

**THE NEPA IMPLIED EXEMPTION DOCTRINE: HOW A  
NOVEL AND CREEPING COMMON LAW EXEMPTION  
THREATENS TO UNDERMINE THE NATIONAL  
ENVIRONMENTAL POLICY ACT**

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*Forty years ago, in Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma, the Supreme Court reserved a critical question that the federal courts have endeavored to answer. In so doing, the lower courts forged the novel common law doctrine of “implied exemption,” which releases agencies from National Environmental Policy Act obligations when they undertake “non-discretionary” actions. This Article tracks the development and consequences of this largely unnoticed but influential doctrine and concludes that, given the chance, the Roberts Court will uphold it. It also evaluates the doctrine’s impact on agency behavior and offers modifications that would realign the incentives of agencies and courts as the doctrine matures and spreads to other statutes.*

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INTRODUCTION: HOW AN UNNOTICED COMMON LAW DOCTRINE IS  
CABINING THE NATIONAL ENVIRONMENTAL POLICY ACT

Often referred to as the Magna Carta of American environmental policy,<sup>1</sup> the National Environmental Policy Act of 1969 (“NEPA” or “the Act”)<sup>2</sup> is a cornerstone of the American environmental regulatory scheme. In an effort to force federal agencies and their private partners to consider the environmental effects of certain projects, the Act requires them to produce an “environmental impact statement” for all “major federal actions significantly affecting the environment.”<sup>3</sup>

This seemingly straightforward directive, however, is much harder to apply in practice. Indeed, NEPA generates enough litigation that the

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1. See Arthur W. Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Coup de Grace?*, 72 COLUM. L. REV. 963 (1972) (describing NEPA as an “environmentalist Magna Carta”).

2. 42 U.S.C. § 4321 (2012).

3. *Id.*

American Bar Association published a 400-page “NEPA Litigation Guide,”<sup>4</sup> and the U.S. Supreme Court has decided 17 NEPA cases in the last 40 years.<sup>5</sup> The Act can be a powerful tool for opponents seeking to delay or derail development projects and can confound those aiming to fast-track those same projects. For both sides, the Act is formidable and not easily circumvented—at least according to common wisdom.

But what if the common wisdom is wrong? What if a federal agency *could* bypass NEPA entirely? Though the practice has received scant attention, federal agencies can, and do, circumvent NEPA’s requirements far more often than commentators and practitioners recognize. Importantly, the federal judiciary explicitly blesses this practice, allowing agencies to sidestep NEPA even when it plainly applies. In fact, all an agency needs to do is characterize its action as “non-discretionary”—a surprisingly broad class of actions that includes federal land acquisitions,<sup>6</sup> wilderness trail maintenance decisions,<sup>7</sup> and even airport landing policies<sup>8</sup>—and most courts will be willing to keep NEPA on the statutory shelf.

To date, no scholar has recognized this expanding, judicially-created exemption to NEPA, let alone its legal underpinnings or general scope. This Article fills that gap by exploring the history, contours, and future of the NEPA implied exemption doctrine. Part I describes NEPA and its basic statutory requirements. Part II analyzes the line of cases in the lower federal courts, born of a question that Justice Marshall explicitly reserved in *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*,<sup>9</sup> that have slowly eroded NEPA’s once broad applicability. Part II demonstrates that, despite Justice Marshall’s reservation of the question 40 years ago, the federal circuits have uniformly, with little fanfare, embraced the government’s position, finding that an agency is “impliedly exempt” from NEPA in the large class of actions that are non-discretionary.

After setting this background, Part III turns to two questions: (1) did the *Flint Ridge* Court intend for NEPA to be shelved in such a wide array of

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4. AM. BAR ASS’N, NEPA LITIGATION GUIDE (Albert M. Ferlo, Karin P. Sheldon & Mark Squillace eds., 2d. ed. 2012).

5. 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, 1510 (2012).

6. *See* *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1262–63 (10th Cir. 2001) (holding federal land acquisition is non-discretionary), *superseded by statute*, 2002 Dep’t of the Interior and Related Agencies Appropriations Act, Pub.L. No. 107–63, § 134, 115 Stat. 414.

7. *See* *Sierra Club v. Hodel*, 848 F.2d 1068, 1096 (10th Cir. 1988) (holding wilderness trail maintenance policy is non-discretionary), *overruled by* *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

8. *See* *American Airlines v. Dep’t of Treasury*, 202 F.3d 788, 813 (5th Cir. 2000) (holding certain airport landing policy decisions are non-discretionary).

9. *See* *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 789 (1976).

circumstances, and (2) how would the current Court answer the question that Justice Marshall reserved?

Finally, Part IV explores the implications of the continued development of this body of jurisprudence. The Part begins by investigating the concept of “non-discretionary” agency actions—a theory that will shape the future of implied exemption, NEPA, and the entire landscape of administrative law. This question is more than academic: the Army Corps of Engineers recently released a detailed memo grappling with this area of case law and its impact on the agency’s policymaking agenda.<sup>10</sup> Part IV of this article then investigates the incentives produced by the doctrine and suggests some modifications to improve it. While a robust implied exemption doctrine may facilitate some gains in agency efficiency, it also creates incentives for agencies to over-characterize their actions as non-discretionary in an effort to skirt NEPA’s procedural requirements. And as the doctrine continues to mature, it continues to expand beyond NEPA. Courts are increasingly willing to release agencies from other statutory obligations, such as the Endangered Species Act, when an action is non-discretionary.<sup>11</sup>

### I. SETTING THE STAGE: NEPA’S CONTOURS

NEPA is significant, both substantively and symbolically. Passed by Congress in December 1969 and signed by President Nixon on January 1, 1970,<sup>12</sup> the Act ushered in what many refer to as “the environmental decade.”<sup>13</sup> The Act was the first of the “major” federal environmental statutes<sup>14</sup>—all passed or significantly amended in the 1970s—and even

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10. U.S. DEP’T OF DEF., DEP’T OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, MEMORANDUM FOR ALL COUNSEL, HQ, DIV, DIST, CENTER, LAB & FOA OFFICES, ESA GUIDANCE (2013) (on file with the author) [hereinafter “Corps Memo”].

11. See *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (“Rather, the ESA’s requirements would come into play only when an action results from the exercise of agency discretion.”).

12. 42 U.S.C. § 4321.

13. See LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* (1982) (referring to the 1970s as the “environmental decade”); see also Environmental Law Institute, *Public Lands, Toxic Chemicals Dominate 96th Congress, 2d Session*, 10 ELR 10231, 10237 (Dec. 1980) (describing the 1970s as “the first environmental decade”).

14. The Clean Air Act, while initially passed in 1963, took its current form at the end of 1970, almost a full year after NEPA. Clean Air Act Extension of 1970, 84 Stat. 1676, Pub. L. 91-604 (1970). Two years after NEPA, Congress enacted the Clean Water Act. Federal Water Pollution Control Amendments of 1972 (Clean Water Act), 86 Stat. 816, Pub. L. 92-500 (1972). Next came the Resource Conservation and Recovery Act (“RCRA”) in 1976 and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) in 1980. Resource Conservation and Recovery Act, 90 Stat. 2795, Pub. L. 94-580; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 94 Stat. 2767, Pub. L. 96-510. Other major federal environmental statutes like the Toxic Substances Control Act (“TSCA”) and Federal Insecticide, Fungicide, and Rodenticide Control Act (“FIFRA”) also postdate NEPA. For a primer on these other significant federal environmental statutes,

predated the creation of the Environmental Protection Agency (“EPA”).<sup>15</sup> NEPA paved the way for the comprehensive and complex web of federal environmental laws that the federal government administers today.

#### *A. NEPA’s Procedural & Substantive Requirements*

Though the Act laid the groundwork for America’s most potent environmental legislation, NEPA functions somewhat differently from statutes like the Clean Air Act (“CAA”), the Clean Water Act (“CWA”), and the Resource Conservation and Recovery Act (“RCRA”). The CWA (water), CAA (air), and RCRA (solid waste) all establish compulsory regulatory schemes grounded in various environmental media.<sup>16</sup> In contrast, NEPA applies across all environmental media; all “major federal action[s] significantly affecting the quality of the human environment” fall within the ambit of NEPA, regardless of the type of environmental impact.<sup>17</sup> Predictably, a bevy of judicial opinions attempt to give meaning to NEPA’s operative language, such as what constitutes a “major federal action”<sup>18</sup> and which actions are “significant.”<sup>19</sup>

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*see* CONGRESSIONAL RESEARCH SERVICE, ENVIRONMENTAL LAWS: SUMMARIES OF MAJOR ENVIRONMENTAL STATUTES ADMINISTERED BY THE ENVIRONMENTAL PROTECTION AGENCY (Oct. 8, 2010), available at <http://fas.org/sgp/crs/misc/RL30798.pdf>.

15. *See The Guardian: Origins of the EPA*, ENVTL. PROT. AGENCY, [http://www2.epa.gov/aboutepa/guardian-origins-epa?\\_\\_utma=27327421.64026050.1378313087.1378313087.1378313087.1&\\_\\_utmb=27327421.1.10.1378313087&\\_\\_utmc=27327421&\\_\\_utmz=27327421.1378313087.1.1.utmcsr=en.wikipedia.orglutmccn=%28referral%29lutmcmd=referralutmctt=/wiki/United\\_States\\_Environmental\\_Protection\\_Agency&\\_\\_utmv=27327421.11=visitor%20id=one%20and%20done%20visitor=1&\\_\\_utmk=111681351](http://www2.epa.gov/aboutepa/guardian-origins-epa?__utma=27327421.64026050.1378313087.1378313087.1378313087.1&__utmb=27327421.1.10.1378313087&__utmc=27327421&__utmz=27327421.1378313087.1.1.utmcsr=en.wikipedia.orglutmccn=%28referral%29lutmcmd=referralutmctt=/wiki/United_States_Environmental_Protection_Agency&__utmv=27327421.11=visitor%20id=one%20and%20done%20visitor=1&__utmk=111681351) (last updated Mar. 16, 2014). (President Nixon first proposed creation of an “independent regulatory agency responsible for implementation of federal laws designed to protect the environment” on July 9, 1970. Reorganization Plan Number 3, 116 Congressional Record H 6523 (91st Congress, 2nd session). It wasn’t until December of 1970 that Congress passed legislation bringing EPA into existence).

