

SACKETT V. EPA AND JUDICIAL INTERPRETATIONS
OF ENVIRONMENTAL STATUTES: WHAT ROLE FOR NEPA?

BY
JOEL A. MINTZ*

This Essay analyzes both the nature and practical importance of EPA administrative compliance orders and the (potential) precedential scope and significance of the U.S. Supreme Court's decision in Sackett v. EPA. Additionally, it critiques the Sackett opinion for its failure to take account of section 102(1) of the National Environmental Policy Act (NEPA)—an unambiguous directive that all public laws, policies, and regulations be interpreted “to the fullest extent possible” in accordance with NEPA’s environmentally protective policies.

I. INTRODUCTION

The U.S. Supreme Court’s long-awaited decision in *Sackett v. U.S. Environmental Protection Agency*,¹ summarized earlier in this collection of Essays, creates at least as many uncertainties as it resolves unsettled issues of law. In this Essay, I will identify a significant subset of those uncertainties and suggest an alternative analysis that the Court might have adopted in *Sackett* that would have harmonized the purposes of both the Clean Water Act (CWA)² and the Administrative Procedure Act (APA)³ with an important, though infrequently cited, directive of the National Environmental Policy Act (NEPA).⁴

In Part II of this Essay, I will discuss the nature and practical significance of the U.S. Environmental Protection Agency (EPA or the Agency) administrative compliance orders (ACOs) within the panoply of enforcement tools generally available to EPA enforcement officials. In Part III, I will focus on the legal principles, if any, that the Supreme Court’s opinion in *Sackett* has established as a matter of stare decisis. Among other things, this Part will touch upon the extent to which the analysis presented by Justice Antonin Scalia in the *Sackett* case may have been intended to apply to Clean Water Act ACOs that do not include determinations of the

* Professor of Law, Nova Southeastern University Law Center; Elected Member, American Law Institute; Fellow, American Bar Foundation; Member Scholar, Center for Progressive Reform.

¹ 132 S. Ct. 1367 (2012).

² Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

³ 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

⁴ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006).

federal government's authority to regulate particular wetlands, or even to be applicable to the enforcement provisions of other important federal environmental laws. Finally, in Part IV, I will discuss how the application of section 102(1) of NEPA⁵ (also known as the NEPA interpretation mandate)—which the Court did not mention in *Sackett*⁶—might have yielded quite a different result in that case, while providing greater clarity as to the scope and meaning of the *Sackett* decision.

II. THE NATURE AND SIGNIFICANCE OF EPA ADMINISTRATIVE COMPLIANCE ORDERS

While the enforcement provisions of the federal pollution control legislation implemented by EPA vary in detail from statute to statute, nearly all such provisions allow the Agency to make use of one or more enforcement mechanisms—often likened to tools in a tool chest—to redress violations of applicable statutory and regulatory requirements. Among those mechanisms is administrative enforcement, a generic term that covers a variety of enforcement techniques which environmental agencies are typically authorized to implement, on their own, to compel compliance with environmental standards or to collect monetary penalties from environmental law violators. Administrative enforcement measures, which vary considerably in their nature, stringency, and consequences, typically include notices of violation,⁷ administrative compliance orders⁸ (like the one at issue in *Sackett*), administrative penalty assessment orders,⁹ emergency orders,¹⁰ and field citations.¹¹

⁵ 42 U.S.C. § 4332 (2006).

⁶ I have analyzed this provision in some detail in Joel A. Mintz, *Taking Congress's Words Seriously: Towards a Sound Construction of NEPA's Long Overlooked Interpretation Mandate*, 38 ENVTL. L. 1031 (2008). Part IV of this Essay borrows much from that article.

⁷ The notice of violation or NOV—the mildest administrative enforcement mechanism—simply informs the entity to which it is issued that that party is in violation, and it requests compliance with applicable requirements. U.S. Env'tl. Prot. Agency, *Enforcement & Compliance History Online: Frequently Asked Questions*, http://www.epa-echo.gov/echo/faq.html#stages_enforcement (last visited Nov. 25, 2012). In a sense, an NOV is similar to a traffic warning issued by a police officer to a speeding motorist.

⁸ Administrative compliance orders (ACOs) grant an administrative agency the authority to require regulated parties to take specific steps to achieve compliance in accordance with a detailed timetable. Enforcement agencies, including EPA, are generally authorized to issue ACOs on a unilateral basis. Alternatively, such agencies may issue such orders upon consent, usually after negotiations with the regulated party. ACOs are typically not self-enforcing. Non-compliance with those orders must be redressed by a civil action in the courts. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1319(a) (2006) (discussing compliance orders under the Clean Water Act).

