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Jeremy M Suttenberg
Tison A Campbell
Lisa G London

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UNRESOLVED CONFLICTS: HOW REVISITING NEPA § 102(2)(E) COULD INCREASE EFFICIENCY, SIMPLIFY GOVERNMENT, AND SAVE TAXPAYERS MONEY

J. SUTTENBERG, L. LONDON, T. CAMPBELL

INTRODUCTION

The recently enacted American Recovery and Reinvestment Act (ARRA), which Congress passed in order to create jobs and promote economic recovery, acknowledges that the National Environmental Policy Act (NEPA) plays an important role in the actions of federal agencies. ARRA also acknowledges that the NEPA process can unnecessarily delay many government programs, and takes steps to streamline that process: “Adequate resources within this bill must be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act are completed on an expeditious basis and that the shortest existing applicable process under the National Environmental Policy Act shall be utilized.” One of the most time consuming processes under NEPA is the alternatives analysis. These analyses are sometimes overused in Environmental Assessments (EAs), and federal agencies could greatly increase the efficiency of the NEPA process by only performing an alternatives analysis when required by NEPA. In this Article we discuss how one type of alternatives analysis, the § 102(2)(E) analysis, is conducted more often than NEPA requires.

NEPA contains two sections that require federal agencies to conduct an alternatives analysis: §§ 102(2)(C)(iii) and (E). Section 102(2)(C)(iii) requires federal agencies to conduct analyses of alternatives to the proposed action as part of any environmental impact statement (EIS). The other section, § 102(2)(E), requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources,” and can apply to both EISs and EAs.

* The authors are practicing attorneys at the United States Nuclear Regulatory Commission. The views expressed in this article are solely those of the authors and do not necessarily represent the positions of the United States Nuclear Regulatory Commission.


4 Many scholars believe that the alternatives analysis constitutes the heart of NEPA. See, e.g., DANIEL R. MANDELER, NEPA LAW AND LITIGATION § 9:18 (2d ed. 2006) (“The alternatives requirement implements NEPA’s environmental policies.”)


The Council on Environmental Quality (CEQ)\(^7\) has promulgated regulations requiring all EAs\(^8\) to “include brief discussions of . . . alternatives as required by Section 102(2)(E) [of NEPA].”\(^9\) Although this regulation merely requires agencies to comply with NEPA when drafting an EA, it raises an interesting question as to the scope of the § 102(2)(E) alternatives analysis requirement. This question is timely due to the recent enactment of ARRA, which directs federal agencies to increase the efficiency of their NEPA process.\(^10\) Because most federal agency NEPA work involves EAs,\(^11\) and an alternatives analysis can significantly increase the time needed to complete a NEPA analysis, the proper trigger for the § 102(2)(E) alternatives analysis takes on greater significance as agencies attempt to streamline the NEPA process in accordance with ARRA.

Given the current state of the law surrounding § 102(2)(E), ARRA’s goal of expediting NEPA review may not be attainable. The federal courts have developed an inconsistent interpretation of the § 102(2)(E) requirements, with a majority of the U.S. Courts of Appeals adopting an overbroad interpretation of § 102(2)(E) that requires an alternatives analysis whenever a proposed action will have environmental impacts, even if those impacts are minimal. In essence, these courts have turned § 102(2)(E) into a more expansive counterpart to § 102(2)(C)(iii), ignoring the important textual distinction between these two sections. Part I of this Article discusses these circuit court cases and shows how most of the circuit courts have ignored the plain meaning of § 102(2)(E)’s text.

The practical effect of the courts’ broad reading of § 102(2)(E) is that federal agencies currently perform unnecessary §102(2)(E) alternatives analyses. As the NEPA Task Force’s 2003 report explains: “Sometimes, the EA alternatives analysis is more than is necessary to comply with CEQ regulations. Additionally, some large EAs contain an alternative analysis that would be more appropriate in an EIS.”\(^12\) Presumably, this

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\(^7\) Title II of NEPA created CEQ, and Executive Order 11991 authorized CEQ to issue binding regulations on federal agencies.

\(^8\) Under NEPA, federal agencies prepare EAs in order to determine whether an EIS is required. The EA may be viewed as the “workhorse” of NEPA. Indeed, a recent study found that federal agencies produce 50,000 EAs a year, in comparison to only 500 EISs. See Bradley C. Karkkainen, *Whither NEPA*, 12 N.Y.U. ENVTL. L.J. 333, 347-48 (2004) (citing a study conducted by the Council on Environmental Quality).

\(^9\) 40 C.F.R. § 1508.9.


\(^11\) *See supra* note 8; *see also* Karkkainen, *supra* note 8 at 347 (“Most NEPA compliance effort these days goes not into producing full-scale EISs, but into producing slimmed-down documents called environmental assessments (EAs), designed to produce just enough information to justify a ‘Finding of No Significant Impact’ (FONSI) to get the agency off the hook.”).

overzealous approach to alternatives analyses in EAs is due, in large part, to concern regarding potential litigation. But if agencies are supposed to expedite NEPA review under ARRA, then performing alternatives analyses not required by NEPA is counterproductive and could potentially hinder compliance with ARRA. It is time, therefore, to reexamine the text of § 102(2)(E) so that agencies can comply with NEPA without having to perform unnecessarily expansive, lengthy, and expensive environmental analyses.