16. *See* Charles J. Gartland, *At War and Peace with the National Environmental Policy Act: When Political Questions and the Environment Collide*, 68 A.F. L. REV. 27, 30–31 (2012) (“[NEPA’s] language paints broad brush strokes of policy instead of detailed technical prescriptions. There is no limit or requirement to curtail specific pollution or activities of any kind—no micrograms per liter, parts per million, or other such limitations found in environmental statutes such as the Clear Air Act or Clean Water Act.”).

17. 42 U.S.C. § 4332.

18. *See* Howard Geneslaw, *Cleanup of National Priorities List Sites, Functional Equivalence and the NEPA Environmental Impact Statement*, 10 J. LAND USE & ENVTL. L. 127, 133–34 (1994) (describing major federal actions “significantly affecting the quality of human environment”).

19. *See id.* at 134. While important and interesting, these questions are outside the scope of this Article. It is sufficient to note NEPA’s broad applicability in contrast to other environmental legislation.

NEPA also stands out because it imposes procedural, rather than substantive, duties. While the CAA,<sup>20</sup> CWA,<sup>21</sup> and RCRA<sup>22</sup> establish compulsory permitting schemes, NEPA only requires an “environmental impact statement” (“EIS”).<sup>23</sup> Thus, unlike more traditional environmental regulatory programs, NEPA does not compel private citizens or government agencies to reduce air pollution or refrain from dumping waste into navigable waters.<sup>24</sup> Because NEPA is an “essentially procedural” statute, compliance may therefore seem straightforward.<sup>25</sup> But as any environmental lawyer can attest, NEPA is deceptively difficult.

For every EIS, there are Council on Environmental Quality<sup>26</sup> (“CEQ”) regulations that dictate a lengthy, multi-step compliance process with several steps. If an agency’s action is subject to NEPA,<sup>27</sup> it must first prepare an “environmental assessment” (“EA”). An EA preliminarily evaluates the environmental effects of a project, explores alternatives, and supplies the justifications for the project.<sup>28</sup> If an agency determines that the proposed action will not significantly affect the environment, it issues a “finding of no significant impact” (“FONSI”).<sup>29</sup> A FONSI excuses an agency from any further NEPA commitments.<sup>30</sup> Thus, environmental groups often challenge FONSI and EAs in court.

Should an EA conclude that a significant environmental impact *will* likely result, a “notice of intent” (“NOI”) to prepare an EIS must be published in the Federal Register.<sup>31</sup> The next step is “scoping,” which requires an agency to determine which types of environmental impacts will be analyzed within the relevant geographical range.<sup>32</sup> Once scoping is

20. 42 U.S.C. § 7401 (2012).

21. 33 U.S.C. § 1151 (2012).

22. 42 U.S.C. § 6901 (2012).

23. 42 U.S.C. § 4321.

24. 42 U.S.C. § 7401; 43 U.S.C. § 1151.

25. *Vt. Yankee v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

26. NEPA established CEQ, an agency in the Executive Office of the President, to promulgate regulations that would effectuate NEPA’s requirements.

27. That is, it is subject to NEPA § 102(2)(C), and is not subject to any of the exemptions discussed *infra*.

28. *See* Geneslaw, *supra* note 19, at 130–31 (“The EA documents the need for the project, the potential environmental effects arising from it and alternatives to the proposed action, thereby functioning as a basis for evaluating the project and determining if an EIS must be prepared.”); *see also* 40 C.F.R. § 1501.3 (2013) (requiring a preliminary EA); 40 C.F.R. § 1508.9 (2013) (detailing the components of an EA).

29. *See* Geneslaw, *supra* note 19, at 131 (“If [an agency] determines that the action will result in no significant environmental effects, it issues a [FONSI] and its NEPA obligations are completed.”); *see also* 40 C.F.R. § 1501.4 (describing a FONSI).

30. *See* 40 C.F.R. § 1501.4 (describing a FONSI).

31. *See* 40 C.F.R. § 1508.22 (requiring publication of a NOI if an EIS must be prepared).

32. *See* Geneslaw, *supra* note 19, at 131 (“The first step in preparation of an EIS is scoping, which identifies the issues the EIS will address in depth and eliminates from considerations

completed, actual production of the EIS begins. In reality, two impact statements must be produced: a preliminary “draft” EIS and a revised version, which takes into account public comments.<sup>33</sup> A complete EIS must consider “all reasonable alternatives” to the proposed action and contain a “full and fair discussion of significant environmental impacts.”<sup>34</sup>

Once a final EIS is submitted, lawsuits challenging the sufficiency of the document often ensue.<sup>35</sup> While these lawsuits are costly, time-consuming, and can even result in a court ordering complete reproduction of an EIS—no small task since the NEPA compliance process can easily take two to three years—they rarely result in the reversal of the agency’s substantive decision to complete a project.<sup>36</sup>

This deferential judicial approach to agency final decisions, irrespective of the potentially significant environmental impacts contemplated by an EIS, was established in a battery of Supreme Court cases decided in the 1970s and 1980s. Specifically, *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*,<sup>37</sup> *Strycker’s Bay Neighborhood Council v. Karlen*,<sup>38</sup> and *Robertson v. Methow Valley Citizens Council*<sup>39</sup> all “significantly narrowed the practical impact of [NEPA’s] mandate that agencies think deeply about the environmental consequences of their

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others that are not likely to have significant impacts.”); *see also* 40 C.F.R. § 1501.7 (explaining the scoping process).

33. *See* Geneslaw, *supra* note 19, at 131 (“NEPA contemplates a two-step process in which an initial draft EIS is prepared, followed by a final EIS which responds to public comments.”).

34. 40 C.F.R. § 1502.1.

35. *See NEPA and Other Overarching Statutes*, U.S. DEP’T OF JUSTICE, ENVIRONMENT AND NATURAL RES. DIV., <http://www.justice.gov/enrd/3150.htm> (last updated Sept. 2013) (noting that “NEPA gives rise to the greatest variety of litigation” for the DOJ’s Natural Resources Section).

36. *See id.* (“Because the substantive statute [NEPA] . . . may provide broad discretionary protection to agency decision making, NEPA’s ‘procedural’ requirements are often the principal, and in some cases only available tool for dissatisfied citizens to challenge agency action in the courts.”).

37. *See generally* *Vt. Yankee*, 435 U.S. at 588. *Vermont Yankee* is one of the first instances of the Supreme Court signaling its hostility to NEPA. There, the Court essentially read NEPA’s substantive goals and provisions out of the Act by declaring the duties it imposes on agencies “essentially procedural.”

38. *See generally* *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980). In *Strycker’s Bay*, the Court further cabined NEPA’s ability to command a substantive result by allowing agencies to “reject an alternative [plan] acknowledged to be environmentally preferable solely on the ground that any change in [the plan] would cause delay.” By holding that an agency only needs to *consider* an EIS, the Court essentially prevented federal courts from second-guessing an agency’s decision making process, no matter how egregious the environmental consequences may be. This “effectively killed any possibility of judicial enforcement of NEPA’s substantive goals.” MATTHEW J. LINDSTROM & ZACHARY A. SMITH, *THE NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL MISCONSTRUCTION, LEGISLATIVE INDIFFERENCE, & EXECUTIVE NEGLECT* 119 (2001).

39. *See generally* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). The Methow Valley Court held that NEPA does not force agencies to develop or implement an environmental mitigation plan. The Court also held an agency need not integrate a “worst-case analysis” catastrophe plan in its EIS.

actions” by reading “NEPA solely as a procedural requirement devoid of any substantive value.”<sup>40</sup> Therefore, although the underlying substantive agency decision to undertake a project is usually unassailable in court, interest groups can nonetheless utilize NEPA’s procedural requirements as a device to slow down an agency project.<sup>41</sup>

### B. Established NEPA Exemptions

Given that an agency’s path to NEPA compliance is often riddled with legal obstacles, agencies usually prefer to avoid the Act altogether.<sup>42</sup> There are three situations when an agency may decline to comply with NEPA, even if its actions would otherwise be subject to the Act.

Of the three types of exemptions, *express exemptions* from Congress are the most straightforward. For an express exemption to apply, Congress must clearly indicate *in a statute* that NEPA does not apply to a particular agency action.<sup>43</sup> Two of the most common express exemptions are found in the CAA<sup>44</sup> and CWA.<sup>45</sup> One-off projects like highway construction<sup>46</sup> or pipeline expansion<sup>47</sup> are also commonly insulated from NEPA via express exemption. Congress rarely provides express exemptions, however, and

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40. David R. Hodas, *NEPA, Ecosystem Management and Environmental Accounting*, 14 Nat. Res. & Env’t 185, 186–87 (2000); *but see* Lazarus, *supra* note 5, at 1585 (arguing that although “NEPA has certainly had a tough time in the Supreme Court . . . [t]here were many important environmental victories within those losses” at the Court).

41. *See* Denis Binder, *NEPA, Nimbys and New Technology*, 25 LAND & WATER L. REV. 11, 17 (1990) (stating that NEPA is “an instrument of delay for opponents of a project”).

42. *See* Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312, 2321 (2004) (describing “agency abuse” of the NEPA categorical exemption in order to avoid undertaking an EA or EIS).

43. *See* Jonathan M. Cosco, *NEPA for the Gander: NEPA’s Application to Critical Habitat Designations and Other “Benevolent” Federal Action*, 8 DUKE ENVTL. L. & POL’Y. F. 345, 353–54 (1998) (“Occasionally Congress will exempt specific federal actions from NEPA by clearly indicating its intent to do so in a subsequently enacted statute.”).

44. *See* 15 U.S.C. § 793(c)(1) (“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.”).

45. *See* 33 U.S.C. § 1731(c)(1) (“Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act, and the issuance of a permit under section 402 of this Act for the discharge of any pollutant by a new source as defined in section 306 of this Act, no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.”).

46. *See, e.g.,* Named Individual Members of San Antonio Conservation Soc’y v. Tx. Highway Dep’t, 496 F.2d 1017, 1022 (5th Cir. 1974) (finding a congressional express exemption for construction of the San Antonio Highway System).