⁹ Administrative penalty assessment orders are orders issued by an administrative agency that is authorized to impose a monetary penalty directly on violators of applicable requirements. *See, e.g., id.* § 1319(g) (providing for administrative penalties under the Clean Water Act); Clean Air Act, 42 U.S.C. § 7413(d) (2006) (discussing administrative assessment penalties). In the case of EPA, a regulated entity receiving such an order is entitled to an adjudicatory hearing conducted in accordance with the Agency's Consolidated Rules of Practice Governing the Assessment of Civil Penalties, 40 C.F.R. pt. 22 (2011). Once that party's

In addition to administrative enforcement, EPA and other administrative agencies are also empowered to make use of a significant additional set of enforcement mechanisms. Thus, EPA has the authority to initiate civil judicial enforcement actions in U.S. District Courts,¹² to refer particular cases to the U.S. Department of Justice (DOJ) for criminal prosecution,¹³ to intervene as a party in civil enforcement cases initiated by private citizen plaintiffs,¹⁴ and under certain limited circumstances, to prohibit all federal agencies from entering into a contract with any person convicted of violating the Clean Water Act or the Clean Air Act.¹⁵ At the same time, however, administrative enforcement remains a vital tool for EPA and other environmental enforcement agencies and represents a large proportion of all EPA enforcement activity. For example, in 2001, over 80% of the Agency's enforcement actions were administrative actions.¹⁶ There are several reasons for this enforcement pattern. First, as Sheldon Novick has aptly observed, if they are used effectively, administrative orders "provide a quick, responsive, and flexible enforcement tool, particularly well-suited to remedying less egregious violations."¹⁷ Second, administrative enforcement

administrative remedies have been exhausted, the party may generally seek judicial review in the federal courts.

¹⁰ Emergency orders are orders issued in those (relatively rare) instances where grave and immediate threats to public health or the likelihood of imminent, serious harm to natural resources require EPA (or other government agencies) to take exceptionally rapid enforcement action. *See, e.g.*, Safe Drinking Water Act, 42 U.S.C. § 300i (2006) (granting EPA the power to take emergency action to protect drinking water in cases of "imminent endangerment").

¹¹ Field citations, which are similar in certain respects to traffic tickets, are a relatively recent innovation in pollution control regulations. EPA uses this mechanism with respect to a limited number of minor violations in at least two programs, the Resource Conservation and Recovery Act (RCRA)'s Underground Storage Tank Program, 42 U.S.C. §§ 6991a–6991b (2006), and the Clean Air Act's Mobile Source Program, 42 U.S.C. §§ 7521–7553 (2006); *see also id.* § 7413(d)(3) (authorizing EPA to issue field citations that assess penalties of up to \$5,000 with respect to minor violations of the Clean Air Act).

¹² *See, e.g.*, 33 U.S.C. § 1319(b) (2006) (Clean Water Act civil enforcement provision); 42 U.S.C. § 6992d(a)(1), (d) (2006) (RCRA civil enforcement provision); 42 U.S.C. § 7413(a)(3)(C), (b) (2006) (Clean Air Act civil enforcement provision).

¹³ *See, e.g.*, 33 U.S.C. § 1319(c) (2006) (Clean Water Act criminal enforcement provision); 42 U.S.C. § 6992d(b) (2006) (RCRA criminal penalties provision); 42 U.S.C. § 7413(a)(3)(D), (c) (2006) (Clean Air Act criminal penalties provision).

¹⁴ *See, e.g.*, 33 U.S.C. § 1365(c)(2) (2006) (Clean Water Act citizen suit provision); 42 U.S.C. § 7604(c) (2006) (Clean Air Act citizen suit provision).

¹⁵ *See, e.g.*, Clean Air Act, 42 U.S.C. § 7606 (2006); Federal Water Pollution Control Act, 33 U.S.C. § 1368 (2006).

¹⁶ In 2001 the EPA referred to the DOJ 256 cases for criminal prosecution, settled 222 civil judicial cases, and issued 3,228 administrative orders and field citations. OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, PROTECTING THE PUBLIC AND THE ENVIRONMENT THROUGH INNOVATIVE APPROACHES, FY 2001, ACCOMPLISHMENT REPORT 10, 15 (2002), *available at* <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy01accomplishment.pdf>. *See also* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, Part One: Statutory Bars in Citizen Suits*, 28 HARV. ENVTL. L. REV. 401, 415 (2004) (discussing a similar trend from the late 1970s through the 1990s).

¹⁷ 1 ENVTL. LAW INST., LAW OF ENVIRONMENTAL PROTECTION § 9:9 (Sheldon M. Novick et al. eds., 2011).

actions make efficient use of scarce EPA resources. Relative to civil or criminal enforcement matters, they often require considerably less staff time and attention.¹⁸ Third, in matters requiring resolution by a neutral party, EPA's own administrative law judges may well be more knowledgeable than members of the general judiciary about the technical aspects of environmental disputes.¹⁹ Finally, EPA administrative enforcement actions do not require coordination with the DOJ²⁰—a separate organizational entity with its own set of personnel, internal procedures, opinions, and priorities.