The statutory language and legislative history of § 102(2)(E) support a more limited interpretation of when agencies need to perform alternatives analyses in EAs. This limited interpretation focuses on whether the agency action involves unresolved conflicts concerning alternative uses of available resources, rather than whether there are any environmental impacts. Part II of this Article examines NEPA’s legislative history, and Part III offers our analysis as to why most courts have misinterpreted § 102(2)(E) by ignoring the statutory text and legislative history. Part III also demonstrates that the plain language of § 102(2)(E) supports a more limited use of alternatives analyses in EAs than contemplated by the courts’ environmental impacts test. Ultimately, we conclude that the term “resource” in § 102(2)(E) should be understood as a natural resource that can be consumed, which limits when an alternatives analysis is required. While agencies should be wary of contrary circuit court precedents, many of these precedents were set in the early 1980s, and the time may be ripe for a judicial reevaluation of § 102(2)(E) — especially given ARRA’s directive to expedite NEPA reviews.

DISCUSSION

Part I — Federal Cases

Most circuit courts either ignore or refuse to give effect to the clear statutory language of § 102(2)(E). Indeed, our research indicates that only two circuits — the First Circuit and the Ninth Circuit — require an inquiry into whether there are unresolved conflicts concerning alternative uses of available resources. Other circuits have either failed to address or have ignored the § 102(2)(E) requirement that environmental analysis only be conducted when there are unresolved conflicts regarding alternative uses of available resources. The practical differences between these circuits and those that disregard the plain meaning of § 102(2)(E) are minimal, though, because the First and Ninth Circuits employ a broad reading of what constitutes an “available resource.”

I. Despite the statutory text, most circuits use an “environmental impacts” test for § 102(2)(E).

The Second Circuit exemplifies those circuits that fail to analyze § 102(2)(E) in terms of unresolved conflicts concerning alternative uses of available resources. In City of New York v. DOT, New York City challenged, inter alia, an EA and a Finding of No Significant Impact (FONSI) that the Department of Transportation (DOT) issued in conjunction with a rule that established a system of preferred routes for trucks carrying radioactive waste. 13 Specifically, New York argued that DOT failed to comply with

13 City of New York v. DOT, 715 F.2d 732 (2d Cir. 1983).
NEPA by not considering alternatives as required by § 102(2)(E). DOT countered by asserting that § 102(2)(E) is inapplicable to the agency action, because the rule did not propose the “use” of a “resource.” The court responded:

This Court . . . has not construed section 102(2)(E) narrowly to apply only to agency actions that propose an identifiable use of a limited resource like park land or fresh water. Instead, we have ruled that federal agencies have a duty under NEPA to study alternatives to any actions that have an impact on the environment, even if the impact is not significant enough to require a full-scale EIS.

The Second Circuit, therefore, essentially replaced the “available resources” test required by the text of §102(2)(E) with an “environmental impacts” test. The Second Circuit’s reasoning was based, in part, on *Trinity Episcopal School Corp. v. Romney.* In that case, the court explained the § 102(2)(E) analysis as follows: “[W]here (as here) the objectives of a major federal action can be achieved in one of two or more ways that will have differing impacts on the environment, the responsible [agency] is required to study, develop, and describe each alternative for appropriate consideration.” Notably, although the Second Circuit quoted § 102(2)(E) when it proposed that agencies must “study, develop, and describe” alternatives, it completely ignored the part of the statute that limits the analysis to “unresolved conflicts concerning alternative uses of available resources.” Without this limiting language, there is effectively no difference between the two sections that require an environmental analysis. And a complete reading of the statute makes clear that an environmental impacts test is the proper test only for a § 102(2)(C)(iii) alternatives analysis, and even then only when there are “significant” environmental impacts.

Even though the Second Circuit’s reading of § 102(2)(E) is not supported by the statutory text, most of the remaining circuit courts also utilize an “environmental impacts” test, although there are differences in how the courts reach their conclusions. Some courts have essentially conflated the § 102(2)(E) alternatives analysis with the § 102(2)(C)(iii) analysis. In *Friends of the River v. FERC,* for example, the D.C. Circuit noted that § 102(2)(E) of NEPA “parallels the general EIS requirement of discussion of ‘alternatives to the proposed action.’” Other courts, while keeping NEPA’s two

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14 Id. at 741-42.

15 Id. at 742.

16 Id. (emphasis added).

17 523 F.2d 88 (2d Cir. 1975).

