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THE PRESIDENT'S "TWO FOR ONE" EXECUTIVE ORDER AND THE INTERPRETATION MANDATE OF THE NATIONAL ENVIRONMENTAL POLICY ACT: A LEGAL CONSTRAINT ON PRESIDENTIAL POWER

Joel A. Mintz*

I. INTRODUCTION

The issuance of executive orders is a significant and longstanding exercise of presidential authority. Beginning with President George Washington, presidents have issued executive orders for a multiplicity of purposes. Some of the earliest executive orders were used to erect lighthouses, withdraw public lands for Indian use, and establish, transfer, and abolish land districts and land offices.[1] Subsequently, executive orders were employed to set aside federal lands for fuel and water storage, target ranges, and bird sanctuaries, to establish and reorganize government agencies, and to "seize" the ownership and management of steel mills.[2]

As wide-ranging as executive orders may be, however, it is axiomatic that, in the United States, Congress enacts laws while the executive branch of the federal government—headed by the president—executes those laws. Within this framework, presidential executive orders may not exceed the bounds of congressional directives and delegations of authority.

This article considers the legal effect of one provision of a federal statute, the National Environmental Policy Act of 1969 ("NEPA")[3] on the authority of the president to issue executive orders that concern environmental protection. In particular, it focuses on § 102(1) of NEPA, which states that "[t]he Congress authorizes and directs that, to the fullest extent possible[,] the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter."[4] This piece examines the potential legal impact of that provision—which I shall refer to as NEPA's "interpretation mandate"—on an important Executive Order issued by President Donald J. Trump that limits the issuance and implementation of federal environmental regulations and policies.

In Part II, this article analyzes the plain meaning, legislative history, administrative regulations, and judicial implementation of NEPA's interpretation mandate. It considers whether this provision applies to executive orders generally, as well as the broader implications of giving it force and effect.

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[1] For a more comprehensive description of the history of presidential Executive Orders, see Robert B. Cash, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME L. REV. 44 (1963).

[2] *Id.*

[3] Pub. L. 91-190, Title I, § 102, 83 Stat. 853 (1970) (codified as amended at 42 U.S.C. § 4332 (2018)).

[4] *Id.*

Part III summarizes the substance of Executive Order 13771, commonly referred to as the "Two For One Order," as it implicates environmental regulations and policies.[5] Lastly, it considers the extent to which the NEPA interpretation mandate limits the scope and validity of the Two for One Order.

II. WHAT DOES THE NEPA INTERPRETATION MANDATE MEAN?[6]

As set forth below, several aspects of NEPA's interpretation mandate seem immediately apparent. First, the subsection is unmistakably mandatory in its application. In clear terms, Congress has not merely urged or suggested that the interpretation and administration of the laws referred to in the provision be consistent with NEPA's policies, it has *required* that to occur. For example, the subsection employs the verb "shall," as opposed to "may," to describe what must occur; traditionally an indication of an intended command as opposed to a mere aspiration.[7] The first sentence of § 102 also indicates that Congress both "authorizes and *directs*" the sort of legal interpretation and administration that the provision mentions must occur.[8] That phraseology further provides an unambiguous indication that Congress intended the provision to be nondiscretionary in its application.

Second, the language of § 102(1) makes plain that what is to be construed and administered in accordance with NEPA's policies are "the policies, regulations, and public laws of the United States."[9] This set of laws is referred to without any qualifying term. Thus, at a bare minimum, subsection 102(1) directs that the nation's *environmental* laws—certainly including but by no means limited to NEPA itself—must be administered and interpreted in the fashion indicated in the provision. Notably, however, the language of subsection 102(1) is not limited in its applicability to federal environmental policies, regulations, or enactments. By its terms, the subsection appears to encompass, without limitation, *all* federal legal authorities that may be described as policies, regulations, or public laws.