47. *See, e.g.,* Earth Res. of Alaska v. Fed. Energy Regulatory Comm’n, 617 F.2d 775, 780 (D.C. Cir. 1980) (finding Congress precluded judicial evaluation of compliance with NEPA in the context of the Alaska pipeline construction project).

courts usually require a statute to include explicit and unambiguous language before freeing an agency from NEPA.<sup>48</sup>

Although they are more complex than express exemptions, *categorical exemptions* (known also as, “categorical exclusions” or “CatEx”) are more commonly applied. Unlike express exemptions created by Congress, categorical exemptions are the result of an agency-controlled process.<sup>49</sup> In a nutshell, categorical exemptions are a list of common agency actions that the agency has determined never require an EA or EIS because they do not significantly impact the environment.<sup>50</sup> Examples include wetlands restoration by the Fish and Wildlife Service, facility maintenance at EPA sites, and approvals of bicycle lane construction plans by the Department of Transportation.<sup>51</sup> To prevent agencies from using categorical exemptions as an end-around to complying with NEPA, a proposed categorical exemption class must receive CEQ review and approval, be published in the Federal Register, and be subjected to a public comment period.<sup>52</sup> CEQ recently issued new guidance strengthening these safeguards.<sup>53</sup>

Finally, *implied exemptions*, the main focus of this Article, are oft-utilized but are more malleable than both express and categorical exemptions. While express exemptions are crafted by Congress and categorical exemptions originate in the executive branch, implied exemptions are judicially-created exceptions to NEPA.<sup>54</sup> As will be explored in Part II, the implied exemption doctrine arose rather unobjectionably as a reasonable solution to a tricky jurisprudential question.

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48. See *Flint Ridge*, 426 U.S. at 788 (noting that in certain limited circumstances, where an agency's own statute or regulations conflict with NEPA, compliance with NEPA may be excused).

49. See C2HM HILL, WHITE PAPER: CATEGORICAL EXCLUSION UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) 1, 1 (2011) (“The original (and current) understanding of CatEx use is that it applies to a list of actions by an agency that do not ‘individually or cumulatively have a significant effect on the human environment.’”), available at [https://www.ch2m.com/corporate/services/environmental\\_management\\_and\\_planning/assets/Abstracts/2011/CH2M-HILL-categorical-exclusion.pdf](https://www.ch2m.com/corporate/services/environmental_management_and_planning/assets/Abstracts/2011/CH2M-HILL-categorical-exclusion.pdf).

50. *Id.*

51. *Id.* at 6, Table 1 (providing a list of common categorical exemptions).

52. See *id.* at 1 (“It was understood when the CatEx mechanism was made a part of the NEPA process that agencies are not free to just “make up” lists of actions for which a CatEx is applicable. Such proposed actions must first go through a review by the Council of Environmental Quality (CEQ), a Federal Register Notice, a public review, and then a final CEQ review to ensure that the CatEx conforms to NEPA.”).

53. See *id.* at 1–2. This fresh guidance was prompted by federal administrative review of the Deepwater Horizon oil spill in the Gulf of Mexico. The development and approval process for the well fell under a categorical exclusion which found that the likelihood of a spill was insignificant. Predictably, CEQ produced a bolstered guidance document that requires agencies to supply stronger evidence to win approval of their request for a categorical exemption.

54. See *Cosco*, *supra* note 44, at 353–56 (providing an introduction to the doctrine).

But as time has passed, the doctrine has expanded considerably, and there is now a risk that the exception will swallow the rule.

## II. A STONE LEFT UNTURNED: *FLINT RIDGE* & ITS PROGENY

The implied exemption doctrine can be traced back almost 40 years to the Supreme Court's decision in *Flint Ridge*.<sup>55</sup> When *Flint Ridge* reached the Supreme Court in 1976, the case law surrounding NEPA was mostly undeveloped, as the Act had been around for only six years and *Flint Ridge* was just the third case to squarely present a NEPA issue to the Court.<sup>56</sup> Two additional factors—the “extremely narrow” holdings of the two prior NEPA cases and the fact that NEPA was an ancillary issue in both—further cemented *Flint Ridge*'s position as the most significant NEPA case to reach the Supreme Court by the mid-1970s.<sup>57</sup>

### A. *Flint Ridge*

In *Flint Ridge*, the U.S. Department of Housing and Urban Development (“HUD”) appealed a Tenth Circuit decision forcing the agency to prepare an EIS before it could give legal effect to several disclosure statements from housing developers under the Interstate Land Sales Full Disclosure Act (“Disclosure Act”).<sup>58</sup> HUD advanced two theories as to why it could legally circumvent NEPA's command to produce an EIS before approving a disclosure statement.<sup>59</sup> Both of HUD's novel arguments were intended to cabin NEPA's applicability by establishing far-reaching legal doctrines that would place broad classes of agency action beyond the ambit of NEPA. Though HUD's arguments were

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55. *Flint Ridge*, 426 U.S. 776.

56. See Lazarus, *supra* note 5, at 1536–39 (noting that *Flint Ridge* represents the third “NEPA case” the Supreme Court considered).

57. See *id.* at 1537–38. Professor Lazarus describes the holdings of these cases, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* and *Aberdeen & Rockfish Railroad Company v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, as “extremely narrow” and “exceedingly narrow,” respectively. Though both *SCRAP* and *SCRAP II* required the Court to resolve NEPA questions, the cases were important primarily because of their “broad standing ruling[s].” Lazarus himself characterizes the *SCRAP* cases as “the Court's high water mark for environmental citizen-suit standing,” as the Court sustained standing despite “an extraordinarily attenuated causal chain [of injury].” See, e.g., *id.* at 1537.

58. *Flint Ridge*, 426 U.S. at 785.

59. See *id.* at 785–87 (“The Secretary and *Flint Ridge* offer essentially two theories for exempting HUD from this duty in the administration of the Disclosure Act.”).

distinct, both relied on successfully demonstrating that a statute other than NEPA can create an “implied exemption” to NEPA itself.<sup>60</sup>

First, the government argued that it was impossible for HUD to comply with both the Disclosure Act’s requirement that documents become legally effective within 30 days of issuance and NEPA’s command to produce an EIS before undertaking that very same action.<sup>61</sup> Thus, if HUD’s act of declaring a disclosure statement legally binding fell within the ambit of NEPA—because it was a “major federal action significantly affecting the quality of the human environment”—the agency would be forced to run afoul of either the Disclosure Act (because creating an EIS inevitably takes longer than 30 days) or NEPA (by declining to generate an EIS).

Justice Marshall, writing for the majority, agreed that either NEPA or the Disclosure Act must give way. He opened by noting that “[i]t is inconceivable that an environmental impact statement could, in thirty days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments.”<sup>62</sup> Of course, the Disclosure Act would not be the only federal legislation to generate such a conflict, so the Court took the opportunity to announce a new test intended to provide clear instructions to agencies facing these dilemmas: “[W]here a clear and unavoidable conflict in statutory authority exists, NEPA must give way.”<sup>63</sup> The Court located two sources of authority for this new principle. First, Justice Marshall pointed to section 102 of NEPA, which directs agencies to comply with NEPA only “to the fullest extent possible.”<sup>64</sup> Justice Marshall believed that Congress included this language to acknowledge that “NEPA must give way” in certain circumstances, including statutory conflicts.<sup>65</sup> To further bolster this position, Justice Marshall cited the Court’s prior decision in *SCRAP*, where the Court declared that “NEPA was not intended to repeal by implication any other statute.”<sup>66</sup> Finally, the Court rejected the argument that because the Disclosure Act included a statutory device enabling HUD to suspend the 30 day compliance period, the agency could comply with both the Disclosure Act and NEPA.<sup>67</sup> Together, these principles from *Flint*

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60. See *id.* (evaluating the implications of the federal government’s arguments in a broad sense and declining to confine the analysis to the facts of the case).

61. *Id.* at 786–89.

62. *Id.* at 788–89.

63. *Id.* at 788.

64. *Id.* at 787.

65. *Id.*

66. *Id.* *SCRAP* and *SCRAP II* are discussed *supra* at note 58.

67. See *id.* at 790–91 (“Not only does the Court of Appeals opinion grant the Secretary a power not conferred by statute, but the exercise of that power ordered by the court would contravene the purpose of the thirty-day provision of the Disclosure Act. The thirty-day time limit, as the Court of Appeals recognized, is designed to protect developers from costly delays as a result of the need to

*Ridge* added up to a new common law doctrine under NEPA—the doctrine of implied exemption.

Although the Court’s “clear and unavoidable conflict” test may appear to be a fairly straightforward test, the rest of the *Flint Ridge* decision raised more questions than it answered. Like the government’s first argument, its second argument was grounded in the idea of an “implied exemption” to NEPA. But rather than locating the *impossibility* of compliance as the source of exemption, the government’s argument depended on successfully characterizing the *inherent nature* of the agency action as “non-discretionary.”<sup>68</sup> Specifically, the government asked the Court to adopt a rule declaring NEPA inapplicable wherever an agency “by statute, has no power to take environmental consequences into account in deciding” whether to undertake an action.<sup>69</sup> Therefore, in *Flint Ridge*, the government contended that NEPA did not apply because HUD could not exercise any discretion in discharging its duties under the Disclosure Act, since the statute’s language compelled the agency to declare a disclosure legally effective within 30 days.<sup>70</sup>

To buttress its position, the government claimed that “NEPA is concerned only with introducing environmental considerations into the decisionmaking processes of agencies that have the *ability* to react to environmental consequences when taking action.”<sup>71</sup> If an agency’s course was predetermined, no measure of negative environmental impacts could sway the agency’s course of action. The respondents countered by noting that:

[E]ven if the agency taking action is itself powerless to protect the environment, preparation and circulation of an impact statement serves the valuable function of bringing the environmental consequences of federal actions to the attention of those who are empowered to do something about them—other federal agencies, Congress, state agencies, or even private parties.<sup>72</sup>

In the end, Justice Marshall punted. Because the Court resolved the case by adopting the clear and unavoidable conflict test, Justice Marshall

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register with HUD. Yet, the Court of Appeals’ reading the statute would make such delays commonplace, and render the thirty-day provision little more than a nullity. Environmental impact statements, and consequent lengthy suspensions, would be necessary in virtually all cases.”).

68. *Id.* at 789–90.

69. *Id.* at 786.

70. *Id.* at 787.

71. *Id.* at 786 (emphasis added).

72. *Id.* at 786–87.

expressly reserved the question of whether an agency undertaking a non-discretionary action must comply with NEPA.<sup>73</sup> At least one prominent commentator considers this outcome a victory for environmentalists,<sup>74</sup> though the dominant view is that *Flint Ridge* ushered in a long line of Supreme Court cases in conflict with NEPA's environmental protection goals.<sup>75</sup>

Conspicuously absent from the scholarly debate is any mention of Justice Marshall's reserved question. While there is a rich discourse among courts and commentators about the general nature of the Supreme Court's NEPA case law, almost none of it considers the impact of Justice Marshall's decision to cast the non-discretionary question aside, let alone the broader implications of *Flint Ridge*.