18 Id. at 93 (emphasis added).


20 *Friends of the River v. FERC,* 720 F.2d 93, 104 (D.C. Cir. 1983) (emphasis added); *see also Highway J Citizens Group v. Mineta,* 349 F.3d 938, 960 (7th Cir. 2003) (citing to 42 U.S.C. § 4332 (2)(C)(iii) & (2)(E) indiscriminately in finding that “NEPA requires that agencies, ‘study, develop, and describe appropriate alternatives’ to major federal projects.”).
alternatives provisions distinct, effectively ignore the differences of the two sections by presuming that environmental impacts constitute the trigger for the § 102(2)(E) alternatives analysis. The Eighth Circuit, for instance, has quoted § 102(2)(E) in isolation, but nevertheless stated, “[T]his provision requires agencies to consider alternatives to proposals where an EIS is not required.” Such a statement presumes that a finding of environmental impact triggers § 102(2)(E) because it views that section within the context of an EIS, without giving § 102(2)(E) any independent significance.

As these cases demonstrate, most circuit courts have found that the scope of an agency’s alternatives analysis is dictated by the environmental impact of the proposed action, even if the court’s reasoning is not as clear as the Second Circuit’s. Conceptually speaking, the majority of circuit courts appear to have adopted the following NEPA framework. First, where there are absolutely no environmental impacts, the agency may issue a FONSI without having to prepare a § 102(2)(E) alternatives analysis. This follows from the Second Circuit’s reasoning in City of New York. If there are non-significant environmental impacts, the agency may still prepare an EA and issue a FONSI, but the agency must also conduct the § 102(2)(E) alternatives analysis. Finally, if there are significant environmental impacts, then the agency must prepare an EIS, which includes a § 102(2)(C)(iii) alternatives analysis that must also satisfy the requirements of § 102(2)(E). This is reflected in the following illustration.

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21 Central S.D. Co-Op Grazing Dist. v. U.S. Dep’t of Agric., 266 F.3d 889, 896 (8th Cir. 2001); see also Mt. Lookout/Mt. Nebo v. FERC, 143 F.3d 165, 172 (4th Cir. 1998) (quoting § 102(2)(E), but then implying that § 102(2)(E) is triggered by a finding of environmental impacts); Davis v. Mineta, 302 F.3d 1104, 1120 (10th Cir. 2002) (citing solely to § 102(2)(E) for the proposition that “a properly drafted EA must include a discussion of appropriate alternatives to the proposed project”).

22 Nor would the agency have to conduct a § 102(2)(C)(iii) alternatives analysis, which is only required when there are significant environmental impacts.

23 There is an additional debate among the courts regarding which of NEPA’s two alternatives requirements is more broad and rigorous. Some courts suggest that § 102(2)(C)(iii) is broader, while others state the opposite. Compare Mt. Lookout/Mt. Nebo v. FERC, 143 F.3d 165, 172 (4th Cir. 1998) (“The rigor with which an agency must consider alternatives is greater when the agency determines that an EIS is required[,]”), with Envtl. Defense Fund v. ACE, 470 F.2d 289, 296 (8th Cir. 1972) (“Section 102(2) (D) requires that the agency ‘study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.’ This provision follows and is in addition to the § 102(2)(C) requirement of a detailed statement discussing, inter alia, alternatives to the proposed action.” (emphasis added)), and Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) (“the § 102(2)(E) consideration of alternatives requirement is both independent of, and broader than, the EIS requirement.” (emphasis added)).

Given the plain language of the statute, we believe that subsection (E) requires a more in-depth alternatives analysis than subsection (C). Compare 42 U.S.C. § 4332(2)(C)(iii) (requiring agencies to produce a detailed statement describing “alternatives to the proposed action”), with 42 U.S.C. § 4332(2)(E) (requiring agencies to “study, develop, and describe” alternatives (emphasis added)). As the courts have recognized, however, an EIS prepared pursuant to subsection (C) can contain the more detailed discussion that subsection (E) requires. See Envtl. Defense Fund, 470 F.2d at 296 (“This is not to suggest, however, that the more extensive treatment of alternatives required by § 102(2)(D) cannot be incorporated in the (continued. . .)
II. Two circuits follow the statutory text and use an “available resources” test.

The First Circuit, in *Aersten v. Landrieu*, reviewed a lower-court determination that the Department of Housing and Urban Development (HUD) did not violate NEPA when committing funds to finance a proposed housing project. A challenger to the project argued that HUD violated § 102(2)(E) of NEPA by failing to consider alternatives to funding the housing project. The court disagreed:

> The text of § 102(2)(E) confines the obligation to a “proposal which involves unresolved conflicts concerning alternative uses of available resources.” In connection with a commitment of funds to finance the development of a parcel of land, the “parcel of land” constitutes the “resources.” *There is nothing in the text, the legislative history known to us, nor the policy and purposes of NEPA to justify an interpretation of “resources” to include the funds to be expended by the federal agency. Such an interpretation would go in a quite different direction from the declared purposes of NEPA, inasmuch as its focus would be not on whether a project harmonizes with and avoids damages to the environment where it is proposed to locate it, but on whether there is a more suitable location or project on which the government could spend its money. The latter raises what* 

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25 *Id.* at 19-20.
are primarily non-environmental questions.\textsuperscript{26} The First Circuit, therefore, makes clear that § 102(2)(E) only requires an alternatives analysis in cases involving unresolved conflicts concerning alternative uses of available resources. But the \textit{Aersten} decision suggests a rather broad reading of what constitutes “available resources,” since it states that if HUD were deciding whether to place low-income housing on one of two possible parcels of land, then that decision \textit{would} require a § 102(2)(E) alternatives analysis.\textsuperscript{27} Under this logic, most agency actions would probably involve a conflict over resources.

