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Have We Sold the Environment Down the River

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HAVE WE SOLD THE ENVIRONMENT DOWN THE RIVER?

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I. Introduction

The American Heritage Rivers Initiative (AHRI), a creation of the Council of Environmental Quality, is touted by the Clinton Administration as a program to "support community-led efforts to revitalize local economies, protect natural resources and the environment, and preserve historic and cultural resources."[1] Unfortunately, the AHRI does little to protect the ecosystems of rivers and their watersheds focusing instead upon the development of riverbank recreational and residential structures of unspecified size and scope. AHRI also calls for the development of federal river transportation systems, a federally funded river "navigator" to act as the final arbiter on all issues concerning the AHRI, and a "river community" committee of non-elected officials with quasi-federal jurisdiction to make all decisions for the river and the area lying within its watershed.[2]

Participation in the AHRI is limited to ten rivers which are to be selected by a presidential competition.

II. Council on Environmental Quality in the Clinton White House

In 1993 the Clinton Administration abolished the Council on Environmental Quality (CEQ) and established an Office of the Environment in the Executive Office of the President. Afterwards, the Administration was forced to reestablish the CEQ because it is mandated by the National Environmental Policy Act (NEPA) and the Executive branch lacks the constitutional authority to blatantly ignore statutes or command governmental agencies to do the same. The Office of Environment quietly disappeared and its leader, Kathleen A. McGinty, became the new Chair of the CEQ.

AHRI was introduced in the State of the Union address, February 4, 1997, and

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[1] 143 CONG. REC. D999-01 (daily ed. Sept. 24, 1997) (statement of Kathleen A. McGinty, Chair, Council on Environmental Quality).

[2] Watersheds will often include immense tracts of land affecting property owners far beyond the river

formally instituted with Executive Order 13061, issued September 11, 1997.[3] Clinton has said that the AHRI is needed "to make sure that the rivers that run through them [the cities] are good, clean rivers."[4] The Administration failed to recognize that the Rural Development Partnership (RDP), which was established by the Bush Administration in 1991, is an existing program which already addresses the same issues of riverside economic development as AHRI and is already at work in almost eighty percent of the states. Vice President Al Gore, in his National Performance Review Status Report, praised the RDP as an example of the "true spirit of reinventing government."[5] Unfortunately, the Vice President also failed to recognize that AHRI substantially duplicates the RDP. The Administration's dedication to reinventing the wheel was painfully apparent as it touted the AHRI as part of its "continu[ing] effort to refine how environmental protection is accomplished in the United States."[6]

Recognizing the similarity between the RDP and AHRI, Congress failed to fund the AHRI in the 1998 Budget Act.[7] The Administration reacted by diverting funds from other programs to fund AHRI in clear violation of both the 1998 budget and the constitutional separation of powers. This is but one of a staggering array of basic rights, statutes and constitutional mandates violated by the AHRI which are identified in this article.

III. We've Got Trouble in River City ---Threats to Basic Rights and Laws

1. National Environmental Policy Act

a. The AHRI Triggers NEPA's Requirement for an Environmental Assessment.

The AHRI violates the protections provided by America's first environmental statute, the National Environmental Policy Act (NEPA).[8] NEPA requires that any "major federal action significantly affecting the quality of the human environment"[9]

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[3] Exec. Order No. 13,061, 62 Fed. Reg. 48,445 (1997).

[4] Gina Robicheaux, *Event: President Clinton September 11 Creates American Heritage Rivers Program*, Capitol Report, FDCH News Service (Sept. 24, 1997).

[5] OFFICE OF THE VICE PRESIDENT, THE VICE PRESIDENT'S NATIONAL PERFORMANCE REVIEW —STATUS REPORT (1994).

[6] Sustainable Development Challenge Grant Program, 62 Fed. Reg. 26,896 (1997).

[7] *See* H. R. REP. NO. 105-36 (1997).

[8] 42 U.S.C. § 4321- 4374 (1996).

[9] 42 U.S.C. § 4332(2)(C)(1996).

must be preceded by an environmental assessment (EA) and possibly an environmental impact statement (EIS).[10] The EA/EIS requirement is triggered when such an action is proposed, long before its implementation, to ensure that federal decision makers consider the environmental impact of major federal projects. The Clinton Administration has ignored EA/EIS requirement, referring to it as "redtape",[11] and replaced the NEPA requirements with its own criteria for the award and implementation of AHRI projects.[12]

An EA is required whenever an agency has made an "irretrievable commitment" of resources.[13] This includes something more than merely giving out leases, but certainly includes the extensive planning and federal resources necessary to complete the AHRI application process which is estimated to require 32 hours to complete each the estimated 250 applications the AHRI will receive.[14] An EA was likely triggered sometime after the President's State of the Union Address on February 4, 1997. During the Address, he announced the program and the deadline for applications of December 10, 1997. It could be argued that this announcement was an "irretrievable commitment" of resources sufficient to trigger the EA/EIS requirement.