Very clearly, administrative enforcement plays a critical role in EPA's enforcement work. It allows the Agency to establish a deterrent enforcement presence across a broad range of regulated industries. In contrast, federal civil and criminal enforcement actions against large companies polluting the environment often require a considerable EPA enforcement effort against only one (typically among many) non-complying company or industry. Although civil and criminal cases do have a deterrent effect, that effect tends to be more limited in scope. Moreover, administrative enforcement actions can typically be resolved more quickly than civil or criminal enforcement matters, and often with equally beneficial environmental results.²¹ And administrative enforcement seems a considerably more potent and forceful enforcement technique than a mere notice of violation or warning letter, which can be ignored by recalcitrant polluters with relatively greater ease.²²

III. THE PRECEDENTIAL SIGNIFICANCE OF *SACKETT V. EPA*: WHITHER EPA ADMINISTRATIVE ENFORCEMENT?

How broadly should the *Sackett* decision be interpreted? Is the Supreme Court's analysis in *Sackett* only meant to be applied to EPA wetlands jurisdictional determinations contained within administrative orders? Should the *Sackett* rationale be applied in challenges to the factual determinations that provide the basis for other types of Clean Water Act ACOs? Is the opinion even applicable to EPA ACOs issued under the authority of other federal pollution control statutes? At least to this observer, the Supreme Court's decision in *Sackett* merely provides indirect

¹⁸ See LYNN M. GALLAGHER, CLEAN WATER HANDBOOK 174 (3d ed. 2003) ("EPA will normally choose the least resource-consuming enforcement option that is appropriate for the violation, which in most cases will be an administrative order.")

¹⁹ See Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1669 (2009).

²⁰ See ROBERT ESORTHY, CONG. RESEARCH SERV., RL34384 FEDERAL POLLUTION CONTROL LAWS: HOW ARE THEY ENFORCED? 18–22 (2012), available at <http://www.fas.org/sgp/crs/misc/RL34384.pdf> (noting that "EPA or a state may . . . initiate a civil administrative action under its own authority without involving the judicial process.").

²¹ See CRAIG N. JOHNSTON ET AL., LEGAL PROTECTION OF THE ENVIRONMENT 479 (3d ed. 2010) (stating that EPA's administrative compliance mechanisms "provide EPA with the advantage of speed").

²² See ENVTL. LAW INST., *supra* note 17, § 9:7, at 553 (stating that "because a notice of violation does not require anything of its recipient, as an order does, it is not the sort of action that is serious or consequential enough to be regarded as a final agency action or as requiring judicial review").

and non-dispositive hints as to how those important questions will be resolved. As I will argue in Part IV, by too narrowly defining the particular “statutory scheme as a whole,”²³ the Court missed an excellent opportunity to resolve the tension between the Clean Water Act, the APA, and other federal environmental statutes in a way that would have accorded appropriate respect to the lofty aims of Congress in enacting pollution control and public health legislation, while simultaneously complying with what seems a straightforward, and *mandatory*, congressional directive as to how environmental and non-environmental statutes are to be harmonized.

The Supreme Court’s majority opinion in *Sackett*, together with an aspect of Justice Ginsburg’s and Justice Alito’s concurring opinions, provide some (albeit minimal) indication that the case should be given a narrow and limited interpretation by the lower courts. One such signal is the narrow way in which Justice Scalia’s opinion states the question before the Court: “We consider whether Michael and Chantell Sackett may bring a civil action under the Administrative Procedure Act to challenge the issuance by the Environmental Protection Agency (EPA) of an administrative compliance order under section 309 of the Clean Water Act.”²⁴ The Court’s refusal to frame the legal issue before it more broadly—for example, by asking whether parties subject to ACOs may bring a civil action under the APA challenging the basis for those orders—may perhaps be argued to signal the Court’s intention to announce only a narrowly based legal principle.

More evidence for a limited reading of the holding of *Sackett* may be gleaned from the concurring opinions of Justices Ginsburg and Alito. Justice Ginsburg indicated that she agreed with the Court’s determination that the Sacketts were entitled at the pre-enforcement stage to judicial review of the jurisdictional basis for the EPA order that was issued to them—that is, to a review of whether EPA had regulatory authority with respect to their real property.²⁵ However, Justice Ginsburg then stated:

Whether the Sacketts could challenge not only the EPA’s authority to regulate their land under the Clean Water Act, but also, at this pre-enforcement stage, the terms and conditions of the compliance order, is a question today’s opinion does not reach out to resolve. Not raised by the Sacketts here, the question remains open for another day and case. On that understanding, I join the Court’s opinion.²⁶

None of the nine Justices who joined the *Sackett* opinion questioned Justice Ginsburg’s statement or expressed a contrary position. One wonders whether the majority’s silence as to whether its holding applies to pre-enforcement judicial review of ACO terms and conditions was a condition

²³ The opinion noted that only “inferences of intent drawn from the statutory scheme as a whole” can overcome the “presumption favoring judicial review of administrative action”—a presumption that the opinion considered inherent in the APA. *See* EPA, 132 S. Ct. 1367, 1373 (2012) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

²⁴ *Sackett*, 132 S. Ct. at 1369 (citations omitted).

