2d at 71.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 73.

¹²⁸ *Id.*

¹²⁹ See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 385-87 (D.C. Cir. 1973); *Env't Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1255-57 (D.C. Cir. 1973).

¹³⁰ *Hathaway*, 525 F.2d at 71.

¹³¹ See *Portland Cement*, 486 F.2d at 385-87; see also *Env't Def. Fund, Inc.*, 489 F.2d at 1255-57.

was the key mechanism of the Act.¹³² In short, the opinion did not follow the reasoning of any of the prior NEPA circuit decisions and, in fact, broadened them without support. Sadly, other circuits would pick up this reasoning and apply it to other statutes and circumstances.

D. Merrell v. Thomas:

The Ninth Circuit Combines Flint Ridge and Portland Cement

The Ninth Circuit case *Merrell v. Thomas* decided in 1986 involved a single simple issue: does EPA have to comply with NEPA when it registers pesticides under FIFRA?¹³³ *Env't Def. Fund, Inc.* and *Hathaway* challenged FIFRA but involved the *withdrawal* of registration of dangerous pesticides. *Merrell* served as the first case to evaluate whether NEPA applies when EPA *registers* new chemicals. The suit occurred when a landowner attempted to enjoin EPA from continuing to register several herbicides that the local road department was spraying along a road leading their farm.¹³⁴ The Merrells claimed the registrations were defective, since EPA had not made the information public, nor had they prepared a site-specific EIS.¹³⁵

The court began its analysis by noting that NEPA, with its EIS procedures, was passed after the original FIFRA statute was in place.¹³⁶ It used this argument to reframe the issue to whether Congress intended to superimpose NEPA procedures on top of the FIFRA registration procedures.¹³⁷

The court then analyzed the reframed issue with a review of past FIFRA amendments. It noted that the 1972 FIFRA amendments did not incorporate a requirement to prepare an EIS.¹³⁸ It concluded that this was a significant indication that Congress had not intended for NEPA to apply. It then focused on the 1972 amendment which details the publication procedures and notes that pesticide applications must be acted upon within three months.¹³⁹ The court held that this timeframe was incompatible with NEPA's EIS requirement, citing

¹³² *Hathaway*, 525 F.2d at 71–73.

¹³³ *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 777–78.

¹³⁷ *Id.* at 778.

¹³⁸ *Id.*

¹³⁹ *Id.*

Flint Ridge in support.¹⁴⁰ However, this argument is disingenuous. *Flint Ridge* involved a thirty-day requirement with no flexibility to the Administrator on publication timeframe, whereas FIFRA required the Administrator to act as “expeditiously as possible” and did not have a mandatory deadline.¹⁴¹ Unlike *Flint Ridge*, *Merrell* did not involve a situation of a clear and fundamental conflict.¹⁴²

The court also reviewed the 1975, 1978, and 1985 amendments to FIFRA and concluded that Congress agreed with EPA’s interpretation that NEPA did not apply to FIFRA, since it failed to add a requirement to comply with NEPA in any of the amendments.¹⁴³ This argument is also disingenuous and contrary to normal congressional practice. Congress states in NEPA that “all agencies of the Federal Government shall” prepare an environmental assessment for all “Federal actions significantly affecting the quality of the human environment.”¹⁴⁴ This is a clear statement from Congress on the application of the statute. Congress does not need to reference NEPA in every environmental statute for it to apply. This also ignores the express exemptions Congress provided for the CAA and CWA. Congress has already shown that it would enact an express exemption when it did not intend for NEPA to apply to a particular statute.

Finally, the court found that the “conditional registration procedure” created in the 1978 amendments, which expedited some pesticide registration, were a key indication that Congress did not intend NEPA to apply.¹⁴⁵ However, “conditional registration” involved a process developed by Congress to resolve a very specific and narrow issue. The 1972 FIFRA amendments had required a reevaluation of a number of pesticides used on food and in homes.¹⁴⁶ But the program never got off the ground, causing a backlog of pesticide evaluations.¹⁴⁷ Congress proposed several programs in the 1978 amendments to break the backlog, including “conditional registration,” which allowed registration while data was gathered to complete final registration.¹⁴⁸ It was a very narrow program and there is no indication in the

¹⁴⁰ *Id.* at 778.