Ultimately, the question left open in *Flint Ridge* is an important one; federal agencies often rely on the non-discretionary nature of their actions to justify absolving themselves of the duty to prepare an EA or EIS. In fact, the argument that some scholars invoke to spin *Flint Ridge* as a pro-NEPA decision—that Justice Marshall's failure to adopt the government's broader non-discretionary test kept the opinion narrow in scope—is actually the proximate cause of NEPA's increasing inapplicability.<sup>76</sup> Almost 40 years have passed since the Court declined to foreclose the government's position in *Flint Ridge*. In the interim, the circuits have embraced the government's alternative argument, finding NEPA inapposite in the large class of cases where an agency lacks discretion.

#### *B. Not So Reserved: The Circuit Courts Answer the Supreme Court's Reserved Question*

Initially, the circuits split as the Department of Justice continued to advance the non-discretionary excuse in federal district and circuit courts. Although some of the early cases were based on the "clear and

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73. See *id.* at 787 ("Because we reject this argument of respondents and find that preparation of an impact statement is inconsistent with the Secretary's mandatory duties under the Disclosure Act, we need not resolve petitioners' first contention [concerning non-discretionary agency actions].").

74. Lazarus, *supra* note 5, at 1536–39.

75. See, e.g., William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 497 (1990) (discussing the twelve NEPA cases where the Court dismissed "interpretations advanced by environmental groups"); Marla A. Weiner, *Environmental Law—Flint Ridge Development Co. v. Scenic Rivers Association: Limiting the Applicability of NEPA*, 13 URB. L. ANN. 225, 236 (1977) (describing how the court created new NEPA exemptions).

76. See generally, *Flint Ridge*, 426 U.S. 776 (highlighting Justice Marshall's opinion on NEPA).

unavoidable” doctrine of statutory preemption, most of the divergence in the case law after *Flint Ridge* can be traced to the question that Justice Marshall left unresolved.

In the decade following *Flint Ridge*, the lower courts frequently rejected the government’s non-discretionary exemption argument. This line of cases typically focused on Congress’s desire to have courts “make as liberal an interpretation as [they] can to accommodate the application of NEPA.”<sup>77</sup> The lower courts usually located two distinct but complementary sources of authority for mandating agency compliance with NEPA for non-discretionary actions: NEPA’s plain language and its legislative history. The Ninth Circuit’s analysis in *Jones v. Gordon* is typical. In *Gordon*, the court first pointed to section 102 of NEPA, directing that the Act “apply to the fullest extent possible.” It then applied language from NEPA’s conference committee report that “[n]o agency shall utilize an excessively narrow construction of its existing statutory authority to avoid compliance.”<sup>78</sup>

While at first the government experienced some pushback from federal courts, the circuits have almost uniformly coalesced around the Department of Justice’s interpretation that NEPA does not apply to non-discretionary agency actions. As a result, most, if not all, circuits<sup>79</sup> now recognize an implied exemption from the EIS and EA requirements when an agency can show that its action is non-discretionary.<sup>80</sup> Somewhat surprisingly, the courts siding with the government cite the same authorities—NEPA’s language and legislative history—as the courts that foreclose an exception

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77. See, e.g., *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986) (finding a congressional desire that “we make as liberal an interpretation as we can to accommodate the application of NEPA”).

78. *Id.* at 826–27.

79. As will be discussed *infra*, two uncertainties make it difficult to determine the precise state of the jurisprudence. First, it appears that some circuits have not yet had occasion to address the question. Second, the case law in some circuits is confused at best and contradictory at worst. In any event, it is clear that the vast majority of circuits have adopted the Department of Justice’s argument.

80. See, e.g., *City of New York v. Minetta*, 262 F.3d 169, 177–78 (2d Cir. 2001) (“[W]here an agency’s decision does not entail the exercise of . . . discretion, an EIS is not required.”); *Sac & Fox Nation*, 240 F.3d at 1262–63 (“[W]e conclude the Secretary reasonably determined that no NEPA or NHPA analysis was required prior to the acquisition.”), *superseded by statute*, 2002 Dep’t of the Interior and Related Agencies Appropriations Act, Pub.L. No. 107–63, § 134, 115 Stat. 414; *American Airlines*, 202 F.3d at 803 (“Agency decisions which do not entail the exercise of significant discretion do not require an EIS.”); *Strahan v. Linnon*, 1998 U.S. App. LEXIS 16314, at \*6 (1st Cir. July 16, 1998) (“NEPA is inapplicable because . . . the Coast Guard has no discretion to consider environmental factors.”); *Hodel*, 848 F.2d at 1089 (“The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. Cases finding ‘federal’ action emphasize authority to exercise discretion over the outcome.”) (quoting W. Rodgers, *Environmental Law* 763 (1977)), *overruled by* *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

for non-discretionary actions.<sup>81</sup> Rather than reading the legislative history as congressional guidance to apply NEPA broadly, this line of cases emphasizes the role of NEPA as a practical tool for informing agency decisionmaking. Since an agency undertaking a non-discretionary course of action cannot change its course no matter how compelling an EA or EIS is, these courts reason that NEPA is superfluous in the context of non-discretionary actions.<sup>82</sup> These cases also implicitly construe NEPA's plain language narrowly, sharing the view of the *Flint Ridge* Court that section 102 requires compliance with the Act only "to the fullest extent possible."<sup>83</sup> That is, they read section 102's "fullest extent possible" language as a *limiting instruction* rather than an *unwavering command*.

As it stands now, almost every circuit to have considered the question will excuse NEPA compliance when an agency action is non-discretionary.<sup>84</sup> At the time of this writing, the First Circuit,<sup>85</sup> Second Circuit,<sup>86</sup> Third Circuit,<sup>87</sup> Fifth Circuit,<sup>88</sup> Eighth Circuit,<sup>89</sup> and Tenth Circuit<sup>90</sup> all clearly fall into this camp. On the other hand, no circuit has explicitly adopted the alternative approach, at least within the past 20 years.

There are three caveats to this assessment of the judicial landscape. First, the state of the law in some circuits is unclear as some courts have not yet had occasion to reach the question of when NEPA may be impliedly excused. However, it is likely that these courts will eventually join their sister circuits in recognizing a non-discretionary action exception. Second,

81. See Lazarus, *supra* note 5, at 1515 (detailing the reasoning these courts provide when they adopt the non-discretionary action NEPA exemption).

82. See, e.g., *Goos v. Int'l Commerce Comm'n*, 911 F.2d 1283, 1295 (8th Cir. 1990) (explaining that "[M]inisterial acts . . . have generally been held outside the ambit of NEPA's EIS requirement. Reasoning that the primary purpose of the impact statement is to aid agency decisionmaking, courts have indicated that nondiscretionary acts should be exempt from the requirement.").

83. See, e.g., *id.*

84. Footnote 79, *supra*, extensively details this case law.

85. *Strahan*, 1998 U.S. App. LEXIS at \*6 ("NEPA is inapplicable because . . . the Coast Guard has no discretion to consider environmental factors.").

86. *Minetta*, 262 F.3d at 177–78 ("[W]here an agency's decision does not entail the exercise of . . . discretion, an EIS is not required.").

87. *NAACP*, 584 F.2d at 634 ("Section 1122 approval, even if it 'enabled' implementation of Plan Omega, does not require the filing of an EIS because the agency's approval was not legally required and the agency was not empowered to consider environmental effects in its review of a state's recommendation.").

88. *American Airlines*, 202 F.3d at 803 ("Agency decisions which do not entail the exercise of significant discretion do not require an EIS.").

89. *Goos*, 911 F.2d at 1295.

90. *Sac & Fox Nation*, 240 F.3d at 1262–63 ("[W]e conclude the Secretary reasonably determined that no NEPA or NHPA analysis was required prior to the acquisition."), *superseded by statute*, 2002 Dept of the Interior and Related Agencies Appropriations Act, Pub.L. No. 107–63, § 134, 115 Stat. 414.

sometimes even the intra-circuit jurisprudence is confused, with two or more cases reaching results that are impossible to reconcile.<sup>91</sup> Another complicating factor is that, on occasion, courts sometimes issue a different interpretation of NEPA without explicitly referencing or overruling a prior construction of the Act.<sup>92</sup> Third, these precedents are somewhat stale, as most of the cases were decided in the 1980s and 1990s. While this does not necessarily mean that a court today would reach a different result, it does suggest that the jurisprudence is subject to change, especially given the Supreme Court's silence since *Flint Ridge* and the relative dearth of cases on the subject (no more than a handful per circuit).

### III. IMPLIED EXEMPTION IN THE SUPREME COURT

To this point, virtually no court or commentator has catalogued, evaluated, or even merely acknowledged the existence and scope of the implied exemption doctrine. This is problematic for two reasons. First, since the issue has yet to reach the Supreme Court since *Flint Ridge*, the circuits have had free reign in one of the most important areas of federal environmental policy. The result has been a largely unnoticed but significant judicial cabining of NEPA's applicability. In and of itself, this is not an objectionable result, but there is a second concern that compounds the first: the circuits could be interpreting NEPA improperly. Given the Supreme Court's 40 year silence on the subject, Justice Marshall's language in *Flint Ridge* should be the starting point for evaluating the circuits' approach to this question. And regardless of which approach the *Flint Ridge* Court thought superior, the ultimate question is whether the Roberts Court will reject or adopt the implied exemption doctrine when it inevitably reaches the Supreme Court.

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91. The Ninth Circuit is a particularly illustrative example. *See generally* *Westlands Water Dist. v. Natural Res. Def. Council*, 43 F.3d 457 (9th Cir. 1994). Although the *Westlands* Court appears to have relied upon several independent lines of reasoning to reach its result, one of the court's foundations for holding NEPA impliedly preempted is that "Congress did not give the Secretary discretion over when he may carry out his duties." *Id.* at 460. One year later, the Ninth Circuit explicitly held that "[NEPA's] procedural requirements are triggered by a discretionary federal action." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995). As a result, it is difficult to square *Babbitt* and *Westlands* with *Gordon's* (described *supra* at note 78) directive that every effort be made to accommodate NEPA. All three Ninth Circuit cases were decided within a decade of each other, although the two most recent decisions seem to adopt the broader construction of *Flint Ridge*.