Third, NEPA's interpretation mandate plainly directs that the required legal interpretation and administration it refers to must take place "to the fullest extent possible."[10] I will further consider the ways courts have thus far construed that phrase (mostly in the context of another NEPA provision, subsection 102(2)) shortly. Nonetheless, even a cursory reading of § 102 strongly suggests that in subsection 102(1), Congress requires a wholehearted and vigorous application of

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[5] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

[6] *See also* Joel A. Mintz, *Taking Congress's Words Seriously: Towards a Sound Construction of NEPA's Long Overlooked Interpretation Mandate*, 38 ENVTL. L. 1031(2008).

[7] When used in statutes, the word "shall" connotes having a duty or being required to do something; a definitional proposition that is well supported in case law. *See, e.g.*, Lopez v. Davis, 531 U.S. 230, 241 (2001); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998); Ass'n of Civilian Technicians, Montana Air Chapter No. 29 v. Fed. Labor Relations Auth., 22 F.3d 1150, 1153 (D.C. Cir. 1994).

[8] 42 U.S.C. § 4332 (emphasis added).

[9] *Id.*

[10] *Id.*

the policies set forth in NEPA. Partial and/or conditional implementation of NEPA's policies, or a failure or refusal to apply them to some particular subset of national policies, regulations, or public laws, seems far less than what the statute demands.

Notwithstanding these self-explanatory features, however, the plain language of subsection 102(1) standing alone leaves certain questions unanswered. For instance, it is unclear from the provision itself precisely which policies "set forth in this chapter" are to provide the basis for interpreting and administering federal policies, regulations, and public laws. Moreover, NEPA's interpretation directive does not indicate, at least in so many words, to whom the provision applies. Finally, though its language may be said to be self-defining, the phrase "to the fullest extent possible" is not expressly defined, either in subsection 102(1) or elsewhere in the statute.

The legislative history of NEPA does, however, shed some light on these questions. Like the interpretation requirement of NEPA itself, the legislative history is pithy. As Professor Daniel R. Mandelker observes, "NEPA's legislative history provides some but only limited guidance on the meaning of the statute. . . . The legislative history of the statute is important more for what is omitted than what is included in the way of explanation."[11] Mandelker's observation appears particularly apt, especially regarding subsection 102(1).

In fact, the only reference to § 102 in NEPA's legislative history is found in the report of the conference committee on the bill that was later enacted.[12] Yet even that conference report makes no specific mention of subsection 102(1). Instead, it refers to § 102 in its entirety, a section including NEPA's Environmental Impact Statement ("EIS") requirement along with the statute's interpretation provision. The report's comments seem mostly to pertain to the EIS portion of section 102:

> The purpose of [section 102] is to make it clear that each agency of the Federal Government shall comply with the directives set out in sub-paragraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However as to other activities of that agency, compliance is required . . . .[T]he language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizes and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.[13]

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[11] DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 2:2 (2018).
[12] *See* H.R. REP. NO. 91-765, at 9-10 (1969) (conf. rep.), *reprinted* in 1969 U.S.C.C.A.N. 2769-70.
[13] *Id.*

As several commentators have explained, the conference committee version of NEPA reflected a House-Senate compromise, in which the House conferees agreed to drop a House-passed amendment that would have limited the impact of NEPA's EIS requirement on federal agencies.[14] The deleted language would have provided that "nothing in this Act shall increase, decrease, or change any responsibility or authority of any Federal official or agency."[15]

Conceivably, it might be argued that the language of the NEPA conference report reflects a consensus among the conferees that NEPA's interpretation mandate applies *only* to federal agencies. Such a reading, however, appears strained and incorrect. Although NEPA's sponsors were undoubtedly concerned with the possibility that federal agencies would attempt to avoid NEPA's action-forcing requirements, absolutely nothing in the statute's legislative history indicates that subsection 102(1) was not *also* intended to apply to any *other* federal governmental entity that is charged with the interpretation of federal law. In particular, as I discuss below, both the statute's text and the judicial interpretations rendered thus far support the conclusion that the provision squarely applies to presidential executive orders as well as federal agencies and departments.[16]

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

> The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[17]

In subsection 101(a), Congress declared that:

> [I]t is the continuing policy of the Federal Government, in cooperation with State and local government, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and

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[14] For detailed examinations of NEPA's legislative history, see Pac. Legal Found. v. Andrus, 657 F.2d 829 (6th Cir. 1981); Lynton Caldwell, *Is NEPA Inherently Self-Defeating?*, 9 ENVTL. L. REP. 50001 (1979); Daniel Dreyfus & Helen Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RES. J. 243 (1976).