¹⁴¹ *Id.*

¹⁴² *See id.*

¹⁴³ *Id.* at 779.

¹⁴⁴ 42 U.S.C. § 4332 (2)(C).

¹⁴⁵ *Merrell*, 807 F.2d at 779.

¹⁴⁶ 124 CONG. REC. 29756 (1978).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 25203, 29758.

Congressional Record that it was intended to signal NEPA did not apply to FIFRA. In fact, Congress specifically stated that “conditional registration” would not apply if it would “significantly increase the risk of, or cause, any unreasonable adverse effect on the environment.”¹⁴⁹

The court never directly stated that FIFRA procedures were the “functional equivalent” of NEPA.¹⁵⁰ Instead, its reasoning relied in part on *Flint Ridge* and also *Portland Cement*, creating a hybrid reasoning of the two cases.¹⁵¹ In the end, it argued that Congress implied FIFRA exclusion from NEPA by creating a registration procedure that did not incorporate the NEPA EIS requirement—a dubious conclusion, considering the CAA and CWA statutory exclusions indicate that Congress knew how to provide an express exclusion from a statute if it desired one.¹⁵² The case proved to be another departure from the procedural comparisons and narrow holding in *Portland Cement* and *Env’t Def. Fund, Inc.*

E. State of Alabama v. EPA:

The Eleventh Circuit Applies Functional Equivalence to RCRA

The 1990 case of *Alabama v. EPA* applied functional equivalence to the Resource Conservation and Recovery Act (RCRA).¹⁵³ In the opinion, the Eleventh Circuit pursued a different analysis from previous circuits to reach its holding. The court first noted that it was not the first time a court had to decide whether NEPA applied to the EPA.¹⁵⁴ It then argued that the efforts to limit NEPA stem from the view that specific statutes prevail over general ones covering the same subject.¹⁵⁵ This was a new method of approaching a NEPA decision and no court had previously used this as the basis for a holding that NEPA did not apply to an environmental statute or EPA.¹⁵⁶ However,

¹⁴⁹ *Id.*

¹⁵⁰ *See Merrell*, 807 F.2d at 776.

¹⁵¹ *See id.* at 778 (where the court finds that the timeframe requirements for the Administrator to make a decision on registration is incompatible with requirements for an EIS (citing *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n*, 426 U.S. 776, 788–91 & 789 n.10)); *see also id.* at 780–781 (where the court describes how FIFRA procedures are similar to a NEPA EIS).

¹⁵² *Id.* at 778.

¹⁵³ *Alabama v. EPA*, 911 F.2d 499 (11th Cir. 1990).

¹⁵⁴ *Id.* at 504.

¹⁵⁵ *Id.* (citing *Merrell*, 807 F.2d, and *Bustic v. United States*, 446 U.S. 398 (1980)).

¹⁵⁶ *See id.*

the court drew the conclusion that RCRA constituted the more specific statute regarding hazardous waste management facilities and therefore was an exception to NEPA.¹⁵⁷

The State of Alabama recognized the obvious weakness in this holding; the two statutes neither covered *the same subject* nor had the *same environmental protection procedures*.¹⁵⁸ The court even noted that EPA *agreed* with the State of Alabama that RCRA did not provide equivalent procedures to NEPA.¹⁵⁹

Despite this agreement, the court held that RCRA was the “functional equivalent” of NEPA.¹⁶⁰ It did not compare the two statutes’ procedures as the courts had in *Portland Cement* and *EDF, Inc.*, but instead made a blanket statement that RCRA was comprehensive in its field and designed to ensure that EPA considered environmental issues when permitting hazardous waste facilities.¹⁶¹ Without further discussion or analysis, it then concluded that Congress did not intend for EPA to comply with NEPA when RCRA applied to an activity.¹⁶²