²⁵ *Id.* at 1374 (Ginsburg, J., concurring).

²⁶ *Id.* at 1374–75.

that the other Justices acceded to as a quid pro quo for obtaining Justice Ginsburg's agreement to join the Court's unanimous opinion. Whether or not that was the case, however, her opinion does provide an additional sign that the *Sackett* holding is indeed of limited scope.

Ironically, Justice Alito's concurring opinion—written from what appears to be an entirely different set of premises than the opinion of Justice Ginsburg—may also be read to bolster a modest and limited interpretation of *Sackett's* reach. Justice Alito stated that, even though the Court's decision in the case provides “a modest measure of relief” to property owners in the position of the Sacketts, the opinion of the Court “still leaves most property owners with little practical alternative but to dance to the EPA's tune.”²⁷ In Alito's view, what is called for is an amendment to the Clean Water Act that “provide[s] a reasonably clear rule regarding the reach of the . . . Act.”²⁸ In the absence of such Congressional action, he opined, EPA should promulgate a rule providing a clear and sufficiently limited definition of the statutory phrase “the waters of the United States.”²⁹

Justice Alito's concurring opinion is significant in two respects. First, it focuses exclusively on the limited issue of the extent of federal government jurisdiction to regulate wetlands—the very question that the Supreme Court grappled with in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*³⁰ and *Rapanos v. United States*.³¹ Alito's concurrence makes no mention of the applicability of pre-enforcement judicial review to other types of Clean Water Act ACOs—that is, those that do not involve EPA jurisdiction in a context other than the enforcement of section 404 of the Act, also known as the Act's wetlands protection provision. Second, Justice Alito's concurring opinion makes no mention of the enforcement provisions of other federal pollution control statutes, nor does it address the extent to which the APA requires that ACOs issued by EPA under those different acts must be subject to pre-enforcement judicial review. In light of those omissions, it seems at least permissible to assume that the Supreme Court viewed the *Sackett* case as *solely* concerned with the type of Clean Water Act ACO that contains express EPA determinations as to the Agency's jurisdiction to regulate particular wetland properties.

Notwithstanding the foregoing discussion, however, the possibility remains that some lower federal courts may find the above-described analysis unpersuasive. Similarly, a differently composed Supreme Court of the future may choose to apply the *Sackett* case more broadly. While it may

²⁷ *Id.* at 1375 (Alito, J., concurring).

²⁸ *Id.*

²⁹ *Id.*; see also Federal Water Pollution Control Act, 33 U.S.C. § 1362(7) (2006) (defining “navigable waters” as “the waters of the United States” for purposes of Clean Water Act jurisdiction).

³⁰ 531 U.S. 159 (2001).

³¹ 547 U.S. 715 (2006). Notably, in spite of the fact that the plaintiffs had contended that EPA's administrative compliance order had deprived them of due process in violation of the Fifth Amendment, neither the opinion of the Court nor either of the concurring opinions of *Sackett* so much as discussed this issue. This judicial silence suggests that the Court saw no merit in that claim, and instead viewed the case as raising only issues of statutory interpretation.

be unlikely, it is conceivable that the case may come to be viewed as a basis for ruling that the APA requires pre-enforcement judicial review of the terms and conditions of Clean Water Act ACOs that do *not* involve wetlands jurisdictional determinations, or even perhaps, pre-enforcement review of ACOs issued by EPA under other federal pollution control legislation such as the Clean Air Act or the Superfund statute.³² In the next Part of this Essay, I will present an alternative approach to the one taken by the *Sackett* Court—an approach that might well have provided greater certainty and predictability as to when the APA requires pre-enforcement judicial review of EPA administrative enforcement actions.

IV. *SACKETT V. EPA* AND THE NEPA INTERPRETATION MANDATE:
AN ALTERNATIVE ANALYSIS

In *Sackett*, the Supreme Court considered two different questions of law. The first part of its analysis focused on whether EPA's issuance of the ACO in question constituted a "final agency action" within the meaning of the APA³³—a question the Court answered in the affirmative.³⁴ The *Sackett* Court opined that, as a general matter, the APA created a "presumption favoring judicial review of administrative action."³⁵ However, it noted that the presumption could be "overcome by inferences of intent drawn from the statutory scheme as a whole."³⁶

The Court then noted and rejected several government arguments that were intended to demonstrate that the language and organizational arrangement of the Clean Water Act precludes pre-enforcement judicial review.³⁷ In adopting that analytical approach, however, the Supreme Court overlooked a crucial but rarely mentioned statutory provision: section 102(1) of NEPA. This brief provision—the so-called "interpretation mandate" of NEPA³⁸—simply states that "Congress authorizes and directs that, to the fullest extent possible[,] the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter."³⁹

³² Comprehensive Environmental Responses, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

³³ Administrative Procedure Act, 5 U.S.C. § 704 (2006).