In its 1988 \textit{Bob Marshall Alliance v. Hodel} decision, the Ninth Circuit echoed the First Circuit by taking a very broad view of the “available resource” test:\textsuperscript{28}

\begin{quote}
The language and effect of the two [NEPA] subsections also indicate that the consideration of alternatives requirement \textit{[of section (E)]} is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects.\textsuperscript{29}
\end{quote}

Indeed, the \textit{Bob Marshall} court held that oil and gas leases issued by the Bureau of Land Management triggered § 102(2)(E) because there was a conflict over whether the land should be used for oil and gas exploration.\textsuperscript{30}

The broad effect given to § 102(2)(E) by the First and Ninth Circuits means that there may not be a practical distinction between what these and the other circuit courts require. Indeed, the Second Circuit’s “environmental impact” test — which is followed by a majority of the circuits — has the same practical effect as the First and Ninth Circuits’ “available resources” test because \textit{Aersten} implies that all environmental impacts involve competing uses of available resources.\textsuperscript{31} The Second Circuit also seems to agree that these two tests merge. In its \textit{City of New York v. DOT} decision, the court explained in a footnote that DOT’s proposed rule “satisfies the literal meaning of 102(2)(E) since the movement of radioactive materials along highways can be considered a ‘use’ of the

\begin{footnotesize}
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\item[26] Id. at 20 (emphasis added).
\item[27] See id. at 20 (“In connection with a commitment of funds to finance the development of a parcel of land, the ‘parcel of land’ constitutes the ‘resources.’”).
\item[28] See \textit{Bob Marshall Alliance v. Hodel}, 852 F.2d 1223, 1239 (9th Cir. 1988) (“[A]ny proposed federal action involving unresolved conflicts as to the proper use of resources trigger NEPA’s consideration of alternatives requirement, whether or not an EIS is also required.”).
\item[29] Id. at 1229 (emphasis added).
\item[30] In this case, the Bureau had issued both regular leases and what are known as “No Surface Occupancy” (NSO) leases (NSO leases are leases that contain stipulations prohibiting the lessee from engaging in any surface-disturbing activity. \textit{Id.} at 1226. Interestingly, the court held that a § 102(2)(E) alternatives analysis was required for \textit{both} the NSO and non-NSO leases because the issuance of the NSO leases may lead to future activities that affect the land’s suitability for a wilderness designation. \textit{Id.} at 1229. This suggests that the court is taking a rather broad view of “unresolved conflicts” as well.
\item[31] See id. at 20 (“The latter raises what are primarily non-environmental questions.”) (emphasis added).
\end{enumerate}
\end{footnotesize}
surrounding air.” Therefore, even though the court decided to hold that § 102(2)(E) requires an alternatives analysis any time there is an impact on the environment, footnote nine indicates that the court believed the result would be the same even if it were strictly applying the language of the statute.

This brief summary of the relevant case law shows that although the circuit courts use different language, there is little functional difference in when they require a § 102(2)(E) analysis. Even the two circuits that stay true to the statutory text — i.e., the First and Ninth Circuits — reach essentially the same conclusion as the other circuits by assuming that all environmental impacts concern alternative uses of available resources. Given the existing case law, it is not surprising that the NEPA Task Force concluded that federal agencies are currently performing unnecessary alternatives analyses in their EAs. The rest of this article explores the legislative history of § 102(2)(E), and shows how proper interpretation of that section can address the NEPA’s Task Force’s concern and serve ARRA’s goal of expediting NEPA review.

PART II — Legislative History

Senator Henry Jackson introduced Senate Bill No. 1075, which ultimately became NEPA, on February 18, 1969. The introduced version of S. 1075 bears little resemblance to the enacted version. As introduced, S. 1075 would have authorized the Secretary of the Interior to study environmental quality and issue environmental reports. But § 1075 specifically noted that the Secretary would not have any authority over other federal agencies, and the proposed bill did not require an alternatives analysis.

The bill was referred to the Committee on Interior and Insular Affairs, and hearings were held on April 16, 1969. During these hearings, Professor Lynton Caldwell of Indiana University recommended that S. 1075 be amended to include a statement of national policy and a requirement that agencies evaluate the environmental effects of their actions. Senator Jackson was receptive to Professor Caldwell’s statement, and after the

32 City of New York v. DOT, 715 F.2d 732, 742 n.9 (2d Cir. 1983)

33 See text accompanying supra note 9 (NEPA Task Force’s conclusions).


35 S. 1075 § 101.

36 S. 1075 § 105 (“Nothing in this Act is intended to give, or shall be construed as giving, the Secretary any authority over any of the authorized programs of any other department or agency of the Government, or as repealing, modifying, restricting, or amending existing authorities or responsibilities that any department or agency may have with respect to the mutual environment.”).