Once again, it is important to contrast this holding with the ones in *Portland Cement* and *EDF, Inc.* The court found that RCRA was the functional equivalent of NEPA even though the two statutes do not have equivalent procedures.¹⁶³ This holding is in stark contrast to *Portland Cement* where the court ruled that functional equivalence prevailed only after a careful comparison of the CAA and NEPA procedures.¹⁶⁴ Additionally, the court did not limit its holding to a specific section of RCRA as in *Portland Cement*, but instead found that EPA did not need to comply with NEPA at all when the action fell under RCRA.¹⁶⁵

It is also important to note the conclusion the court drew from the statutory exemptions provided by Congress for the CAA and CWA. In footnote twelve of its opinion, it acknowledged that Congress provided express exemptions to NEPA for other statutes.¹⁶⁶ However, it justified these exemptions as support for its holding by stating that these

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 505.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 384–86 (D.C. Cir. 1973).

¹⁶⁵ *Alabama*, 911 F.2d at 505.

¹⁶⁶ *Id.* at 505 n.12.

“express exemption[s] [are] Congress’s way of making more obvious what would likely occur as a matter of judicial construction.”¹⁶⁷ This contradicts the premise that when Congress provides express exemptions to a statute, it indicates they know how to do so.

IV

EVALUATING THE FUNCTIONAL EQUIVALENCE DOCTRINE

The Functional Equivalence Doctrine has developed into a major exemption from NEPA, significantly limiting the Act’s reach. Courts have continued to apply the Doctrine and expand its application, even though Congress has shown that it will provide express statutory exemptions where there are conflicts with other environmental statutes.¹⁶⁸ As the review of cases above indicates, courts have applied the Doctrine with varying criteria and inconsistent reasoning, straying far from the original criteria discussed in *Portland Cement*.¹⁶⁹ The courts have been so quick to apply the Doctrine that they have failed to perform the threshold analysis and determine whether it comports with NEPA.

However, an evaluation of the Doctrine clearly shows that it is contrary to the text, congressional intent, and goals of NEPA and therefore illegal. It is equally clear that NEPA applies to all federal agencies, regardless of whether their authorizing statutes contain environmental procedures. Finally, the Doctrine undermines the national environmental policy contemplated by Congress.

A. The Functional Equivalence Doctrine Is Illegal

In evaluating the legality of the doctrine, the place to start is the statute’s text. Section 4332 states:

¹⁶⁷ *Id.*

¹⁶⁸ *Alabama*, 911 F.2d 499 (applying functional equivalence to RCRA); *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (applying functional equivalence to critical habitat designation); *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1329 (9th Cir. 1992) (applying functional equivalence to section 404(b)(1) of the CWA); 33 U.S.C. § 1371(c) (the CWA statutory exemption); 15 U.S.C. 793(c)(1) (the CAA statutory exemption).

¹⁶⁹ Compare the reasoning and analysis of *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) with *Alabama v. EPA*, 911 F.2d 499 (11th Cir. 1990) and *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986).

The Congress authorizes and directs that, to the fullest extent possible: (1) 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, and (2) all agencies of the Federal Government shall

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposed be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and ir retrievable commitments of resources which would be involved in the proposed action should it be implemented.¹⁷⁰

The text is clear and unambiguous. It states that federal agencies *shall* comply with the requirements of the Act and *shall* include an EIS for major federal actions significantly affecting the quality of the human environment.¹⁷¹ The Supreme Court has held that the word “shall” signifies that the requirements are mandatory and not discretionary.¹⁷² Therefore, the requirement to comply with the Act and provide an EIS is mandatory. The Functional Equivalence Doctrine is in direct conflict with the text of NEPA, since it allows agencies to avoid compliance just because the authorizing statute includes procedures for considering environmental issues similar to NEPA. Congress did not include an express exemption in NEPA for situations where environmental procedures are included in the authorizing statute. However, there is a qualification to the mandatory requirements which states that federal agencies are to comply “to the fullest extent possible.”¹⁷³

The phrase “to the fullest extent possible” was inserted as a result of a concern by some representatives that the EIS enlarged the authority

¹⁷⁰ 42 U.S.C. § 4332 (C).