[15] H.R. REP. NO. 91-765, at 9, *reprinted in* 1969 U.S.C.C.A.N. 2770. The NEPA regulations promulgated by the Council on Environmental Quality ("CEQ") are similarly unenlightening as to all questions left unresolved by NEPA § 102(1). *See* 40 CFR §§ 1500.1–1500.6.

[16] *See* discussion *infra* Section II.C, at notes 54-56 and accompanying text.

[17] Pub. L. 91-190, Title I, § 2, 83 Stat. 853 (1970) (codified at 42 U.S.C. § 4332 (2018)).

> promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[18]

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

> [I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may–
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[19]

Some may contend that in contrast to subsection 101(a)—which describes the goals it enumerates as "the continuing policy of the Federal Government"—the goals expressed in subsection 101(b) were not meant to be a basis for the interpretation of the policies, regulations, and public laws authorized and mandated by subsection 102(1). Under this view, subsection 101(b) merely announces "the continuing responsibility of the Federal Government," as opposed to making a "policy" statement, and thus not within the scope of subsection 102(1). This notion, however, seems entirely devoid of merit.

Black's Law Dictionary defines "policy" as "[t]he general principles by which a government is guided in its management of public affairs."[20] An express statement of the "continuing responsibility" (as included within subsection 101(a)) of a government appears to fall squarely within that definition.

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[18] 42 U.S.C. § 4331(a) (2018).
[19] *Id.* § 4331(b).
[20] *Policy*, BLACK'S LAW DICTIONARY (8th ed. 2004).

Moreover, the idea that subsection 101(b) is a legislative declaration of policy is supported by the Supreme Court's decision in *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*.[21] In *Aberdeen*, the Court considered a challenge by a group of law students to a decision of the Interstate Commerce Commission not to suspend a surcharge on railroad freight rates without preparing an EIS required under NEPA.[22] The Court reversed the lower district court's decision that had set aside the Commission's order pending the preparation of an EIS.[23] However, in a footnote, the Court made a significant observation specifically with respect to subsection 102(1) of NEPA:

> Part of NEPA provides that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter," 42 U.S.C. § 4332(1); and *one of the policies of the chapter is to "approach the maximum attainable recycling of depletable resources*."[24]

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

A. Judicial Interpretations of the NEPA Interpretation Mandate

The NEPA interpretation mandate has been invoked relatively rarely in the federal courts. Section 102(2)(C) of NEPA—which requires the preparation of an environmental impact statement for every major federal action that significantly affects the quality of the human environment[25]—has been the subject of extensive analysis by federal and state judges.[26] In contrast, only eleven cases have made specific reference to NEPA § 102(1), and none of those included a complete analysis of the provision's scope and legal effect.[27] Given the immensely

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[21] Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975).
[22] *Id.* at 297-98.
[23] *Id.* at 328.
[24] *Id.* at 317 n.18 (emphasis added).
[25] *See* 42 U.S.C. § 4332(C).
[26] An examination of the Lexis-Nexis compilation of citations for Section 102(2)(C) performed in April 2018 found 3,470 federal court decisions that referenced NEPA's EIS requirement along with thirty-two state court cases.
[27] *See Aberdeen*, 422 U.S. at 289; Arlington Coal. on Transp. v. Volpe, 332 F. Supp. 1218 (E.D. Va. 1971), *rev'd*, 458 F.2d 1323 (4th Cir. 1972); Nat'l Helium Corp. v. Morton, 361 F. Supp. 78 (D. Kan. 1973), *rev'd. on other grounds,* 486 F.2d 995 (10th Cir. 1973); Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd. on other grounds sub nom*., Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974); Carolina Action v. Simon, 389 F. Supp. 1244 (M.D.N.C. 1975), *aff'd*, 522 F.2d 295 (4th Cir. 1975); People v. City of South Lake Tahoe, 466 F. Supp. 527 (E.D. Cal. 1978); Nat'l Res. Def.

important implications of NEPA's substantially unambiguous interpretation directive, there seems little principled reason for the paucity of judicial attention to this provision, however.