38 Senate Hearings, supra note 35 at 116 (“Congress should at least consider measures to require the Federal agencies, in submitting proposals, to contain within the proposals an evaluation of the effect of (continued: . . )
hearings he introduced an amendment that mirrored Professor Caldwell’s testimony.\textsuperscript{39} The amended version of S. 1075 was adopted by the committee on July 8, 1969, and the bill passed the Senate unanimously on July 10th. Section 102(d), the precursor to § 102(2)(E)\textsuperscript{40}, required that, “all agencies . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of land, water, or air.” While ultimately NEPA’s language is different — it speaks of “available resources” rather than “land, water or air”\textsuperscript{41} — the fact that S. 1075 referenced specific natural resources provides compelling circumstantial evidence that the § 102(2)(E) alternatives provision was not meant to apply to all agency actions that had environmental impacts. The Senate Report’s section-by-section analysis bears this out:

> Wherever agencies of the Federal Government recommend courses of action which are known to involve unresolved conflicts over competing and incompatible uses of land, water, or air resources, it shall be the agency’s responsibility to study, develop, and describe appropriate alternatives to the recommended course of action. The agency shall develop information and provide descriptions of the alternatives in adequate detail for subsequent reviewers and decision-makers, both within the executive branch and in the Congress, to consider the alternatives along with the principal recommendations.\textsuperscript{42}

The fact that the Senate intended agencies to submit their alternatives analysis to Congress implies that the purpose of this provision was to force agencies to consider alternatives when faced with big-picture policy questions. As Robert E. Jordan notes, the Senate report “suggests that Congress was occupied with more cosmic issues involving fundamental policy choices[].”\textsuperscript{43}

After passing the Senate, S. 1075 was referred to the House of Representatives. The

\textsuperscript{39} \textit{Senate Hearings, supra} note 35 at 205-207 (Appendix 2).

\textsuperscript{40} Section 102(d) was re-designated as § 102(2)(D) when NEPA was enacted in 1970. Pub. L. No.94-83, 89 Stat. 424, (1975) amended NEPA by re-designating subparagraph (D) as subparagraph (E). Because the 1975 amendments did not alter the language of the subparagraph, the legislative history of § 102(2)(D) is identical to the legislative history of § 102(2)(E). For the remainder of this article, §§ 102(2)(D), 102(2)(E), and 102(d) should be viewed as interchangeable.

\textsuperscript{41} Unfortunately, the legislative history does not offer an explanation as to why this language was changed. \textit{See infra} note 44 for when we believe this language was changed. \textit{See infra} Part III for an analysis of the significance of this change.

\textsuperscript{42} \textit{S. REP. NO.} 91-296, at 21 (1969) (emphasis added).

House, though, had been considering H.R. 12549 (introduced by Congressman John Dingell), which contained similar language to Senator Jackson’s bill. On September 23, 1969, the House passed H.R. 12549, and its language was substituted in full into S. 1075. The bill was then returned to the Senate with a request for a conference to work out the differences between the two chambers. Before the bill went to conference, however, Senator Jackson introduced an amendment to the Senate-passed language of S. 1075. This amendment, which is known as the Muskie-Jackson compromise, resolved a dispute between the two senators over committee jurisdiction and the overall purpose of NEPA. During the floor debate, Senator Jackson offered insight into the § 102(d) alternatives provision:

The controversy over the construction of dams in the Grand Canyon, for example, could have been resolved at a much earlier date if the Department of the Interior had been required to present Congress with alternative proposals where, as in that case, there were unresolved major environmental conflicts. Section 102(d) of S. 1075 would go far toward resolving such problems by requiring the development and presentation of alternatives in all future legislative reports on measures involving major unresolved environmental conflicts.

Like the Committee Report, Senator Jackson’s statement reveals that Congress inserted the alternatives language in § 102(d) to avoid large-scale environmental controversies. The intent was not to foist an alternatives analysis on all environmental analyses, but rather to force agencies to consider alternatives when trying to determine the best way to utilize scarce resources.

After the Senate approved the Jackson amendment, S. 1075 went to conference, where the House and Senate reached a compromise. The conference committee submitted its report on December 17, 1969, but the report offers no further guidance as to what § 102(2)(E) requires. The Senate agreed to the compromise language contained in the report on December 20th, and the House agreed on December 22nd. Neither the Senate nor House floor debates reference what is now § 102(2)(E), and so the original Senate Report and Senator Jackson’s October 8th statement provide the sole congressional insight into what Congress intended “unresolved conflicts” to mean.

44 H.R. 12549, however, did not have a counterpart to what would become § 102 of NEPA.


46 To the best of our knowledge, this is when the § 102(d) language changed from “land, water, or air” to “available resources.” See 115 Cong. Rec. 29051 (October 8, 1969) (containing the amended version of S. 1075). Note, though, that we were unable to find any specific reference to this change in the October 8 floor debate. See 115 Cong. Rec. 29046-65 (October 8, 1969) for the floor debate.