¹⁷¹ *Id.*

¹⁷² *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

¹⁷³ 42 U.S.C. § 4332.

of existing agencies.¹⁷⁴ Representative Aspinall (D-Colorado) was worried that NEPA and especially § 102 would be read to constitute a grant of new authority to existing federal agencies.¹⁷⁵ As a result, he negotiated the insertion of the qualifier at the beginning of § 102.¹⁷⁶ Since the provision could be interpreted by the courts as a limitation, the conferees included a statement in the Conference Report to clarify the language. The statement declares:

In making this change in favor of the less restrictive provision ‘to the fullest extent possible’ the Senate conferees are of the view that the new language does not in any way limit the Congressional authorization and directive to all agencies of the Federal Government set out in subparagraphs (A) through (H) of clause (2) of Section 102.¹⁷⁷

This clearly indicates that the clause was never meant to provide an excuse for an agency to avoid the EIS requirement. The report goes on to say:

The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency’s operations does not make compliance possible. If this is found to be the case, then compliance with the particular directive is not required but the provisions of Section 103 would apply.¹⁷⁸

The report makes clear that Congress intended each agency to fully comply with § 102 and the EIS requirement unless compliance was not possible. The House report has a similar explanation stating, “the purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out . . . unless the existing law applicable to such agency’s operations

¹⁷⁴ Terrence T. Finn, *Conflict and Compromise: Congress Makes a Law: The Passage of the National Environmental Policy Act 531 (1973)* (Ph.D. dissertation, Georgetown University). This unpublished dissertation is probably the most comprehensive review of NEPA’s legislative history.

¹⁷⁵ *Id.* at 534.

¹⁷⁶ *Id.* at 535.

¹⁷⁷ 115 CONG. REC. 40418 (1969).

¹⁷⁸ *Id.*

expressly prohibits or makes full compliance with one of the directives impossible.”¹⁷⁹

The Supreme Court in *Flint Ridge* and *Public Citizen* addressed the issue of when compliance with NEPA becomes impossible. The Court held in *Flint Ridge* that compliance with NEPA was not required when a “clear and fundamental” conflict with the authorizing statute exists.¹⁸⁰ The Functional Equivalence Doctrine certainly does not present a clear and fundamental conflict, since it applies in a situation where the authorizing statute and NEPA procedures are very similar. This is not a conflict, but rather an overlap or duplication with very similar environmental processes. Therefore, the *Flint Ridge* exemption does not apply. The Court in *Public Citizen* held that NEPA did not apply when a federal agency lacked the discretion to take environmental effects into account when making a decision.¹⁸¹ The Functional Equivalence Doctrine does not present a situation where the agency cannot take environmental issues into account in their decision making. In fact, environmental procedures are included in the authorizing statute. Therefore, the *Public Citizen* exemption also does not apply. In short, functional equivalence is not a situation where the existing law applicable to the federal agency makes compliance with NEPA impossible.

The plain language of the statute, the legislative history, and Supreme Court opinions make it clear that the Functional Equivalence Doctrine directly conflicts with the statute and is therefore illegal.

B. Congress Intended for NEPA to Apply to All Federal Agencies

The unambiguous text clearly states NEPA applies to “all agencies of the Federal government.”¹⁸² It does not include a distinction depending on whether the agency’s primary responsibilities are environmentally related or not. Additionally, the statute universally refers to “agencies,” indicating that the statute applies to all federal agencies without limitation. The legislative history regarding this section supports this interpretation. Senator Jackson (D-Washington), in explaining the Bill to the Senate, makes it clear that NEPA states a “national policy” in providing “management of America’s future

¹⁷⁹ Finn, *supra* note 174, at 537 (citing U.S. Congress, House Conference Report, 91st Congress H. Report 91-765, 9 (1969)).

¹⁸⁰ *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 788–91 (1976).

¹⁸¹ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004).

¹⁸² 42 U.S.C. § 4332.

environment.”¹⁸³ It would be counter intuitive for a national policy that manages the future environment of the nation not to apply to all federal agencies. The structure of the statute also supports this interpretation.

