

Blue Ridge Environmental Defense League

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July 20, 2018

Mary B. Neumayr, Chief of Staff
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

RE: Docket No. CEQ-2018-0001, Advanced Notice of Proposed Rulemaking

Dear Ms. Neumayr:

On behalf of the Blue Ridge Environmental Defense League. I write to comment on the Advance Notice of Proposed Rulemaking in the docket posted in the Federal Register of June 20, 2018. The notice is based on the Executive Order 13807 signed by President Trump on August 15, 2017.

Executive Order #13807, entitled “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” is wrongfully named and would be further wrongful if allowed to proceed to actual rulemaking, as posited by the FRN of June 20. The principal goal of the order appears to be reducing the amount of time it takes for environmental reviews for infrastructure projects. Yet neither the order nor the CEQ guidance associated with the order offers any showing of need. No examples are given on infrastructure projects delayed by NEPA review. In sum, the order lacks any legal basis upon which to predicate a rulemaking of the nature contemplated by the order.

As you know, the purpose of the National Environmental Policy Act is the enhancement of the environment and was established by the President’s Council on Environmental Quality pursuant to an act of Congress. The preamble to NEPA states:

To declare 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.¹

The law enacted on January 1, 1970 was a watershed event in the development of environmental policy in the United States and serves as a model for other nations as well. In fact, NEPA is referred to as the environmental Magna Carta, alluding to the 1215 *Magna Carta Libertatum*, “the foundation of the freedom of the individual against the arbitrary authority of the despot.”²

¹ United States. National Environmental Policy Act of 1969. Pub.L. 91–190, Approved January 1, 1970. 42 U.S.C. § 4321

² Ascribed to Lord Denning, Danziger, D.; Gillingham, J. (2004). *1215: The Year of Magna Carta*. Hodder

However, the President's Executive Order poses the following rationale for action:

Inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment. More efficient and effective Federal infrastructure decisions can transform our economy, so the Federal Government, as a whole, must change the way it processes environmental reviews and authorization decisions.³

Further, timetables for environmental reviews for "major infrastructure projects" would be imposed on the law by the Director of the Office of Management and Budget. Designated major infrastructure projects include fossil fuel and nuclear power plants, for which multiple authorizations by various agencies are now necessary. EO 13807 would substitute an approach called "One Federal Decision" for major infrastructure projects. Under this approach, a lead federal agency would manage the federal environmental review and authorization processes. The Order directs that federal agencies "shall all agree to a permitting timetable" and agencies shall record their individual decisions in a single record of decision, "completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years." EO 13807 Section 2(h).

A "One Federal Decision Memorandum of Understanding" was announced on April 9, 2018. Signatories to the MOU include *inter alia* the US Department of Energy, the Environmental Protection Agency, the U.S. Army Corps of Engineers, the Federal Energy Regulatory Commission, and the Advisory Council on Historic Preservation.

However, Executive Order 13807 is both totally unnecessary and counterproductive. Guidance published by the Council on Environmental Quality, includes the following response to a frequently asked question:

35. Time Required for the NEPA Process. How long should the NEPA process take to complete?

A. When an EIS is required, the process obviously will take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from

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³ Executive Order 13807, August 15, 2017

NEPA.

The time required for the preparation of program EISs may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.⁴

The Executive Order 13807 is based upon a fiction which holds that environmental reviews are to blame for the failure of some energy projects to be constructed. In our organizational experience of 34 years, unworthy projects have been abandoned for a variety of reasons; for example, economic factors or faulty management, but never because an environmental review took too long.

The legal fiction embodied in Executive Order 13807 is its fatal flaw, and wise counsel would consign it to the scrap heap of ill-considered ideas, in accord with the legal dictum:

Fictio legis iniquus operatur alieni damnum vel injuriam⁵

That is: "Fiction of law is wrongful if it works loss or injury to anyone." The injury imposed by the carrying out of Executive Order 13807 would be borne by the people the law is supposed to protect.

Respectfully submitted,



Louis A. Zeller
Executive Director

⁴ 46 Fed. Reg. 18026 (March 23, 1981) As amended (1986)

⁵ (2013, 04). Fictio Legis Iniquus Operatur Alienus Damnum Vel Injuriam legaldictionary.lawin.org Retrieved 07, 2018, from <https://legaldictionary.lawin.org/fictio-legis-iniquus-operatur-alienus-damnum-vel-injuriam/>, 2 Coke, 35; 8 Coke, 36; Broom, Leg. Max. (3d London Ed.) 122