47 See DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 2:3 (2d ed. 2006), for a discussion of the compromise.

48 115 Cong. Rec. 29055 (emphasis added).

PART III — A better § 102(2)(E) analysis

The judicially crafted “environmental impact” test results in unnecessary alternatives analyses in EAs, and is not supported by the statutory text. We believe that agencies should instead focus on the actual language used in § 102(2)(E).

I. The “environmental impacts” test ignores the plain language of the statute.

The plain language of § 102(2)(E) suggests a strong argument that an alternatives analysis is only required in cases involving unresolved conflicts over available resources. And it is well-settled that the plain text of the statute governs. Here, the statute requires an alternatives analysis only when there are “unresolved conflicts concerning alternative uses of available resources.” The plain meaning of this section, therefore, is at odds with the broad view taken by a majority of the circuit courts because it specifically ties the need for an alternatives analysis to situations that involve a dispute over available resources. While the Second Circuit may believe that its “environmental impacts” test acts as a useful proxy for when a § 102(2)(E) analysis is required, such a test is inconsistent with the actual text of the statute.

Moreover, the Supreme Court has also emphasized that “statute[s] should be construed so that effect is given to all [their] provisions, so that no part will be inoperative or superfluous, void or insignificant.” Ignoring the part of the statute that limits the alternatives analysis to cases involving unresolved conflicts over available resources arguably runs afoul of this rule since it renders the last clause of § 102(2)(E) superfluous. Indeed, following the Second Circuit’s reasoning leads to the conclusion that § 102(2)(E) is merely an appendage to § 102(2)(C)(iii). Under this logic, § 102(2)(C)(iii) requires an alternative analysis for agency actions that have “significant environmental impacts,” and § 102(2)(E) requires an alternative analysis for agency actions that have “environmental impacts.” Although certainly plausible from a theoretical standpoint, such a scheme ignores the fact that NEPA’s two alternatives sections exist to accomplish different things. Section 102(2)(E) was not intended to be the “alternatives-lite” counterpart to § 102(2)(C)(iii), but rather was intended to constitute an independent alternatives analysis requirement.

50 See, e.g., Carcieri v. Salazar, 129 S. Ct. 1058, 1063-64 (2009) (“This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms” (internal citations omitted).)

51 See supra Part I for a discussion of those circuit court cases.


53 Interestingly enough, even the Second Circuit recognizes the problems with conflating §§ 102(2)(E) and 102(2)(C)(iii). The court notes: “Though we have required an agency to give some consideration to alternatives even though preparation of an EIS is not required . . . it remains something of an anomaly to insist that an agency assess alternatives for an action that it has determined will not have a ‘significant’ effect on the environment.” City of New York, 715 F.2d at 744 (emphasis added). But this “anomaly” only exists to the extent that the Second Circuit is analyzing the § 102(2)(E) alternatives (continued. . .)
NEPA’s legislative history bears this out. Indeed, Senator Jackson’s statements indicate that § 102(2)(E) alternatives analyses should not be conducted only in cases where an EIS is being prepared, nor required for every EIS and EA. The senator’s reference to the Department of the Interior’s plan to construct dams in the Grand Canyon shows that the history of § 102(2)(E) requires a case-by-case analysis in order to determine whether the triggering threshold of unresolved conflicts is met. Therefore, the broader view adopted by some of the circuits — that § 102(2)(E) essentially acts as a proxy for the § 102(2)(C)(iii) alternatives analysis when the agency does not have to perform an EIS — ignores both the plain meaning of the statute and its legislative history. In addition, it ignores the statutory scheme established by Congress by failing to recognize that NEPA’s § 102(2)(C)(iii) alternatives analysis requirement serves a different purpose than the § 102(2)(E) alternatives analysis requirement. This is contrary to well-settled Supreme Court precedent. 54 Section 102(2)(E)’s place in the overall statutory scheme suggests that it is supplemental to § 102(2)(C)(iii), and that its trigger is distinct from that for a § 102(2)(C)(iii) alternatives analysis.

II. The plain language of § 102(2)(E) requires an evaluation of “unresolved conflicts concerning alternative uses of available resources.”

Recognizing that the proper § 102(2)(E) trigger is not the “environmental impacts” test leads to the question of what constitutes an “unresolved conflict concerning alternative uses of available resources.” The courts that have addressed this question (i.e., the First and Ninth Circuits) have not offered an entirely clear or satisfactory answer. 55 CEQ, likewise, has been silent. As the NEPA Task Force stated, “many agencies noted that the meaning of ‘unresolved conflict concerning the alternative uses of available resources’ is unclear, and that CEQ regulations do not provide any clarification[,]” 56 The requirement through the lens of § 102(2)(C)(iii). If the court recognized the independent function of § 102(2)(E), there would be no anomaly.