92. *See supra* note 81. The current Ninth Circuit jurisprudential quagmire is likely a textbook example of this precise circumstance. It appears three different Ninth Circuit panels reached three different results without taking into account the cumulative impact of three different "binding" cases reaching three completely incompatible holdings.

A. *Implied Exemption & the Flint Ridge Court: Is Flint Ridge Anti-Environmental?*

This article now examines the Supreme Court's treatment of the NEPA implied exemption doctrine. After evaluating the *Flint Ridge* Court's attitude towards NEPA, this article turns to the future: how will the Roberts Court likely address the implied exemption doctrine when it inevitably reaches the Nation's highest court?

1. The Traditional View

Since NEPA laid the foundation for American environmental governance in 1970, the U.S. Supreme Court has decided 17 cases that posed a question about an aspect of NEPA; in all 17, the Court sided against the pro-NEPA plaintiffs.<sup>93</sup> Predictably, this seemingly unbalanced judicial treatment of NEPA has generated a flurry of scholarly commentary, almost all of which decries the Court's "hostile" attitude towards the Act.<sup>94</sup> Though most of this literature concentrates its fire on other decisions, *Flint Ridge* has not been immune from academic criticism. The little writing that does exist on *Flint Ridge*, none of which addresses the issues considered here, joins the chorus of commentators characterizing the case law as squarely anti-environmental.<sup>95</sup>

2. A New Take on NEPA Jurisprudence & *Flint Ridge*

While reading the Court's NEPA case law as anti-environmental is certainly reasonable, such a shallow reading papers over important themes in the Court's treatment of NEPA. More recent scholarship—most notably, that of Harvard Law Professor Richard Lazarus—provides a significant gloss on the case law that undermines the dominant narrative.<sup>96</sup> In a broad

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93. See Lazarus, *supra* note 5, at 1510 (detailing this history).

94. See, e.g., Oliver A. Houck, *Book Review, Is That All? A Review of the National Environmental Policy Act, An Agenda for the Future*, by Lynton Keith Caldwell, 11 DUKE ENVTL. L. & POL'Y F. 173, 184–87 (2000). In the 1990s, academic criticism of the Supreme Court's NEPA record only increased from the 1980s. See, e.g., Rodgers, *supra* note 76, at 497 (characterizing the Supreme Court's NEPA jurisprudence as "consistently rejecting interpretations advanced by environmental groups" in favor of "narrower accounts espoused by the government"). Today, with a few exceptions, the same view holds sway with the majority of commentators. See, e.g., Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 561 (1997) (describing the Court as waging an "unrelenting campaign against NEPA").

95. See Weiner, *supra* note 76, at 237 (arguing that *Flint Ridge*'s "particularly severe" interpretation of NEPA could render the Act "a mere noble statement of purpose").

96. See generally, Lazarus, *supra* note 5 (cataloguing and analyzing the 17 NEPA cases the Supreme Court has decided).

sense, Professor Lazarus contends that upon closer examination of the full record (internal Supreme Court deliberations, oral and written arguments by counsel, and the Court's dicta), the Supreme Court's NEPA jurisprudence is far more nuanced and balanced than scholars recognize.<sup>97</sup>

Lazarus dissects each case in the Court's NEPA catalogue, including *Flint Ridge*. Interestingly, Lazarus reads the opinion differently than most circuit courts. First, he points to the *Flint Ridge* Court's invocation of section 102's language commanding that NEPA be applied "to the fullest extent possible" as evidence that Justice Marshall was trying to maximize NEPA's role in federal decisionmaking (except under a narrow range of circumstances where an unavoidable conflict exists).<sup>98</sup> Professor Lazarus believes the Court was attempting to characterize section 102 as "words of expansion rather than words of limitation,"<sup>99</sup> which is plainly at odds with how the circuits today interpret the statute.<sup>100</sup> Second, Lazarus highlighted the Court's exhortation that NEPA forces environmental considerations into the sphere of nearly every federal statute and agency decision.<sup>101</sup> In other words, agencies cannot avoid the environmental aspects of their decisions no matter how irrelevant they may seem. At first blush, this does not necessarily contradict one of the circuit courts' arguments in favor of an expansive implied exemption doctrine—that NEPA is merely a decisional tool, so it has no place in non-discretionary situations where the course of action is predetermined.<sup>102</sup> But upon closer inspection, the circuit courts take Lazarus' observation and flip it on its head: because NEPA, as a decisional tool, pushes environmental considerations into all corners, the circuits contend that it only makes sense to bring NEPA into decisional spaces where there is some discretion to be exercised.<sup>103</sup> Finally, Professor Lazarus argues that Justice Marshall "filled [*Flint Ridge*] with as much NEPA dicta favorable to environmentalists as he could muster, while keeping his majority," and intentionally injected the opinion with strong pro-environmental undercurrents.<sup>104</sup> The language that Lazarus is referring

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97. See *id.* at 1511–14 (describing Professor Lazarus' research methodology and ultimate conclusion).

98. *Id.* at 1540–41.

99. *Id.*

100. See *supra* Part II.B (observing that the circuits interpret section 102's language as a "limiting instruction rather than an unwavering command").

101. Lazarus, *supra* note 5, at 1540–41.

102. See *Goos*, 911 F.2d at 1295 ("Reasoning that the primary purpose of the impact statement is to aid agency decisionmaking, courts have indicated that nondiscretionary acts should be exempt from the requirement.").

103. See *supra* Part II.B ("[s]ince an agency undertaking a non-discretionary course of action cannot change its course no matter how compelling an EA or EIS is, these courts reason that NEPA is superfluous in the context of non-discretionary actions.").

104. Lazarus, *supra* note 5, at 1540.

to appears in the sections of *Flint Ridge* where Justice Marshall rejects the government's arguments for a broader result.<sup>105</sup>

### 3. Reconciling the Traditional View & the New View

So which interpretation of *Flint Ridge* is correct? The question is of enormous practical consequence because when the issue reaches the Supreme Court again, the Roberts Court's likely first step will be to scour *Flint Ridge* for guidance. Unfortunately, there does not appear to be a clear-cut answer. Professor Lazarus is certainly accurate in some respects, most clearly that Justice Marshall's decision to resolve the case on narrower grounds than the government preferred was a silent but significant victory for environmentalists.<sup>106</sup> And Lazarus' reading of the case is strongly supported by the Court's plain language and the additional primary sources that he cites (pool memoranda, oral argument transcripts, and bench memoranda).

But, on balance, Lazarus' analysis is hindered by two important shortcomings. Most significantly, he fails to account for the impact of Justice Marshall's refusal to foreclose the government's non-discretionary argument instead of simply rejecting it.<sup>107</sup> Lazarus even attempts to spin the Court's treatment of the non-discretionary question as evidence of *Flint Ridge*'s positive environmental bent when, in actuality, it paved the way for the circuits to develop the implied exemption doctrine.<sup>108</sup> Thus, despite Lazarus' possible intentions, *Flint Ridge* is the proximate cause of the expansive implied exemption doctrine to NEPA that exists in the status quo.

Professor Lazarus' first oversight is a corollary of his second; although his construction of the case is plausible, it is overly optimistic. Indeed, the federal judiciary's subsequent interpretations of *Flint Ridge* underscore just how out of sync Lazarus' reading of the case law is with the courts' actual behavior; every circuit to have considered the question not only expands the number of circumstances in which they will release an agency from NEPA, but also reaches conclusions flatly incongruous with Lazarus' interpretation

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105. *Id.* at 1540–41.

106. *See id.* at 1540–41. In the process of adopting a test that allows agencies to avoid complying with NEPA only where a "clear and unavoidable conflict" exists, Justice Marshall rejected several alternative theories that would have cabined NEPA far more than the test the Court settled on. Specifically, Justice Marshall foreclosed the government's arguments that federal approval of private actions is a "minor" federal role (making NEPA inapplicable entirely), that NEPA is inapposite to statutory schemes where no independent authority for environmental considerations exists (such as the Interstate Land Sales Full Disclosure Act), and that the administrative burdens of NEPA should mean the Court should construe NEPA narrowly.

107. *Flint Ridge*, 426 U.S. at 789–90.

108. Lazarus, *supra* note 5, at 1539.

of the case.<sup>109</sup> As discussed in Part II.B, the circuits almost uniformly read section 102's "fullest extent possible" language as words of limitation, not expansion. Furthermore, the circuits consider Justice Marshall's portrayal of NEPA as a decisional aid to be an instruction to limit NEPA only to discretionary actions, rather than requiring compliance where a course of action is predetermined.<sup>110</sup> And the circuit courts' arguments are just as plausible as Professor Lazarus's. That Justice Marshall interpreted section 102 at least partially as a limiting instruction can be gleaned from his observation that "section 102 recognizes [that in some circumstances], NEPA must give way."<sup>111</sup> Similarly, by explicitly declining to foreclose the government's contention that "NEPA is concerned only with introducing environmental considerations into the decisionmaking processes of agencies that have the ability to react to environmental consequences when taking action,"<sup>112</sup> it is entirely reasonable for the circuits to reason that Justice Marshall believed the argument has merit. Therefore, not only does Professor Lazarus view *Flint Ridge* through rose-colored glasses, but he also overlooks some strong evidence in support of a contrary construction of the case.

In the end, Professor Lazarus and numerous federal judges can reach contradictory conclusions about *Flint Ridge* precisely because the Court furnished few, if any, incontrovertible clues about its true view of NEPA or the non-discretionary excuse. But it is possible to draw at least a few relevant conclusions. First, if Professor Lazarus' reading of Justice Marshall's intent is correct—which it appears to be, given Justice Marshall's rejection of the government's more limiting arguments and the numerous instances of pro-environmental dicta<sup>113</sup>—the circuits, in adopting a broad non-discretionary excuse jurisprudence, appear to have read *Flint Ridge*'s pro-environmental gloss out of the case. Second, regardless of which approach is ultimately "true," there is ample support for either a pro- or anti-environmental reading of the case, rendering *Flint Ridge* of little precedential value.<sup>114</sup> Indeed, Professor Lazarus's conclusion that Justice Marshall drafted *Flint Ridge* to have "virtually no precedential effect" in order to avoid "sharply limit[ing] NEPA's reach" is a double-edged

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109. See *id.* at 1539–40 (noting Lazarus' view that *Flint Ridge* has a "positive environmental bent").