³⁴ *Sackett*, 132 S. Ct. at 1371–73.

³⁵ *Id.* at 1373 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

³⁶ *Id.* (quoting *Block*, 467 U.S. at 349).

³⁷ *Id.* at 1373.

³⁸ 42 USC § 4332 (2006).

³⁹ *Id.* § 4332(1). As previously mentioned, I have discussed this provision in a detailed fashion in an earlier piece, Mintz, *supra* note 6. A portion of the analysis that follows draws heavily on my discussion of NEPA in that prior publication. Selected portions of my earlier article are thus restated *infra* with relatively minimal changes of wording—even occasionally verbatim. I apologize to readers of *Taking Congress's Words Seriously* for that selective repetition, which is intended mainly for the benefit of readers who have not read my previous writing on this topic.

On a careful reading of this statutory sentence, several of its aspects are immediately apparent. First, the subsection is unmistakably mandatory. In clear terms, Congress has not merely urged or suggested that the interpretation and administration of the laws referred to in the provision be consistent with NEPA's policies, it has *required* that to occur. The subsection employs the verb "shall" as opposed to "may" to describe what must occur—traditionally an indication of an intended command as opposed to a mere aspiration.⁴⁰ The first sentence of section 102 also indicates that Congress both "authorizes and directs" that the sort of legal interpretation and administration that the provision mentions must take place.⁴¹ That phraseology provides a further, unambiguous indication that what Congress referred to in the provision is nondiscretionary.

Second, the subsection makes plain that what is to be construed and administered in accordance with NEPA's policies are "the policies, regulations, and public laws of the United States."⁴² By its terms, the subsection thus appears to encompass, without limitation, *all* federal legal authorities that may be described as policies, regulations, or public laws—a set of laws that is referred to without any term of qualification. Environmental laws are unquestionably public laws. Clearly, therefore, at a bare minimum, section 102(1) directs that the nation's *environmental laws* be administered and interpreted in the manner indicated in the provision. Notably, however, the language of section 102(1) is not limited in its applicability to federal *environmental* policies, regulations, and enactments. Inasmuch as the APA is also a public law, the NEPA interpretation mandate unmistakably applies to that piece of federal legislation as well.

Third, NEPA's interpretation mandate plainly directs that the required legal interpretation and administration it refers to must take place "to the fullest extent possible."⁴³ Even a cursory examination of this phrase makes plain that in section 102(1), Congress was requiring a wholehearted and vigorous application of the policies set forth in NEPA. Partial or conditional implementation of NEPA's policies, or a failure or refusal to apply them to some particular subset of national policies, regulations, or public laws, is undoubtedly far less than the statute demands.

Notwithstanding these self-explanatory features, however, the plain language of section 102(1), standing alone, leaves certain questions unresolved. For instance, it is unclear from the provision itself precisely which policies "set forth in this chapter" are to provide the basis for interpreting and administering federal policies, regulations, and public laws. Moreover, NEPA's interpretation directive does not indicate—at least not in

⁴⁰ When used in statutes, the word "shall" connotes having a duty or being required to do something. BLACK'S LAW DICTIONARY 1499 (9th ed. 2009). This definitional proposition is well supported in case law. *See, e.g.,* Lopez v. Davis, 531 U.S. 230, 241 (2001); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998); Ass'n of Civil Technicians v. Fed. Labor Relations Auth., 22 F.3d 1150, 1153 (D.C. Cir. 1994).

⁴¹ 42 U.S.C. § 4332 (2006).

⁴² *Id.* § 4332(1).

⁴³ *Id.* § 4332.

so many words—precisely to whom the provision applies. Finally, the phrase “to the fullest extent possible” is not squarely defined, either in section 102(1) or elsewhere in the statute.

Regrettably, the legislative history of NEPA sheds little light on these questions. Like the interpretation requirement of NEPA itself, the legislative history is pithy. As Professor Daniel R. Mandelker has observed, “NEPA’s legislative history provides some but only limited guidance on the meaning of the statute. . . . The legislative history of the statute is important more for what is omitted than what is included as explanation.”⁴⁴ Mandelker’s observation appears particularly apt with respect to section 102(1).

The only reference to section 102 in NEPA’s legislative history may be found in the report of the conference committee on the bill that was later enacted.⁴⁵ The NEPA conference report makes no specific mention of section 102(1), but instead refers to this section *in its entirety*. Section 102 includes NEPA’s environmental impact statement (EIS) requirement along with the statute’s interpretation provision, and the report’s comments appear mostly to pertain to the EIS portion of section 102.⁴⁶

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

Section 2 provides:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to

⁴⁴ DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* § 2:2, at 2-6 (2d ed. 2012).