As Professor Eric Pearson has forcefully argued, allowing the interpretation mandate of NEPA to have force and effect would scarcely revolutionize the judicial process.[28] Unlike other statutory directives, Pearson contends § 102(1) "merely guides interpreters and administrators of law and policy in their function of extracting meaning from law or policy itself."[29] Since the Environmental Impact Statement provision of NEPA is drafted to be independent of NEPA's interpretation mandate, "the legal significance of one should not bear on the legal significance of the other."[30] Moreover, the interpretation mandate does not violate the separation of powers doctrine,[31] and it is entirely consistent with the regime of judicial review under *Chevron U.S.A. v. Natural Resources Defense Council.*[32] Given these considerations, Professor Pearson seems entirely correct in his conclusion that: "What is necessary is for a court to step up to the plate and invoke section 102(1) to resolve a legal dispute."[33]

B. What is Meant By "To the Fullest Extent Possible"?

As we have observed, § 102 of NEPA requires that both the interpretation and administration of federal laws and policies and the EIS requirement imposed on all federal agencies be carried out in accordance with NEPA's policies "to the fullest extent possible." Thus far, that phrase has not been judicially construed as it pertains specifically to subsection 102(1). Nonetheless, federal courts have addressed the meaning of "to the fullest extent possible" as those words apply to the duty of federal agencies to prepare and consider EIS's. Those decisions appear

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Council, Inc. v. Berklund, 609 F.2d 553 (D.C. Cir. 1979); Ctr. For Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157 (9th Cir. 2003); Def. of Wildlife v. North Carolina Dep't. of Transp., 971 F. Supp. 510 (E.D.N.C. 2013); Beverly Hills Unified School Dist. v. Fed. Transit Admin., No. CV 12-9861-GW(SSx), 2016 WL 4650428, at *1 (C.D. Cal. Feb. 1, 2016); Ctr. for Biological Diversity v. Fed. Highway Admin., No. ED CV 16-133-GW(SPx), 2017 WL 2375706, at *1 (C.D. Cal. May 11, 2017). The NEPA interpretation mandate has also received relatively little attention from legal scholars. *See* Joel A. Mintz, *Taking Congress's Words Seriously: Towards A Sound Construction of NEPA's Long-Overlooked Interpretation Mandate*, 38 ENVTL. L. 1031 (2008); Eric Pearson, *Section 102(1) of the National Environmental Policy Act*, 41 CREIGHTON L. REV. 369 (2008); Joel A. Mintz, Sackett v. EPA *and Judicial Interpretations of Environmental Statutes: What Role for NEPA?*, 42 ENVTL. L. 1027 (2012).

[28] Pearson, *supra* note 26, at 378.

[29] *Id.* at 374.

[30] *Id.* at 377.

[31] *Id.* at 375.

[32] *Id.* at 380.

[33] *Id.* at 384.

to give some guidance—indirect though it may be—for the future application of subsection 102(1).