110. See *Goos*, 911 F.2d at 1295 (explaining that because "the primary purpose of the impact statement is to aid agency decisionmaking, courts have indicated that nondiscretionary acts should be exempt from the requirement").

111. *Flint Ridge*, 426 U.S. at 788.

112. *Id.* at 786.

113. *Id.* at 792.

114. Lazarus, *supra* note 5, at 1540.

sword.<sup>115</sup> The very fact that the case has little precedential value is exactly what allowed the circuits to functionally expand its holding in such a broad manner. Finally, Part II.B demonstrates that the federal judiciary has coalesced around a view of *Flint Ridge* that, if not “anti-environmental,” at least limits NEPA’s reach.<sup>116</sup>

*B. The Roberts Court Edges Towards the Circuits: Home Builders, Public Citizen, & Why Today’s Court Will Bless the Implied Exemption Doctrine*

This lack of conclusive evidence or explicit guidance from the *Flint Ridge* Court leaves open an important question: how will the Roberts Court treat the implied exemption doctrine if (and likely when) it makes its way to the Supreme Court? Because the Court can exercise a free hand, largely unconstrained by *Flint Ridge*, clues must be gleaned from elsewhere.

Two pieces of evidence strongly suggest that today’s Supreme Court would likely side with the circuits and uphold the implied exemption doctrine. First, the Court’s holdings and dicta in two cases—*Department of Transportation v. Public Citizen* and *National Association of Home Builders v. Defenders of Wildlife*—demonstrate the Justices’ tendency to release agencies from environmental statutory obligations when the action is non-discretionary.<sup>117</sup> Second, as alluded to in Part III.A, the implied exemption doctrine stands on a firm legal footing. In fact, the doctrine is a logical outgrowth of the “clear and unavoidable conflict” test from *Flint Ridge*.<sup>118</sup>

1. The Impact of *Public Citizen & Home Builders* on Implied Exemption

*Public Citizen* and *Home Builders* supply the strongest indications that the Roberts Court would cement the implied exemption doctrine if given the chance. In *Home Builders*, the Roberts Court held that the “no-jeopardy” agency consultation requirements of the Endangered Species Act are only activated when an agency’s action is non-discretionary.<sup>119</sup> After conducting the requisite analysis, the Court found that the statutory provision in question—the CWA’s nine-factor test for transferring permitting authority from the EPA to analogous state agencies—was in fact

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115. *Id.* at 1539–40.

116. *See supra* Part II.B (discussing agency abuse of the categorical exemption).

117. *See Nat’l Ass’n of Home Builders*, 551 U.S. at 666 (showing the Court’s position on releasing agency obligation for non-discretionary actions); *see also* *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 773 (2004) (releasing agencies from statutory obligations when action is non-discretionary).

118. *Flint Ridge*, 426 U.S. at 788.

119. *Nat’l Ass’n of Home Builders*, 551 U.S. at 673.

non-discretionary and, as a result, the ESA was inapplicable.<sup>120</sup> In a broad sense, this holding alone stands as substantial proof that the Roberts Court would view the circuit courts' approach with a favorable eye. Though *Home Builders* is an ESA case, its analysis and holding are not so narrow as to be confined to the facts of the case or even just to the ESA. Rather, the portion of the opinion that analyzes the inherent character of non-discretionary actions is far-reaching and applicable to other statutory schemes, like NEPA.<sup>121</sup> Thus, *Home Builders* seems to stand for the proposition that the Court is willing to release agencies from extraneous statutory obligations where the agency's action is non-discretionary, at least in the context of environmental laws such as the ESA and NEPA.

This expansive reading of *Home Builders* is bolstered not only by the broad language Justice Alito employed, but also by the way he fused his ESA analysis with cases and principles drawn from other environmental laws. Most importantly, when the *Home Builders* Court announced the "basic principle" of appraising agency discretion, it relied extensively on *Public Citizen*, a NEPA case.<sup>122</sup> By fusing *Public Citizen* (a NEPA case) and *Home Builders* (an ESA case) to craft a universal test for determining the discretionary nature of an agency action, the *Home Builders* Court acknowledged that the ESA is not the only statute, environmental or otherwise, that might be rendered superfluous by implicit congressional command.<sup>123</sup> Even under a narrow reading of *Home Builders*, the case at

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120. *See id.* at 664–72 (holding that because the CWA's nine-factor test gave the EPA no final transfer authority at the end of the analysis, the statutory provision dictated a non-discretionary course of action). In this section of the opinion, Justice Alito appears to subtly delineate between agency actions that require discretion on the front-end of the decisional process and those that require discretion on the back-end of the decisional process. In this instance, while the analysis of the nine factors of whether a state could properly assume CWA permitting authority required some exercise of discretion on the front-end (e.g., determining whether the state water authority actually meets the enumerated factors in the first place), the final decision was not discretionary. If the EPA found that the nine factors were satisfied, the CWA dictates that the agency "shall approve" the transfer of authority. In contrast, a back-end discretionary analysis would consider whether the agency's *final decision* was discretionary. For example, if the EPA could consider the nine factors, determine the state met them, but ultimately decide to retain authority over the water pollution program, such an action would be "discretionary." Justice Alito seemed to indicate that statutory directives with front-end discretion can still be properly termed non-discretionary as long as the back-end decision is non-discretionary.

121. *See id.* Justice Alito drew on a diverse array of sources to support his contention that the ESA no-jeopardy clause is only germane to discretionary agency actions, including *Chevron* deference, compulsory language in statutory instructions to agencies, and an agency's classification of its own action as discretionary or non-discretionary. None of these factors are CWA- or ESA-specific.

122. *Id.* at 667–68.

123. *See id.* at 667–68 ("We do not suggest that *Public Citizen* controls the outcome here... these cases involve agency action more directly related to environmental concerns than the FMCSA's truck safety regulations. But the basic principle announced in *Public Citizen*—that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion not to take—supports the reasonableness of the FWS' interpretation of § 7(a)(2) as reaching only discretionary agency actions.").

least significantly informs whether there is an implied exemption to NEPA, given that the *Home Builders* Court explicitly invoked a NEPA precedent (*Public Citizen*).<sup>124</sup> And the five Justices in the majority in *Home Builders* still sit on the Court today.

And even if circuits and federal agencies are reading NEPA and *Flint Ridge* incorrectly, it might not matter, as applying *Home Builders* to the agencies' interpretation of NEPA will likely result in *Chevron* deference controlling the disposition of the issue. In *Home Builders*, Justice Alito referenced *Chevron* several times, making the point that an agency's interpretation of its own statute must be accorded significant deference.<sup>125</sup> For Justice Alito, *Chevron* counseled in favor of deferring to an agency's characterization of its own action as discretionary or non-discretionary and to the larger question of whether certain statutory requirements could be triggered.<sup>126</sup> As long as the Court believes the question of implied exemption is ambiguous, which it seemed to believe in *Home Builders*,<sup>127</sup> *Chevron* step two controls, and an agency's interpretation need not be unassailably correct. As long as the interpretation is "permissible" or "reasonable," it will survive judicial scrutiny.<sup>128</sup> Therefore, if an agency defending an action as impliedly exempt from NEPA invokes *Chevron*, the

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124. *Id.* at 667–68.

125. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 672 (stating that "an agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'). Much has been written on *Chevron*. Here, it is sufficient to note that it is a foundational administrative law case that controls when a court is reviewing an agency's interpretation of a statute it administers and the agency's decision has the force of law. Step one requires a court to determine whether Congress unambiguously spoke to the question at issue; if so, that construction controls. If not, step two asks the court to evaluate whether the agency's interpretation of the statute is "permissible" or "reasonable"; if the agency's interpretation survives this deferential standard, its interpretation stands.

126. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 666 ("When [the ESA] is read this way, we are left with a fundamental ambiguity that is not resolved by the statutory text. An agency cannot simultaneously obey the differing mandates set forth in . . . the ESA and . . . the CWA, and consequently the statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance as to which command must give way. In this situation, it is appropriate to look to the implementing agency's expert interpretation, which cabins the ESA's application to 'actions in which there is discretionary Federal involvement or control.' This reading harmonizes the statutes by applying [the ESA] to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates.").

127. *See id.* Since Justice Alito cited *Chevron* favorably in the context of according deference to the Fish and Wildlife Service's interpretation of the ESA, it appeared as if he believed the agency was operating within the framework of step two, since step two is where the agency is accorded deference.

128. *See Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 838 (1984) (holding the "Court need not conclude that agency's construction of statute which it administered was only one it permissibly could have adopted to uphold construction, or even reading the court would have reached if question initially had arisen in judicial proceeding").

reasonability of the arguments in favor of an implied exemption doctrine should be enough to convince the Court to adopt it.<sup>129</sup>

Therefore, at its core, *Home Builders* is an implied exemption case that holds high predictive value for how the Court will treat the implied exemption doctrine in the context of NEPA. In *Home Builders*, the CWA was impliedly exempt from the ESA's consultation requirements in non-discretionary situations; in the status quo, a range of statutes and congressional orders are exempt from NEPA's EIS and EA requirements in non-discretionary situations.<sup>130</sup> Since it is difficult, if not impossible, to distinguish *Home Builders* in such a way as to render it inapplicable to NEPA, the case provides a strong indication that the Roberts Court would bless the circuit courts' implied exemption doctrine in its current form.

## 2. Reading *Flint Ridge* as Legal Support for Implied Exemption

Although the Supreme Court's own statements are the best predictors of how it might view the implied exemption doctrine, the independent merit of the arguments the circuit courts advance in favor of the doctrine lend further support to the view that the Court will accept the circuits' take on this issue. As discussed at length in Part II.B, the circuit courts' reading of *Flint Ridge* and NEPA's text, while not without the flaws Professor Lazarus highlights, is probably correct.<sup>131</sup> Not only does the case law tend to confirm that the Supreme Court perceives NEPA as primarily a decisional tool (lending support to the circuits' contention that it is therefore superfluous when an agency's course of action is fixed), but section 102's language requiring NEPA be complied with "to the fullest extent possible" can also be properly read as a limiting instruction, especially in light of

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129. It is important to note the distinct nature of the *Chevron* questions that would be presented to the Court in such a scenario. The threshold question would be whether a specific statute or course of action is impliedly exempt from NEPA. Since this inquiry turns on statutory construction and interpretation of Congress' instructions to the agency (specifically, did Congress intend to give the agency discretion in undertaking the course of action?), *Chevron* will likely control the analysis (subject to *Mead*, discussion of which is not necessary here). As long as the Court adopts an analysis similar to its approach in *Home Builders*, this threshold question will likely be subjected to step two deference, and an agency's interpretation will be accorded significant deference and upheld as long as it is "permissible." Given the Court's proclivity in *Home Builders* to allow an agency to interpret a statutory requirement as impliedly exempt, the same result can be expected here, for reasons already explained. Question two then becomes whether the agency properly deemed its specific action as non-discretionary. An analogous analysis must be conducted, this time guided by Part II.A's explanation of what factors the Court uses to investigate the discretionary nature of an agency's action.