⁴⁵ H.R. REP. NO. 91-765, at 9–10 (1969) (Conf. Rep.), *reprinted in* 1969 U.S.C.C.A.N. 2767, 2769–70.

⁴⁶ The portion of the NEPA conference report that pertains here is as follows:

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

Id. at 2770. For detailed examinations of NEPA’s legislative history, see *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 835–36 nn.5–7, 837 n.8, 838 & n.11, 839–40 (6th Cir. 1981); Lynton K. Caldwell, *Is NEPA Inherently Self-Defeating?*, 9 ENVTL. L. REP. 50,001, 50,001–03 (1979); Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 244–56 (1976).

enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.⁴⁷

In section 101(a), Congress declared that:

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.⁴⁸

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

[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve 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.⁴⁹

Some may contend that in contrast to section 101(a)—which describes the goals it enumerates as “the continuing policy of the Federal Government”⁵⁰—the goals expressed in section 101(b) were not meant to be a basis for the interpretation of policies, regulations, and public laws authorized and directed in section 102(1). Under this view, section 101(b) is a mere announcement of “the continuing responsibility of the Federal Government,” as opposed to a statement of “policy,” and thus not within the scope of section 102(1). This notion, however, seems entirely devoid of merit.

⁴⁷ 42 U.S.C. § 4321 (2006).

⁴⁸ *Id.* § 4331(a).

⁴⁹ *Id.* § 4331(b).

⁵⁰ *Id.* § 4331(a).

Black's Law Dictionary defines the term "policy" as "[t]he general principles by which a government is guided in its management of public affairs."⁵¹ An express statement of the "continuing responsibility" of a government appears to fall squarely within that definition. Moreover, the idea that section 101(b) is a legislative declaration of policy finds authoritative support in the only opinion of the United States Supreme Court in which section 102(1) was even minimally analyzed. In *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*,⁵² the Court considered a challenge by a group of law students to a decision of the Interstate Commerce Commission not to suspend a surcharge on railroad freight rates without preparing a NEPA EIS.⁵³ The Court reversed a United States District Court decision that had set aside the Commission's order pending the preparation of an EIS.⁵⁴ However, in a footnote, the Court made a significant observation with respect to section 102(1):

Part of NEPA provides that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter," . . . and *one of the policies of the chapter is to* "approach the maximum attainable recycling of depletable resources."⁵⁵

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

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

As we have seen, section 102(1) directs that interpretation of the public laws of the United States, along with the Nation's policies and regulations, is to be in accordance with NEPA's policies. The language of this subsection contrasts sharply with that of section 102(2), NEPA's EIS provision, which contains a specific set of mandates that are expressly applicable only to "all agencies of the Federal Government."⁵⁶ The omission of any reference to "all agencies of the Federal Government" in section 102(1) appears highly significant. Had Congress wished to limit the applicability of the interpretation mandate to federal agencies, it could simply have drafted the subsection to declare that "all agencies of the Federal Government shall

⁵¹ BLACK'S LAW DICTIONARY 1276 (9th ed. 2009).

⁵² 422 U.S. 289 (1975).

⁵³ *Id.* at 297–98.

⁵⁴ *Id.* at 295, 328.

⁵⁵ *Id.* at 317 n.18 (emphasis added) (quoting 42 U.S.C. §§ 4332(1), 4331(b)(6) (1970)).

⁵⁶ 42 U.S.C. § 4332(2) (2006).

interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in this chapter.” Its refusal to write the statute that way carries an unmistakable implication: section 102(1) applies to *all* governmental entities in *all* branches of the federal government that are responsible for the interpretation as well as the administration of our nation’s policies, regulations, and public laws.

In a common law system, it is axiomatic that one of the responsibilities of judges is to interpret the meaning of statutes. Federal agencies, of course, have an important role to play in the administration of federal laws, and—at least in some circumstances—courts will defer to the statutory interpretations of those agencies for statutes that they have been directed to implement.⁵⁷ Nevertheless, courts have construed legislative enactments since the earliest days of the Republic, a fact that Congress was undoubtedly aware of at the time that NEPA was passed into law. In view of this, it seems logical to read the nonspecific language of section 102(1) as a broad instruction—to *courts and agencies alike*—that they are to interpret federal statutes in accordance with NEPA’s policies. To date, no federal court has reached a contrary conclusion.⁵⁸

As I have observed, section 102 of NEPA requires that both the interpretation and administration of federal laws and policies and the EIS requirement imposed on all federal agencies be carried out in accord with NEPA’s policies “to the fullest extent possible.” Thus far that phrase has not been judicially construed as it pertains specifically to section 102(1).⁵⁹ Nonetheless, federal courts have addressed the meaning of “to the fullest extent possible” as those words apply to the duty of federal agencies to prepare and consider EISs.⁶⁰ That set of decisions strongly suggests that this statutory phrase is far from empty rhetoric.