The most influential interpretation of "to the fullest extent possible" was made soon after NEPA's enactment by Judge Skelly Wright in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission* ("*Calvert Cliffs*").[34] At issue in *Calvert Cliffs* was the validity of a set of rules that the United States Atomic Energy Commission ("AEC") had adopted governing the consideration of environmental issues.[35] Among other things, those rules prohibited outside parties from raising non-radiological environmental issues at any AEC hearing for which a public notice had been given prior to March 4, 1971.[36] The rules allowed AEC hearing boards to ignore environmental factors unless they were affirmatively raised by staff members or outside parties and hearing boards were prohibited from independently evaluating environmental factors if other agencies had certified that their own environmental standards were satisfied.[37] AEC's rules also provided that when a construction permit for a facility had been issued before NEPA compliance was required, the Commission would not formally consider environmental factors or require modifications in the proposed facility until the time of issuance of an operating license.[38]

Declaring that "the Commission's crabbed interpretation of NEPA makes a mockery of the Act,"[39] the D.C. Circuit emphatically rejected the regulations at issue. The court opined that even though the general substantive policy of the Act is a flexible one leaving room for a responsible exercise of discretion, NEPA's procedural provisions establish a "strict standard of compliance."[40]

With respect to the meaning of "to the fullest extent possible," the D.C. Circuit took a strong stance:

> We must stress as forcefully as possible that this language does not provide an escape hatch for foot dragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high

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

[35] *Id.* at 1111-12 (framing the argument as being between petitioners claiming the new rules "fail to satisfy the rigor demanded by NEPA" and the Commission contending "the rules challenged by petitioners fall well within the broad scope of the Act").

[36] *Id.* at 1117.

[37] *Id.* at 1116-17 (noting that, under one rule at issue, "[a]lthough environmental factors must be considered . . . such factors need not be considered by the hearing board conducting an independent review of staff recommendations, unless affirmatively raised by outside parties or staff members," while under another rule at issue, "the hearing board is prohibited from conducting an independent evaluation and balancing certain environmental factors if other responsible agencies have already certified that their own environmental standards are satisfied by the proposed federal action").

[38] *Id.* at 1117.

[39] *Id.*

[40] *Id.* at 1112.

> standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.[41]

The D.C. Circuit went on to observe that:

> Compliance to the "*fullest*" possible extent would seem to demand that environmental issues be considered at every important stage in the decision-making process concerning a particular action - at every stage where an overall balancing of environmental factors is applicable and where alterations might be made in the proposed action to minimize environmental costs.[42]

The *Calvert Cliffs* court's early, strict view of the meaning of "to the fullest extent possible" proved influential in subsequent judicial construction of NEPA's EIS requirement.[43] The case's implications for the interpretation of the NEPA interpretation requirement, however, is less clear. Nonetheless, at a minimum, *Calvert Cliffs* does contain a firm indication that "to the extent possible" is statutory language of considerable significance. It is a phrase that federal courts and agencies should not (and must not) ignore as they interpret NEPA.

In a decision handed down five years after *Calvert Cliffs*, the U.S. Supreme Court, in *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma (Flint Ridge),*[44] accepted *Calvert Cliff*'s overall interpretation of "to the fullest extent possible" while adding a significant caveat. *Flint Ridge* concerned the question of whether the United State Department of Housing and Urban Development ("HUD") was required to prepare an EIS whenever it receives a "statement of record" from a potential land developer pursuant to the Interstate Land Sales Full Disclosure Act.[45] Such a statement—which must contain various information needed by potential purchasers to prevent false and deceptive practices in the interstate sale of undeveloped tracts of land—will become automatically effective under that Act on the thirtieth day after filing, unless HUD determines that it is incomplete or materially inaccurate.[46]

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[41] *Id.* at 1114.
[42] *Id.* at 1118 (emphasis in original).
[43] The *Calvert Cliffs* decision has been followed by four United States Courts of Appeals and a United States District Court. *See, e.g.*, Shiffler v. Schlesinger, 548 F.2d 96, 100-01 (3d Cir. 1977); Save Our Sound Fisheries Ass'n v. Callaway, 387 F. Supp. 292, 309 (D.R.I. 1974); Greene Cnty. Planning Bd. v. Fed. Power Comm'n, 455 F.2d 412, 420 (2d Cir. 1972); Davis v. Morton, 469 F.2d 593, 596-98 (10th Cir. 1972); Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971*). Calverty Cliffs* was also recently cited with approval in an administrative decision of the Nuclear Regulatory Commission. *See* In re Dominion Nuclear N. Anna, L.L.C., 65 N.R.C. 539, 558-59, 602, 614-16 (2007).
[44] Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776 (1976).
[45] *Id.* at 778 (discussing the Interstate Land Sales Full Disclosure Act, 15 U.S.C., §§ 1701-1720 (2006)).
[46] *See id.* at 781.