130. Although Justice Alito did not use the phrase "impliedly exempt" in *Home Builders*, his result is functionally indistinguishable from how the circuits use the phrase impliedly exempt when construing the analogous NEPA doctrine, as the previous discussion demonstrates.

131. See *supra* Part II.B (discussing at length the circuit courts' reading of *Flint Ridge* and NEPA's text).

Justice Marshall's qualification that this language means "NEPA must give way" in certain circumstances.<sup>132</sup>

There is even a credible argument, yet to be ventilated in the circuits or agencies, that implied exemption in its current form is simply the logical extension of the "clear and unavoidable conflict test" that Justice Marshall adopted in *Flint Ridge*.<sup>133</sup> Since *Flint Ridge* allowed agencies to skirt NEPA wherever there is an unavoidable conflict with *another statute*,<sup>134</sup> a party appealing this issue to the Supreme Court could argue that the non-discretionary excuse doctrine is just another shade of the clear and unavoidable conflict test. The conflict in these circumstances is with *Congress' command* that an action be carried out. Indeed, stripped to their basics, both the original *Flint Ridge* test and the implied exemption doctrine are cut from the same cloth. Since conflicting statutory directives are themselves congressional commands, drawing a defensible distinction between the original clear and unavoidable conflict test and its descendant test becomes a nearly impossible task.

In sum, the balance of the available evidence leaves little doubt as to how the Roberts Court would handle the NEPA implied exemption doctrine. Both external precedent like *Home Builders* and *Flint Ridge* itself strongly suggest that the Court would almost certainly accept this doctrine with open arms, likely relying on *Flint Ridge* as the basis for the new test.

#### IV. PLOTTING THE FUTURE OF IMPLIED EXEMPTION

Since the Roberts Court will likely ratify NEPA implied jurisprudence in its current form, the focus shifts to the executive branch. Implied exemption, as contemplated by the Roberts Court both in terms of the ESA and (probably) NEPA, grants agencies enormous power to bypass certain statutory devices because of *Chevron's* long shadow in administrative law.<sup>135</sup> Part IV begins by considering two important ancillary questions raised by the forthcoming expansion of implied exemption: what is a "non-discretionary" agency action and what is the scope of this legal theory? This Part then investigates how a robust implied exemption doctrine impacts agency behavior and considers modifications to the doctrine that would more properly balance agency and court incentives.

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132. See *supra* Part II (undertaking a more thorough analysis of these points).

133. *Flint Ridge*, 426 U.S. at 788.

134. *Id.*

135. See Evan J. Criddle, *Chevron's Consensus*, 88 B. U. L. REV. 1271, 1277 (2008) (noting the *Chevron* decision cast a long shadow over federal statutory interpretation).

### A. Non-Discretionary Agency Actions

The notion of non-discretionary agency action has been articulated by both agencies and courts. Both perspectives will be analyzed here.

#### 1. The Agency View

A recent Army Corps of Engineers (“Corps”) memorandum serves as both a useful starting point for understanding the distinction between non-discretionary and discretionary agency actions and as a signal of the importance of this issue to environmental decisionmakers. On June 1, 2013, the chief counsel to the Corps issued a guidance document to all Corps counsel providing clarification of which Corps actions trigger the ESA’s section seven consultation requirements.<sup>136</sup> As will be discussed *infra*, ESA section seven consultation duties are only triggered when an agency’s action is discretionary, per the Supreme Court’s directive in *Home Builders*.<sup>137</sup> Since it appears that the non-discretionary/discretionary label will carry the same classification across different statutory schemes,<sup>138</sup> the Corps’ ESA analysis likely also illuminates which actions it thinks are exempt from NEPA. If the Corps thinks an action is non-discretionary for the purposes of the ESA, the Corps likely also views it as non-discretionary for the purposes of NEPA.

In the memo, the chief counsel isolated all Corps maintenance of civil works structures (dams, locks, etc.) as non-discretionary actions, and thus outside the ambit of ESA section seven.<sup>139</sup> Reasoning that the “responsibility to maintain civil works structures so they continue to serve their congressionally authorized purposes is inherent in the authority to construct them,” the chief counsel contended that continual maintenance and repair of civil works structures can be logically bootstrapped to the

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136. Corps Memo, *supra* note 11, at 2.

137. *Nat’l Ass’n of Home Builders*, 551 U.S. at 669–70.

138. The law of agency non-discretionary action is worthy of its own article, but for the purposes of this paper, it is sufficient to briefly note the three clues the case law supplies as to why the same label likely carries the across different statutes. First, when the *Home Builders* Court refined the “basic principle” of evaluating agency discretion, it drew heavily from *Dep’t of Treasury v. Public Citizen*, a NEPA-based case. As a result, the Court fused an ESA case (*Home Builders*) with a NEPA case (*Public Citizen*) to generate a universal test for determining the discretionary character of an action. Second, the *Home Builders* Court broadly merged the discussion of the CWA and the ESA, suggesting each statute does not get a separate non-discretionary analysis. Finally, most circuits tackling the same issue tend to apply the same designation across statutes. *See Babbitt*, 65 F.3d at 1512 (same designation across NEPA and ESA). The *Babbitt* Court noted that “[i]f anything, [the] case law is more forceful in excusing nondiscretionary [federal] action[s] from the operation of NEPA,” but nonetheless concluded that “to a large extent” resolution of the ESA claim “dictates resolution of the NEPA claim.” *Id.*

139. Corps Memo, *supra* note 11, at 3.

more obvious non-discretionary congressional command to construct the civil work in the first place.<sup>140</sup> Although the memorandum did add the caveat that the maintenance actions *themselves*, as opposed to the actual *result* of the maintenance (e.g., continued existence of a large civil work) might be discretionary,<sup>141</sup> it appears that the Corps views a potentially wide range of its actions, including most large maintenance and new construction projects, as non-discretionary and therefore properly pardoned from certain statutory obligations such as NEPA and the ESA.

## 2. The Judicial View

But agency guidance is only part of the story, as the Supreme Court appears to have provided several hints as to what characterizes a non-discretionary agency action. *Home Builders* provides the most guidance in this area.<sup>142</sup> In *Home Builders*, Justice Alito authored an opinion holding that when the EPA transfers water pollution control to an analogous state authority (per the CWA), it need not comply with a provision of the ESA requiring agencies to consult with the Fish and Wildlife Service in situations where an agency decision could jeopardize endangered or threatened species, even if the action may threaten some wildlife covered by the ESA.<sup>143</sup> To reach this result, the Court primarily relied on the argument that the ESA's no-jeopardy consultation duty is only triggered when an agency's action is discretionary; therefore, the Court was forced to drill down on the concept of discretionary and non-discretionary agency actions.<sup>144</sup>

Foundationally, the Court noted that “agency discretion presumes that an agency can exercise ‘judgment’ in connection with a particular action” and thus “an agency cannot be considered the legal ‘cause’ of an action that it has no statutory discretion not to take.”<sup>145</sup> And an action need not be purely ministerial to be classified as discretionary.<sup>146</sup> In the Court's eyes, a non-discretionary agency action may still require an agency to “exercise some judgment,” as long as the decision does not involve the agency

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140. *Id.* at 2–3.

141. *Id.* at 3.

142. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 669 (describing non-discretionary actions as “actions that an agency is required by statute to undertake”).

143. *Id.* at 670.

144. *Id.* at 669–70.

145. *Id.* at 667–68.

146. *See id.* (noting as the mandatory language of § 402(b) itself illustrates, not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion).

evaluating “underlying standards or their effect.”<sup>147</sup> For instance, EPA’s decision in *Home Builders* required the EPA Administrator to consider nine factors and exercise his “judgment,” yet the Court classified the action as non-discretionary.<sup>148</sup> Finally, Justice Alito emphasized the fact that the relevant agency regulations described the action in question as discretionary, so *Chevron* deference attached to the agency’s interpretation of its own action.<sup>149</sup> Therefore, it seems that the Court is willing to afford some deference to an agency’s own characterization of its action in the name of *Chevron*.

NEPA implied exemption decisions from circuit courts are also instructive as to what courts believe constitute non-discretionary actions. As *Home Builders*’ guidance suggests, the range of actions the circuits find non-discretionary for purposes of NEPA is broad and includes federal land acquisitions,<sup>150</sup> wilderness trail maintenance decisions,<sup>151</sup> and airport policy.<sup>152</sup> Even agency actions that might seem to be squarely within NEPA’s sphere, such as the Department of Interior’s approval of a logging road construction plan in federal forestland, can be excused from NEPA if the agency can successfully couch the decision as a non-discretionary one.<sup>153</sup>

The end result, from both the agency and judicial perspectives, is a potentially broad class of agency actions that may release an agency from its NEPA obligations. Construction of major bridges and dams, extensive maintenance of civil works, and even actions with discretionary elements, all of which can significantly impact the environment, may be considered non-discretionary and outside the breadth of NEPA.

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147. *Id.* at 672.

148. *Id.* at 663–65.

149. *Id.* at 666–67.

150. *See Sac & Fox Nation*, 240 F.3d at 1262–63 (holding federal land acquisition is non-discretionary), *superseded by statute*, 2002 Dep’t of the Interior and Related Agencies Appropriations Act, Pub.L. No. 107–63, § 134, 115 Stat. 414.

151. *See Hodel*, 848 F.2d at 1096 (holding wilderness trail maintenance policy is non-discretionary), *overruled by* *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

152. *See, e.g., Minetta*, 262 F.3d at 183–84 (holding certain airport landing policy decisions are non-discretionary); *American Airlines*, 202 F.3d at 813 (holding certain airport landing policy decisions are non-discretionary).

153. *See Babbitt*, 65 F.3d at 1512 (holding that the Department of Interior’s decision to approve a logging road’s construction on Bureau of Land Management forestland did not trigger NEPA’s requirements because “case law excus[es] nondiscretionary agency action or agency inaction from the operation of NEPA”).