With the above explanation of section 102(1) of NEPA in view, let us now consider how the application of this Congressional command to *Sackett* might have altered the Supreme Court’s rationale in the *Sackett* case. Clearly, to interpret a statute (or statutes) consistent with NEPA’s

⁵⁷ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. (Chevron)*, 467 U.S. 837, 842–44 (1984).

⁵⁸ Several judicial decisions have focused on the extent to which the NEPA interpretation mandate imposed a requirement on federal executive branch agencies and officials. See, e.g., *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972); *Nat’l Helium Corp. v. Morton*, 361 F. Supp. 78 (D. Kan. 1973), *rev’d on other grounds*, 486 F.2d 995 (10th Cir. 1973); *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev’d on other grounds sub nom. Sierra Club v. Calloway*, 499 F.2d 982 (5th Cir. 1974). For an analysis of those decisions, see Mintz, *supra* note 6, at 1038–41.

⁵⁹ See Eric Pearson, *Section 102(1) of the National Environmental Policy Act*, 41 CREIGHTON L. REV. 369, 372–73 (2008) (discussing the lack of jurisprudence surrounding this section of the act).

⁶⁰ See, e.g., *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 787 (1976) (noting that the phrase “to the fullest extent possible” is a “deliberate command” that is “neither accidental nor hyperbolic”); *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (“[T]he requirement of environmental consideration ‘to the fullest extent possible’ sets a high standard for agencies, a standard which must be rigorously enforced by the reviewing courts.”). For a more extensive discussion of these decisions, see Mintz, *supra* note 6, at 1041–44.

interpretation mandate, a reviewing court must ask three questions: 1) is the statute (or statutes) at issue a “public law of the United States,” and thus a proper subject for application of NEPA section 102(1); 2) what are the purposes and public policies underlying the statute (or statutes) in question; and 3) to what extent are those statutory purposes and policies “in accordance with” the policies set forth in NEPA? It is then required that, “to the fullest extent possible,” the court give preference to whichever statutory interpretation is most in keeping with NEPA’s policies. When one applies that framework to *Sackett*, as noted above, there can be no doubt that the two statutes in question in the case—the Clean Water Act and the APA—are both “public laws of the United States.” These laws and their inter-relationship must therefore be examined to assay the extent to which their policies and goals are “in accordance” with NEPA’s policies. To the extent that their provisions appear to conflict, these provisions must then be harmonized on the basis of their similarity to the policies of NEPA and the degree to which judicial interpretation of those provisions further NEPA’s environmental objectives.

The purposes and policies of the Clean Water Act are set forth in that Act itself. The Act’s “objective” is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”⁶¹ To achieve that public objective, the statute announced a number of national goals and policies. Thus, the Act declared it to be “the national goal” that “the discharge of pollutants into the navigable waters be eliminated by 1985”⁶² and that, wherever attainable, the protection of fish, shellfish, wildlife, and recreational uses of water be achieved by July 1, 1983.⁶³ Moreover, the statute established a “national policy” that “the discharge of toxic pollutants in toxic amounts be prohibited.”⁶⁴ Although the Clean Water Act established no express policy as to its enforcement, it seems clear that the broad authorities given to EPA to bring enforcement actions against violators of the statute’s standards and requirements are fully consistent with the Act’s objective, goals, and policies. There can be little doubt that Congress would not have delegated such a broad set of enforcement powers to EPA if it had not expected that they would be used vigorously to sanction non-compliance—and deter violations—as a means of furthering Congress’s stated legislative aims.

When one compares the Clean Water Act’s objectives and policies with those of NEPA, there is an obvious similarity. The Clean Water Act’s goals of maintaining the integrity of the Nation’s waters, and eliminating discharges that impair that integrity, interfere with recreation, or harm aquatic life, seem fully in accordance with NEPA’s stated policies of “encourag[ing] productive and enjoyable harmony between man and his environment,”⁶⁵ and

⁶¹ Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2006).

⁶² *Id.* § 1251(a)(1).

⁶³ *Id.* § 1251(a)(2).

⁶⁴ *Id.* § 1251(a)(3).

⁶⁵ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

preventing and eliminating “damage to the environment and biosphere.”⁶⁶ The Clean Water Act’s goals are also obviously on all fours with NEPA’s policies of “creat[ing] and maintain[ing] conditions under which man and nature can exist in productive harmony,”⁶⁷ fulfilling “the responsibilities of each generation as trustee of the environment for succeeding generations,”⁶⁸ and assuring “for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.”⁶⁹