The Court held that under these circumstances HUD was not required to prepare an EIS.[47] Citing NEPA's legislative history, the Court implicitly accepted *Calvert Cliffs'* notion that the "to the fullest extent possible" language of section 102 reflected a congressional mandate that had to be implemented in a serious and resolute manner:

> NEPA's instruction that all federal agencies comply with the impact statement requirement – and with all the other requirements of § 102 – "to the fullest extent possible" . . . is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.[48]

At the same time, however, the Court concluded that NEPA must give way where there is a "clear and unavoidable statutory conflict."[49] The Court reasoned that such a conflict existed in *Flint Ridge* since (as a practical matter) HUD could not actually comply with its statutory duty to allow statements of record to go into effect within thirty days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare EIS's on proposed developments.[50]

Certainly, *Calvert Cliffs* and the NEPA EIS cases that followed, along with the Supreme Court's opinion in *Flint Ridge*, make clear that the words "to the fullest extent possible" are far from empty rhetoric. They are, as the *Flint Ridge* Court opined, a "deliberate command" that is "neither accidental nor hyperbolic."[51] At the same time, however, "to the fullest extent possible" appears to mean something less than "under all circumstances and notwithstanding all other considerations." Where another statute imposes a conflicting duty that makes it simply *impossible* to implement NEPA's policies without effectively voiding that other statute's mandate, the other statute must take precedence.[52] Presumably, such situations will arise infrequently. Nonetheless, in circumstances where a statutory conflict is "clear and unavoidable," NEPA must give way.

These judicial interpretations of NEPA are fully consistent with the statute's legislative history. The Conference Report that accompanied the final version of the bill stated that "it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used . . . as a means of avoiding compliance with the directives set out in Section 102."[53] In adopting this position, the conferees agreed to remove from the final Act language in the House bill that would have provided that "nothing in this Act shall increase, decrease or change

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[47] *Id.* at 791.
[48] *Id.* at 787.
[49] *Id.* at 788.
[50] *Id.* at 789-93.
[51] *Id.* at 787.
[52] *Id.* at 788.
[53] H.R. REP. NO. 91-765, at 9-10, *reprinted in* 1969 U.S.C.C.A.N. 2770.

any responsibility or authority of any Federal official or agency created by other provision of law."[54]

C. Does the Interpretation Mandate Apply to Presidential Executive Orders?

As noted previously, subsection 102(1) does not indicate on its face whether the type of interpretation (of policies, regulations, and public laws) that it mandates applies to those implemented by the president or federal agencies, and NEPA's legislative history fails to clarify that question. Nonetheless, there is good reason to conclude that this is indeed the case.

As we have seen, subsection 102(1) directs that interpretation of the public laws of the United States, along with the nation's policies and regulations, must be in accordance with NEPA's policies. The language of this subsection contrasts sharply with that of subsection 102(2), NEPA's EIS provision, which contains a specific set of mandates that are expressly made applicable to "all agencies of the Federal Government."[55] The omission of any reference to "all agencies of the Federal Government" in subsection 102(1) appears highly significant. Had Congress wished to limit the applicability of the interpretation mandate to federal agencies, it could surely have drafted the subsection to declare that "all agencies of the Federal Government shall interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in this chapter." Its refusal to do so carries an unmistakable implication: subsection 102(1) applies to *all* governmental entities that are responsible for the interpretation as well as the administration of our nation's policies, regulations, and public laws, including the president of the United States.