54 See, e.g., Fla. Dep’t of Revenue v. Piccadilly Cafeterias, 128 S. Ct. 2326, 2335 (2008) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (citing to Davis v. Mich. Dep’t of Treasury, 489 U.S. 803, 809 (1989))).

55 See supra Part I, Federal Cases, for a discussion of the relevant judicial decisions. None of the cases mentioned in that Part offers a detailed analysis of the statutory language. The First Circuit provides the most analysis, but ultimately the court holds that actions raising non-environmental questions do not require a § 102(2)(E) alternatives analysis. See Aertsen, 637 F.2d at 20. While true to the statutory text, this does not really address the core language of the statute. The Ninth Circuit says, “[i]n short, any proposed federal action involving unresolved conflicts as to the proper use of resources triggers NEPA’s consideration of alternatives requirement.” Bob Marshall Alliance, 852 F.2d at 1229. But the Ninth Circuit did not provide a detailed explanation of what that entails. Finally, the Second Circuit, for its part, only devotes a sentence to the statutory language. City of New York, 715 F.2d at 742 n.9.

56 NEPA TASK FORCE, REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION 70-71 (2003).
NEPA Task Force concluded that “the range of alternatives should be addressed in CEQ guidance,” but CEQ has not issued any such guidance to date. This article, therefore, attempts to fill the void. In accordance with Supreme Court precedent, an analysis of a statute starts with the language of the statute itself. Here, there are three important statutory phrases: (1) unresolved conflicts, (2) alternative uses, and (3) available resources.

Starting with the unresolved conflicts clause, the *New Oxford American Dictionary* (2d) defines conflict as “a serious disagreement or argument, typically a protracted one.” This definition implies that a conflict exists when there is some sort of controversy, defined as “disagreement, typically when prolonged, public, and heated,” over the proposed federal action. (The First Circuit supports this view: it has found that § 102(2)(E) conflicts only exist when there is a “controversial project.”) Therefore, the phrase “unresolved conflicts” should be read to encompass only those conflicts that are related to controversial projects.

As to what those conflicts need be about, the statute provides the answer — “unresolved conflicts concerning alternative uses of available resources.” The dictionary defines alternative as: “(of one or more things) available as another possibility” or “(of two things) mutually exclusive.” Alternative, used here as an adjective modifying “uses of available resources,” describes a state where multiple uses for a given resource are possible. Further, the term uses must also be defined. The dictionary defines uses as “the action of using something or the state of being used for

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57 *Id.* at 71.


59 See, e.g., *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (“Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute.”).

60 The New Oxford American Dictionary (2d), Mac OS X 10.5.7 (2009).

61 *Id.*

62 *See Aertsen v. Landrieu*, 637 F.2d 12, 20 (1st Cir. 1980) (“the s 102(2)(E) obligation extends only to a proposal that . . . is controversial.”) (emphasis added)); see also *Marquez-Colon v. Reagan*, 668 F.2d 611, 615 (1st Cir. 1981) (quoting *Aertsen* and noting that the agency action in question is “nothing if not controversial[].”)

63 “Controversial,” in the NEPA context, relates to the level of opposition to the agency action. If there is a local or national group opposing the agency proposal, then it probably meets the controversial threshold. Therefore, this may not be as limiting as it appears at first glance.


65 The New Oxford American Dictionary (2d), Mac OS X 10.5.7 (2009).
some purpose.” The verb to use is defined as to “take, hold, or deploy (something) as a means of accomplishing a purpose or achieving a result; employ,” or to “take or consume (an amount) from a limited supply of something.” In this case, where the focus is on environmental resources that generate unresolved conflicts, the noun uses is best defined as the action of taking or consuming (an amount) from a limited supply. So a § 102(2)(E) analysis would only be required in those cases where there are multiple and competing possible uses of the available resource in question. Thus, whether the § 102(2)(E) alternatives analysis can be limited depends on the definition of available resources.

An analysis of the term available resources requires a two-part evaluation. The first part of this term, available, lends itself to the standard method of statutory interpretation, i.e., the common dictionary meaning of the term. As defined by the New Oxford American Dictionary, available means “able to be used or obtained.” But the definition of the term resource does not directly address the intended meaning of the term in § 102(2)(E) because the dictionary definition focuses on the more general sense of the word and does not include general environmental concepts such as air, land, or water. In this context it is necessary to view the meaning of resource through an environmental lens and through NEPA’s legislative history.

As noted in Part II, the term resources in § 102(2)(E) replaced “land, water, or air” in the original Senate bill. This change should be understood as imposing an additional limitation on the scope of § 102(2)(E). Indeed, “land, water, or air” is inherently broad because it presumably includes any use of land, water or air. Resources, however, are more limited. As the dictionary definition of the term indicates, a resource is “a stock or supply of . . . assets that can be drawn on” — in other words, a limited quantity that can be consumed.