In contrast to the Clean Water Act, the APA does not contain an explicitly articulated set of objectives, goals, and policies. It seems apparent, however, that in enacting it, Congress envisioned increased public access to governmental information and records, open disclosure of discussions that occur at governmental meetings, a uniform approach to federal agency rule making and adjudication, and extensive judicial review of final agency actions by persons adversely affected or aggrieved by those actions.⁷⁰ Clearly these are laudable and important public purposes and policies, to which reviewing courts must give effect. Notably, however, not one of those policies is constitutionally mandated. Moreover, none of them relate directly to the express environmental policies, mentioned above, that are at the heart of NEPA.⁷¹

Given this, how might the Supreme Court have incorporated the “command” of Congress, as codified in section 102(1) of NEPA, into its resolution of *Sackett*? At least to me, there is no “one right answer” to that question. In this instance, there still seems some remaining room for the exercise of judicial discretion. Nonetheless, a straightforward application of the NEPA interpretation provision to the fullest extent possible might very well have resulted in a different ultimate outcome from the one reached in the actual case.

As we have seen, Justice Scalia’s opinion in *Sackett*, citing *Block v. Community Nutrition Institute*,⁷² took the position that the APA creates a “presumption favoring judicial review of administrative action”—a presumption that might be overcome by “inferences of intent drawn from the statutory scheme as a whole.”⁷³ If the opinion of the Court had been faithful to the Congressional directive contained in section 102(1) of NEPA, however, the Court might well have decided that the APA’s presumption favoring judicial review simply does not apply where a court is interpreting a public law whose policies are particularly close to and consistent with those of NEPA. The Court might have compared the relevant policies of the Clean

⁶⁶ *Id.*

⁶⁷ *Id.* § 4331(a).

⁶⁸ *Id.* § 4331(b)(1).

⁶⁹ *Id.* § 4331(b)(2).

⁷⁰ See generally Administrative Procedure Act, 5 U.S.C. § 552 (2006) (requiring federal agencies to make certain information publicly available).

⁷¹ Compare 42 U.S.C. § 4321 (2006) (“encourag[ing] productive and enjoyable harmony between man and his environment”), with 5 U.S.C. § 552 (2006) (committing agencies to providing public access to agency information).

⁷² 467 U.S. 340 (1984).

⁷³ *Sackett*, 132 S. Ct. 1367, 1373 (2012) (citing *Block*, 467 U.S. at 349).

Water Act, the APA, and NEPA, and concluded that, given the obvious importance of EPA enforcement to the accomplishment of the policies underlying both the Clean Water Act and NEPA, and the centrality of administrative compliance orders to EPA enforcement, the government's (and the public's) interest in effective enforcement trumped the plaintiff's interest in challenging EPA administrative compliance orders before they were in effect.⁷⁴ In fact, when one attempts to apply NEPA's interpretation directive to the fullest extent possible, Justice Scalia's observation in *Sackett* that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all,"⁷⁵ may well not apply.

An alternative analytical approach that the Supreme Court might have adopted, also consistent with NEPA's interpretation command, would have been for the Court to continue to rely upon the principle that the APA creates a presumption favoring judicial review, while at the same time broadening the Court's definition of the "statutory scheme as a whole"—from which the Court indicated that inferences of an intent to overcome the presumption might be drawn. If NEPA had been considered to be a part of this "statutory scheme" *along with* the Clean Water Act, and the command of NEPA section 102(1) had been implemented to the fullest extent possible, the Supreme Court might well have concluded that the statutory scheme in question does indeed overcome any APA-created presumption that *any* type of Clean Water Act ACOs must be subject to pre-enforcement judicial review.

Notwithstanding its unanimity, the Supreme Court's opinion in *Sackett v. EPA* appears flawed as a result of the Court's failure to take into account section 102(1) of NEPA—an unambiguous congressional directive that the *Sackett* court entirely ignored. Although there may be no certainty as to how the Supreme Court might have ruled in *Sackett* if the NEPA interpretation mandate had been applied, this discussion suggests that there is at least a reasonable possibility that the Court would have analyzed and decided the case quite differently from the way it did. Thus, the decision in *Sackett* should be seen as a failure to acknowledge that section 102(1) of NEPA is a command and not a suggestion. Section 102(1)'s words must be taken at face value by the federal courts and fully integrated into the judicial interpretation of federal environmental statutes. *Sackett* was also a missed opportunity for the Supreme Court. The decision represents a regrettable failure to continue a longstanding and well-founded tradition of judicial deference to public policies that are established and implemented by the democratically elected, political branches of the federal government—unless those policies run afoul of constitutional limitations.

⁷⁴ Notably, and regrettably, the government's attorneys made no reference to NEPA section 102(1) in their arguments to the Court. *See generally Sackett*, 132 S. Ct. 1367 (2012). Perhaps, in hindsight, the government's position that violators of administrative compliance orders could be, in effect, liable for double penalties of up to \$37,500 per day of violation—i.e., penalties counted for violation of the order itself, and for violating the underlying requirement that the administrative order was meant to enforce—was overreaching on the government's part. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1319(d) (2006); Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4 (2010).

⁷⁵ *Sackett*, 132 S. Ct. at 1374.