The statute begins with § 4331, which announces the “national environmental policy.”¹⁸⁴ It follows with § 4332, the action-forcing provision entitled “Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.”¹⁸⁵ Congress drafted the Act in this way because § 102 provides the mechanism to carry out the national policy, which applies to the entire federal government. Legislative history supports this interpretation. In discussing this provision, Senator Jackson stated that “taken together [§ 101 and 102] directs *any Federal agency* which takes action that it must take into account environmental management and environmental quality considerations.”¹⁸⁶ These provisions clearly indicate they are applicable to the entire federal government and not to select departments or agencies.

The history of other NEPA sections also reinforces this view. The conference report, in discussing the addition of the language “to the fullest extent possible,” makes clear that the language of § 102 applies to all agencies of the federal government.¹⁸⁷ The report states that “the new language does not in any way limit the Congressional authorization and directive to all agencies of the Federal Government”¹⁸⁸

It is clear from the text, legislative history, and structure of NEPA that Congress intended it to apply to all agencies including EPA. This position is also pragmatic. Providing an exemption to NEPA for EPA or any other environmental agency raises the question of “[w]ho shall police the police?” as Judge Leventhal asked in *Portland Cement*.¹⁸⁹ Senator Jackson was concerned about this as well, stating, “It cannot be assumed that EPA will always be the good guy.”¹⁹⁰ Congress

¹⁸³ 115 CONG. REC. 40416 (1969).

¹⁸⁴ 42 U.S.C. § 4331.

¹⁸⁵ 42 U.S.C. § 4332.

¹⁸⁶ 115 CONG. REC. 40416 (1969); *see also* Finn, *supra* note 174.

¹⁸⁷ 115 CONG. REC. 39703 (1969).

¹⁸⁸ *Id.*

¹⁸⁹ *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir 1973).

¹⁹⁰ *Id.* In footnote 39 of the *Portland Cement* opinion, Judge Leventhal quotes Senator Jackson as saying: “Since EPA was formed, they have done an admirable job and they are

realized that no one can guarantee that EPA or any federal agency will always promote what is best for the environment and so it drafted NEPA accordingly.

C. An EIS Is Required Even When an Agency's Authorizing Statute Contains Environmental Procedures

A related issue is whether an EIS should apply when a federal agency's authorizing statute contains environmental procedures and considerations. The textual and structural arguments above apply as equally to this matter. Regarding the EIS requirement, there are two types of actions that can trigger an EIS. NEPA states that an EIS should be "include[d] in every recommendation or report on proposals for legislation and major Federal actions significantly affecting the quality of the human environment."¹⁹¹ This appears to be a clear requirement and is not qualified by the procedures of an agency's authorizing statute. The only qualifier would dictate that an EIS should be done when either of these actions (legislation or major federal action) "significantly [affect] the quality of the human environment."¹⁹² Each of these elements has been extensively litigated, effectively limiting situations when an agency must submit an EIS. However, the elements do not rely or depend on the presence of other agency environmental procedures.

Legislative history offers instruction on this issue. As discussed above, a compromise resulted in the addition of the language "to the fullest extent possible" at the beginning of § 102.¹⁹³ The conferees specified in the Conference Report that "the purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency's operations does not make compliance possible."¹⁹⁴ This makes clear that Congress intended each agency to fully comply with the EIS requirement unless compliance was not possible.

continuing to do so, at least for the present. However, it cannot be forgotten that EPA is a regulatory agency and in the past in Washington almost all regulatory agencies have eventually come under the control of those that they are charged with regulating," quoting from the September 22, 1972, National Wildlife Federal Conservation Report.

¹⁹¹ 42 U.S.C. § 4332 (C).

¹⁹² *Id.*

¹⁹³ Finn, *supra* note 174, at 535.