Section 102(2)(E), therefore, is more limited than the original bill

66 Id.
67 Id.
68 Id.
69 The New Oxford American Dictionary defines resources as, “a stock or supply of money, materials, staff, and other assets that can be drawn on by a person or organization in order to function effectively,” or “a country’s collective means of supporting itself or becoming wealthier, as represented by its reserves of minerals, land, and other assets,” Id.
70 Id.
73 The New Oxford American Dictionary (2d), Mac OS X 10.5.7 (2009).
74 Id. (defining “supply” as “[t]he amount of a commodity available for meeting a demand”).
because it does not encompass all uses of land, air or water; it only includes those uses that limit the availability of or consume land, air or water. A federal action that impacts the Colorado River, for example, would fall under § 102(2)(E), since the river is a resource used to supply water (water must be extracted from the river for use) and power (the flow of water down the river must be limited to produce power). In contrast, other uses of land, air, or water do not necessarily fall under § 102(2)(E). The turning of a windmill, for example, does not consume the resource “air.” But the construction of a windmill would consume the land or water on which it is built, so a § 102(2)(E) analysis could be necessary with respect to the use of land or water, but not air.

A plain reading of § 102(2)(E) results in a slight, but important, change from the circuit courts’ “environmental impact” test. Under this reading, some § 102(2)(E) alternatives analyses that would be performed under the “environmental impacts” test would not have to be conducted. A federal action to redesignate flight paths approaching an airport illustrates this difference: Applying the circuit courts' test, the environmental impacts of the proposal would determine whether a § 102(2)(E) analysis is necessary. If the proposal resulted in increased air traffic, for example, then there would be at least minimal environmental impacts sufficient enough to trigger a § 102(2)(E) alternatives analysis. But under the unresolved conflicts concerning alternative uses of available resources test, a § 102(2)(E) alternatives analysis might not be necessary. In this case, the agency would have to evaluate whether there is an unresolved conflict regarding the alternative uses of the air space (e.g., military use of the air space for training, commercial use for radio towers, etc.). Only if such a conflict exists would the agency then have to perform the § 102(2)(E) alternatives analysis. Use of the unresolved conflicts test, therefore, not only follows the plain reading of the statute, but could decrease the number of federal actions that require an alternatives analysis. This addresses the NEPA Task Force’s concern that agencies are performing unnecessary EAs, and furthers ARRA’s goal of expediting NEPA reviews.

CONCLUSION

There is a strong legal argument that a § 102(2)(E) analysis is only required in cases involving unresolved conflicts over available resources. A plain reading of the statute and the legislative history support this conclusion. But given the current state of the law, this approach would not be without risks — interested parties could challenge this interpretation, and it is possible that the circuit courts could rule against an agency espousing such a view. If an agency were challenged on its interpretation of § 102(2)(E), courts would probably apply two separate standards of review.

First, the court would review the agency’s legal interpretation of § 102(2)(E). It is

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75 See definition supra (defining uses as the action of taking or consuming (an amount) from a limited supply).

76 If the impacts were significant, then an EIS and § 102(2)(C)(iii) alternatives analysis would be required as well.
well established that an agency’s interpretation of a statute enforced by multiple agencies (e.g., the Administrative Procedure Act [APA], the Freedom of Information Act [FOIA], NEPA, etc.) is not entitled to the scheme of deference established in *Chevron v. NRDC*. Therefore, a court would subject the agency’s interpretation of § 102(2)(E) to a *de novo* review. And considering the current state of the law on this topic, it is not guaranteed that an interpretation supporting the plain language of the statute would prevail. But because most of the circuit court opinions articulating the environmental impacts test are from the early 1980s (or cite to cases from the 1980s), the courts may be receptive to revisiting § 102(2)(E). Agencies could probably strengthen their argument by referencing the ARRA’s NEPA provision.

Second, the court would review the agency’s *factual* determination that the action does not involve any unresolved environmental conflicts under the APA’s arbitrary and capricious standard. Section 706(2)(A) of the APA provides: “The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The leading case interpreting this section is *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co. (State Farm)*. In *State Farm*, the Court explained:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Therefore, under the Court’s interpretation of the arbitrary and capricious standard, an agency determination that an action does not involve unresolved environmental conflicts will be upheld unless that determination is unsound or irrational.

Ultimately, in those cases where there are no significant environmental impacts and no unresolved conflicts involving available resources, agencies will have to decide whether it is worth the risk to advocate the more limited interpretation of § 102(2)(E). We believe that this more limited interpretation is supported by the plain language of the statute and the legislative history, but recognize that agencies may be unwilling to take the risk of being overturned by the courts, which generally apply an environmental impacts test when evaluating whether an agency needs to conduct a § 102(2)(E) analysis.

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77 See *Dubois v. U.S. Dep’t of Agriculture*, 102 F.3d 1273, 1285 n.15 (1st Cir. 1996) (“We note that the two-step process articulated in *Chevron* . . . does not apply [to the agency’s interpretation of NEPA], because we are not reviewing an agency’s interpretation of the statute that it was directed to enforce.”); *see also Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 349 (1st Cir. 2005) (stating “we exercise plenary review over the Commission’s compliance with the APA,” and noting that agencies’ interpretations of statutes they do not administer are not entitled to particular deference (internal citations omitted)).


80 *Id.* at 43.