As noted above, presidential executive orders vary greatly in their scope and purposes. Some announce measures that are entirely symbolic.[56] Others, however (like the Executive Orders described in the next section of this article), are clearly intended to interpret existing laws and to effectuate public policy. To the extent that an executive order purports to do so, it is unquestionably a "policy" that must, therefore, be interpreted consistent with the policies established in NEPA to comply with that statute's interpretation mandate.

Among the expressly enumerated duties of the president of the United States is to "take care that the laws be faithfully executed."[57] The National Environmental Policy Act is indisputably a duly enacted federal statute. The president is thus obligated to honor all of its provisions and directives in all of his actions, including his executive orders.

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[54] *Id.* at 9.
[55] 42 U.S.C. § 4332.
[56] Recent examples include Exec. Order No. 13816, 82 Fed. Reg. 238 (Dec. 13, 2017) (revising the Seal for the National Credit Union Administration); *see also* Proclamation No. 9722, 83 Fed. Reg. 15729 (Apr. 6, 2018) (declaring April 9, 2018 as National Former Prisoner of War Recognition Day).
[57] U.S. CONST. art. II, § 3.

III. THE NEPA INTERPRETATION MANDATE AND PRESIDENT TRUMP'S "TWO-FOR-ONE" EXECUTIVE ORDER: ARE THEY CONSISTENT?

In the early months of his administration, President Donald Trump issued a flurry of executive orders. Several of those orders carry significant implications for established environmental laws and policies. This section of this article examines the most far-reaching of the President's executive orders, "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs,"[58] and the extent to which NEPA's interpretation mandate limits or negates its legality. This Executive Order was issued only ten days after President Trump was inaugurated. Widely referred to as the "Two for One Order," this document declared that: "[I]t is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations."[59]

To accomplish this stated purpose, Executive Order 13771 established three significant new directives regarding the issuance of new federal administrative regulations. First, it provided that, "[u]nless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed."[60] Second, the Order directed the heads of all agencies that:

> For fiscal year 2017 . . . the heads of all agencies are directed that the total incremental cost [to regulated parties] of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).[61]

Third, the Executive Order decreed that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations."[62]

Executive Order 13771 further directed that, in future fiscal years, agency heads must identify off-setting regulations for each regulation that increases incremental costs, along with an estimation of the total costs or savings associated with each new regulation.[63] Moreover, the Order outlines a process under which, in every fiscal year, the Director is to identify a "total amount of incremental costs"

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[58] Exec. Order No. 13771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017).
[59] *Id.* at § 1.
[60] *Id.* at § 2(a).
[61] *Id.* at § 2(b).
[62] *Id.* at § 2(c).
[63] *Id.* at § 3.

regarding new regulations that agencies will not be permitted to exceed "unless required by law or approved in writing by the Director."[64]

The Executive Order defines the term "regulation" or "rule" (with a few non-environmentally-related exceptions) to mean "an agency statement of general or particular applicability and future effect designed to implement, *interpret*, or prescribe law or policy, or to describe the procedure or practice requirements of an agency."[65]

In considering the legality of this Order in light of the NEPA interpretation mandate as the Order affects federal regulations that protect the environment, one must first inquire whether the Order is a "policy, regulation or public law of the United States," and only if so must the interpretation and administration of the Order be carried out in accordance with NEPA's policies. There seems little doubt that Executive Order 13771 falls within the meaning of that phrase. By imposing a regulatory regime that considers only the private costs of regulations without examining their benefits, this Order undoubtedly creates a new federal policy. Moreover, along with other regulations, the Order clearly affects the implementation of several federal environmental statutes, including the Clean Air Act,[66] the Clean Water Act,[67] the Toxic Substances Control Act,[68] and the Endangered Species Act[69] by constraining the authority of regulatory agencies to implement those statutes consistent with their express purposes and goals.

Since Executive Order 13771 is indeed a federal policy, one must then ask whether it interprets applicable law "in accordance" with the policies of NEPA to the fullest extent possible. While NEPA contains no definition of "accordance," the *Random House Dictionary of the English Language* defines that term as "conformity, agreement."[70] Given that definition—which is consistent with the common understanding of the word—all policies, regulations, and public laws of the United States must conform to NEPA's stated policies.