¹⁹⁴ *Id.*

The language of the statute and the conference reports show that Congress intended strict compliance with the EIS requirement for all agencies unless their enabling statute expressly prohibited it. This also comports with the *Flint Ridge* decision by the Supreme Court, which provided an exemption only if there was a fundamental and irreconcilable conflict.¹⁹⁵ The express exemptions Congress provided EPA for both the CAA and CWA reinforce the issue. As noted in Part II above, these exemptions and their legislative histories reveal that Congress provides an express exemption when it thinks an environmental statute requires one. For example, Congress provided an exemption when NEPA and environmental statute procedures, such as the Clean Air Act, conflicted.¹⁹⁶ Legislative history also points out that Congress provided express exemptions when NEPA was being used to thwart the environmental goals of other environmental statutes.¹⁹⁷ In all other situations, Congress intended for the EIS requirement to apply.

D. The Functional Equivalence Doctrine Undermines NEPA's National Policy Objectives

NEPA promulgates a national environmental policy and offers procedures for federal agencies to incorporate it in their decision-making process. The Functional Equivalence Doctrine undermines this practice by displacing or eliminating NEPA procedures. FIFRA is a good example.

The Ninth Circuit, in *Merrell v. Thomas*, provided EPA with an exemption from NEPA when registering new pesticides.¹⁹⁸ According to the court, EPA need follow only FIFRA's procedures not NEPA's EIS requirements when determining whether to register pesticides.¹⁹⁹ However, these procedures do not provide for full disclosure of chemicals to the public, consultation with other agencies on the impact of the new pesticides or long-term environmental impacts. This undermines the national environmental policy of documenting environmental impacts and disclosing them to the public and other agencies, the very heart of NEPA's goals. A similar argument can be

¹⁹⁵ *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976).

¹⁹⁶ 15 U.S.C. § 793(c)(1).

¹⁹⁷ See 120 CONG. REC. 18957 (1974).

¹⁹⁸ *Merrell v. Thomas*, 807 F.2d 776, 778 (9th Cir. 1986).

¹⁹⁹ *Id.*

made for the court's blanket exemption from NEPA for RCRA. In *State of Alabama*, the Eleventh Circuit provided a blanket exemption for EPA from NEPA as applied to RCRA.²⁰⁰ As noted in that case, RCRA procedures are not the same as NEPA's, which again undermines the national environmental policy Congress directed. In both cases, the judiciary determined the scope of the national environmental policy instead of Congress and the Executive Branch.

CONCLUSION

NEPA is the cornerstone of our environmental legal framework.²⁰¹ However, over the past five decades, Congress and the courts have limited the statute with exemptions and exceptions.²⁰² The Functional Equivalence Doctrine, an exemption originally created by the D.C. Circuit to resolve a conflict between the CAA and NEPA, has now been applied to many of our fundamental environmental statutes, including FIFRA, RCRA, and the ESA.²⁰³ This continued incursion undermines NEPA and compromises our environmental protections.

The plain language of the statute, its legislative history and Supreme Court opinions clearly demonstrate that the Doctrine directly conflicts with NEPA and is therefore illegal. It is also apparent that Congress intended the statute to apply to all federal agencies regardless of whether their authorizing statutes included environmental procedures. Allowing agencies to substitute their authorizing statute procedures for NEPA undercuts both the statute and the national environmental policy set by Congress.

Although NEPA remains a fundamentally important part of the national environmental regulatory framework, the Functional Equivalence Doctrine jeopardizes its effectiveness. It's time for Congress and the courts to rein in the doctrine and uphold the original goals and objectives of the statute.

²⁰⁰ *Alabama v. EPA*, 911 F.2d 499, 505 (11th Cir. 1990).

²⁰¹ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 42, U.S.C. §§ 4321-4370h (1970); DANIEL R. MANDELKER, *NEPA LAW & LITIGATION* § 1.01 (2nd ed. 1992).

²⁰² *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973) (exempting the CAA from NEPA); *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986) (exempting FIFRA from NEPA); *Alabama v. EPA*, 911 F.2d 499 (11th Cir. 1990) (exempting RCRA from NEPA); *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (exempting critical habitat designation from NEPA); 33 U.S.C. § 1371(c) (the CWA statutory exemption); 15 U.S.C. 793(c)(1) (the CAA statutory exemption).

²⁰³ *Id.*