*B. Implied Exemption's Impact on Agency Behavior & Policy Considerations*

As the Corps memorandum illustrates, agencies are realizing the potential power of characterizing their actions as non-discretionary.<sup>154</sup> If the Corps memorandum withstands judicial review—a likely outcome, given the analysis in Part III<sup>155</sup>—a wide array of new construction, regular maintenance on civil works, and operations on public lands would escape NEPA and the ESA. In a practical sense, this means that the agency gets to avoid preparation of a time-consuming and expensive EIS (under NEPA) and sidestep a consultation process with the Fish and Wildlife Service that could risk shutting down or delaying a project's implementation (under the ESA). And since such determinations enjoy *Chevron* deference, agencies can exercise a fairly free hand in making these decisions.<sup>156</sup>

These legal rules might appear to create the potential for agencies to run amok, classifying as many actions as possible as non-discretionary to avoid NEPA's requirements, with little prospect of effective judicial review. However, upon closer inspection, there are a variety of competing agency considerations that undermine this seemingly clear prediction. Implied exemption actually affects agency behavior in a variety of distinct ways.

The incentives and rationales pushing agencies toward liberal use of the NEPA implied exemption device are fairly clear. Efficiency gains are probably the biggest inducement for agencies to label large swaths of their actions non-discretionary.<sup>157</sup> By avoiding the EA and EIS processes, agencies can significantly streamline and expedite their decisionmaking. Completing projects expeditiously carries a corollary benefit too; agencies are able to comply with congressional commands more effectively.<sup>158</sup> If Congress truly intended for an action to be non-discretionary, engaging in NEPA review lessens the chances of agencies being able to comply with congressional directions in a straightforward and diligent manner. Invoking implied exemption also allows agencies to sidestep tricky environmental

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154. See Corps Memo, *supra* note 11, at 1 (illustrating the Corps' guidelines for determining discretionary versus non-discretionary actions).

155. See *supra* Part III (discussing implied exemptions in the Supreme Court).

156. *Chevron*, 467 U.S. at 843. Of course, if an agency attempted to classify an "unambiguously" discretionary action as non-discretionary or claim that NEPA is impliedly exempt where it is "unambiguously" applicable, a court could step in and invalidate the determination under *Chevron* step one.

157. Moriarty, *supra* note 43, at 2322.

158. See *Minetta*, 262 F.3d at 182–83 (discussing the difficulties of complying with both agency and congressional demands).

considerations that may be wholly foreign to a specific project, the agency's expertise, or Congress's intent in authorizing the agency action.<sup>159</sup> In this way, NEPA implied exemption gives agencies the ability to eliminate potentially extraneous considerations from their decisionmaking.

There are also there policy arguments and agency considerations that might prevent development of an overly broad NEPA implied exemption doctrine. From a policy perspective, implied exemption significantly lessens the prospect of rigorous judicial review, which risks transferring too much power from Congress to the Executive.<sup>160</sup> And if agencies start over-classifying their actions as non-discretionary, environmental considerations could be pushed entirely out of the decisional spaces where Congress intended for them to apply.<sup>161</sup> Fortunately, agencies are unlikely to go overboard with this new power because, by declaring an action to be non-discretionary, they lose control over the final implementation decision. Although they may retain some discretion on the front-end, like *how* to undertake a project, they give up final decisionmaking authority over *whether* to undertake a project.<sup>162</sup> Thus, a significant countervailing consideration is an agency's loss of control over a project's final disposition.

Ultimately, agencies deciding whether or not to label an action non-discretionary in order to skirt NEPA are faced with a choice: is circumventing NEPA, and its attendant procedural requirements and litigation potential, worth losing final decisional control over a project? In the end, as the Corps memorandum in Part IV.A intimates, the agency calculus seems to tilt in favor of using the non-discretionary tag in a broad range of circumstances.<sup>163</sup> Though there are obvious downsides, they do not seem to outweigh the benefits of keeping NEPA (or in the case of the Corps memo, the ESA) out of the picture from the agency's perspective.

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159. *See id.* at 178 (concluding that environmental factors cannot, and will not, affect an agency's decision in a required action).

160. That is, Congress, speaking through NEPA, directed agencies to issue EAs and if necessary, an EIS. If the courts allow agencies to abdicate this responsibility without sufficient judicial checks, Congress's instructions risk being usurped by executive branch decisionmakers.

161. Moriarty, *supra* note 43, at 2322.

162. *See generally* Corps Memo, *supra* note 11 (discussing the distinction between front-end and back-end discretion).

163. *Id.* at 4.

*C. Improving Implied Exemption: Realigning Incentives for Courts & Agencies*

If NEPA implied exemption is here to stay, how can it be modified to more properly realign the incentives of agencies and courts? There are two potential adjustments, one legislative and one judicial, that would alleviate many of the problems plaguing the current doctrine.

Congressional action is the most preferable, albeit an unlikely, option. At least two possibilities are available to Congress: (1) amend NEPA itself to resolve the ambiguity this doctrine attempts to address or (2) include a statement in each statutory scheme concerning NEPA's applicability. The latter option makes little sense for obvious reasons—chiefly the difficulty of including such a statement in each potentially pertinent legislative package.<sup>164</sup> Unfortunately, the former option, while it would be the best solution to resolve NEPA's lack of clarity vis-à-vis other statutes, is highly unlikely to gain any traction in Congress.<sup>165</sup> The benefits of such a resolution are clear. By inserting explicit language concerning when NEPA can and cannot be preempted, Congress's intent becomes abundantly clear, and the judiciary is no longer forced to offer its best guess. But, like most significant American environmental statutes, NEPA has not been substantially amended in several decades.<sup>166</sup> In fact, some members of Congress probably even *favor* a regulatory environment where environmental laws lose prominence and become outdated.<sup>167</sup> In any event, since the legislature displays little appetite for rehabilitating the entrenched environmental framework, any chance of real reform of the NEPA implied exemption doctrine will need to originate in the courts.

When the Supreme Court passes on the validity of this doctrine, it should reappraise its current approach to implied exemption cases. Specifically, the Court should tweak the way it applies *Chevron* to these cases by making clear that it will conduct a full step one analysis before shifting to step two. *Home Builders* seems to suggest that the Court will default to step two, the highest level of deference in the administrative

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164. Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENVTL. L. 275, 282, 294 (1997).

165. *Id.* at 294, 297.

166. See Dave Owen, *An Important Stormwater Case and it's Not the One You're Thinking Of*, ENVTL. LAW PROF. BLOG (Jan. 9, 2013) [http://lawprofessors.typepad.com/environmental\\_law/2013/01/an-important-stormwater-case-and-its-not-the-one-youre-thinking-of.html](http://lawprofessors.typepad.com/environmental_law/2013/01/an-important-stormwater-case-and-its-not-the-one-youre-thinking-of.html) (noting that "constructive amendments to federal environmental laws" are not a "possibility" in the status quo).

167. See Scott W. Reed, *No Need to "Improve" NEPA*, 48 ADVOCATE (IDAHO) 20, 21–22 (2005) (Westlaw) (illustrating Congress's preference for outdated environmental laws).

jurisprudential arena, when considering both an agency's contention that an environmental statute conflicts with another statutory scheme and that an action is non-discretionary.<sup>168</sup> Such an approach improperly abdicates the judiciary's task of rigorous judicial review by bypassing step one (asking whether the conflict or classification is ambiguous in the face of congressional instructions).<sup>169</sup> The result is a doctrine that allows agencies to pick and choose which environmental statutes they want to comply with, and when.

To alleviate this imbalance in power between agencies on one hand and the legislature and courts on the other, the Supreme Court should make clear that an agency's implied exemption arguments will be subject to the full *Chevron* analysis. This mandate would allow the judiciary to conduct an unhindered inquiry into whether Congress clearly intended for NEPA or the ESA to factor into an agency's decisionmaking process, instead of ceding that decision to the agency. Such an approach would still allow courts to exercise deference where appropriate, namely when Congress' instructions are objectively vague, either in terms of the discretionary nature of an action or whether the environmental statute is supposed to apply. It also ensures that agencies do not get a free pass on either inquiry and must comply with NEPA, the ESA, and other environmental statutes to the "fullest extent possible."

#### CONCLUSION: THE SPREAD OF NON-DISCRETION & IMPLIED EXEMPTION

For almost 40 years, the circuit courts have created a common law doctrine that has slowly cabined NEPA in a wide variety of circumstances.<sup>170</sup> To date, the NEPA implied exemption doctrine has received scant scholarly attention and surprisingly little discussion among practitioners. Given the doctrine's significant impact on how NEPA is

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168. See *Nat'l Ass'n of Home Builders*, 551 U.S. at 666 ("An agency cannot simultaneously obey the differing mandates of ESA § 7(a)(2) and CWA § 402(b), and consequently the statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance as to which command must give way. Thus, it is appropriate to look to the implementing agency's expert interpretation, which harmonizes the statutes by applying § 7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates. This interpretation is reasonable in light of the statute's text and the overall statutory scheme and is therefore entitled to *Chevron* deference.").

169. See generally Marianne Kunz Shanor, *The Supreme Court's Impingement of Chevron's Two Step*; *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (2009), 10 WYO. L. REV. 137 (2010) (discussing the Court's approach to the *Chevron* two part test).

170. See *supra* Part II.B (exploring the circuit courts' interpretation of non-discretionary NEPA excuses).

interpreted and applied, it is vitally important that this doctrine receive more robust scrutiny.

While it seems clear that the Roberts Court is positioned to endorse the implied exemption doctrine,<sup>171</sup> this assumption should not end the inquiry. If the doctrine is set to become a permanent feature of NEPA, the Court should change the way it treats agency pronouncements on whether NEPA conflicts with another statutory directive and whether an agency's action is properly deemed non-discretionary. Restoration of full judicial review is especially important given the trend toward expanding the applicability of the implied exemption doctrine.<sup>172</sup> The NEPA implied exemption mirrors its ESA counterpart, and it is not hard to see this approach to statutory construction spreading to other environmental statutes and beyond. Before this doctrine becomes irrevocably entrenched in the common law, it should be refined to take full account of agency incentives, congressional directions, and judicial duties.

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171. *Nat'l Ass'n of Home Builders*, 551 U.S. at 667–70.

172. Taunya L. McLarty, *The Applicability of NEPA to NAFTA: Law, Politics, or Economics?*, 19 MD. J. INT'L L. & TRADE 121, 121 (1995).