As noted above, one such "continuing policy" of NEPA is to "use all practicable means and measures . . . in a manner calculated to . . . create and maintain conditions under which man and nature can exist in productive harmony."[71]

On its face, at least as it affects regulations designed to protect the environment, Executive Order 13771 seems entirely inconsistent with this express policy of NEPA. The notion that an Executive Order which only focuses on regulatory costs to private entities without ever measuring any of the public benefits of environmental regulations is "calculated to create and maintain

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[64] *Id.* at § 3(d).
[65] *Id.* at 9340, § 4 (emphasis added).
[66] *See generally* Clean Air Act, 42 U.S.C. §§ 7401-7671q (2018).
[67] *See generally* Clean Water Act, 33 U.S.C. §§ 1251-1388 (2018).
[68] *See generally* Toxic Substances Control Act, 15 U.S.C. §§ 2601-2697 (2018).
[69] *See generally* Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2018).
[70] *Accordance*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966).
[71] 42 U.S.C. § 4331.

conditions under which man and nature can exist in productive harmony," defies logic. In fact, a 2011 study of the costs and benefits of the Clean Air Act concluded that the estimated central benefits of the Clean Air Act exceed the costs it necessitates by a factor of more than thirty to one, mostly because of reductions in premature mortality and health care costs.[72]

Moreover, several of the federal environmental statues that authorize environmental regulations subject to Executive Order 13771 are clearly intended to foster conditions under which man and nature can exist harmoniously. For example, the Toxic Substances Control Act declares that its "primary purpose" is "to assure that [technological] innovation and commerce in . . . chemical substances and mixtures does not present an unreasonable risk of injury to health or the environment."[73] The Clean Air Act lists as one of its central purposes "to protect and enhance the quality of the Nation's air so as to promote the public health and welfare and the productive capacity of its population."[74] The Clean Water Act states the its "objective" is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[75] The Endangered Species Act indicates that its purposes are "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species."[76]

Existing regulations promulgated under those statutes must be consistent with those environmentally protective purposes. In most instances they were developed through a painstaking public process that involved careful scientific research, legal analysis, and public scrutiny. Many also survived rigorous judicial review. To require their repeal before permitting the creation of new regulations—no matter how beneficial existing regulations may be to human health and welfare or to productive human harmony with nature, and no matter how urgently new regulations may be needed to meet emerging environmental challenges—can scarcely be said to be one of the "practicable means and measures" that NEPA's policies call for.

IV. CONCLUSION

In a concluding sub-section, Executive Order 13771 states that "this order shall be implemented consistent with applicable law."[77] This article has suggested that the operative sections of the Order are, in fact, *inconsistent* with applicable law. Though rarely invoked, the gist of the NEPA interpretation mandate is a clear congressional command that all federal policies be interpreted consistent with

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[72] ENVTL. PROTECTION AGENCY, BENEFITS AND COSTS OF THE CLEAN AIR ACT: 1990-2020, at 7-1 (2011), http://www.epa.gov/sites/production/files/2015-07/documents/fullreport_rev_a.pdf.
[73] 15 U.S.C. § 2601(b)(3).
[74] 42 U.S.C. § 7401(b)(1).
[75] 33 U.S.C. § 1251(a).
[76] 16 U.S.C. § 1531(b).
[77] Exec. Order No. 13771, 82 Fed. Reg. 9339, 9340 (Jan. 30, 2017).

NEPA's policies to the fullest extent possible. President Trump's "Two for One Order" establishes a policy that misinterprets a number of federal environmental statutes and squarely contradicts their purposes. By focusing solely on the costs of environmental regulations without the least consideration of their numerous benefits to public health, welfare, and the environment, Executive Order 13771 clearly runs afoul of NEPA's policy that the public laws and regulations of the United States must be construed to harmonize human conduct with the natural environment. Its legality must, under this framework, be very seriously questioned.