When an agency fails to conduct an EA or an EIS, that decision is subject to judicial review. The case law requires an agency to take a "hard look" at the environmental effects of a proposed major federal action, such as the AHRI, in order the fulfill the agency's NEPA obligations. Whether an agency took such a "hard look" is tested against the "arbitrary and capricious standard."[15] To date, no one has completed either an EA or EIS for the AHRI and there is no evidence that the Administration has even considered NEPA's requirements. Because the CEQ has joined with the Departments of Agriculture, Commerce, Defense, Energy, Interior, Justice, Transportation and Housing and Urban Development, the Environmental Protection Agency, Advisory Council on Historic Preservation, Army Corps of Engineers, the National Endowment for the Arts, and the National Endowment for the Humanities in implementing the AHRI, it is unlikely that either the Environmental Protection Agency (EPA) or the CEQ will fulfill their traditional roles as the watchdogs of NEPA compliance.[16] Furthermore, neither the EPA or the CEQ could proceed with the AHRI without preparing an EA or an EIS, because the two agencies

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[10] 42 U.S.C. § 4332(2)(C)(i) (1996).

[11] Dori Meinert & Frank Fuhrig, *Counties Oppose Clinton's River Plan*, THE STATE JOURNAL-REGISTER, Dec. 24, 1997, at A7.

[12] American Heritage Rivers Initiative, 62 Fed. Reg. 48,860 (1997).

[13] Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983).

[14] Submission for OMB Review, Comment Request, 62 Fed. Reg. 28,001 (1997).

[15] Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

[16] 143 CONG. REC. D999-01 (daily ed. Sept. 24, 1997) (testimony of Kathleen A. McGinty).

are affiliated with thirteen other government departments, commissions or agencies which do not enjoy any exemption from the requirement to produce an EA or EIS.

Once an EA is triggered, the proponent agency must determine if the proposed project is a "major federal action" and whether it may have a "significant effect" on the human environment.[17] If either of these two standards are met, the agency must prepare an EIS. It is not a heavy burden to determine if there is a "major federal action", any project which involves a broad scope of federal resources can be a major action. The determination of a "significant effect" on the human environment is subjective, but requires that all interconnected federal activities be considered in the determination.[18] To determine the scope of the AHRI, the interconnectedness of the project must be measured by the test of *Thomas v. Peterson.*[19] Interconnectedness occurs whenever a proposed federal project can not proceed unless other actions are taken either before or simultaneously with the project.[20] Under current law, it is likely that each river associated with the AHRI could be evaluated separately because they lack sufficient interdependence to be evaluated on a national scale. However, because an EIS appears to be warranted for each of the projects contemplated by the AHRI, the current Supreme Court could find that an EIS with a national scope may be warranted. In *Kleppe v. Sierra Club*,[21] the Court held that a local rather than a regional EIS was sufficient to issue coal leases locally, but the Court also suggested that Congress should adopt a national coal-leasing program and end the local lease program. It could be argued that AHRI is such a national program and that the current Court could require an EIS with national rather than local scope.

In *SCRAP II* [22], the Court determined that a final EIS is required whenever an agency proposes or recommends a project. A final EIS for the AHRI was probably required when the proposal was made, but is certainly called for by the time applications are to be received by the CEQ.

Traditionally, federal courts will enjoin further agency action on a project where the agency has failed to comply with NEPA and produce an EA or an EIS if called for. It is likely that if the AHRI process was tested in the courts, the CEQ would be enjoined from proceeding until an EA and possible an EIS have been completed.

b. A Significant Effect on the Human Environment --- The Goal of the AHRI as Well

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[17] 42 U.S.C. § 4332(C) (1996).

[18] *See* Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985).

[19] *See id.*

[20] *Id.* at 758.

[21] 427 U.S. 390 (1976).

[22] Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P), 422 U.S. 289, 320 (1975).

as the Trigger for NEPA.

The goal of the AHRI is to have a "significant effect on the human environment" and to "support community-led efforts to revitalize local economies, protect natural resources and the environment, and preserve historic and cultural resources." Certainly these goals fall within the ambit of NEPA. For example, one community has already applied to the AHRI in order to further its plan of riverbank development, recreational and residential construction and the construction of a river transportation systems, all in a pristine area, which has been officially designated as such by the Clean Air Act. [23] NEPA requires the CEQ to consider such significant impacts on the human environment in an EA and consider alternatives which minimize the environmental impact of the project. There is no indication from AHRI proponents that any of NEPA's environmental safeguards will be implemented to provide an enviornmental review of these projects. While all other "major federal actions" receive scrutiny for their effects on the human environment, it is incomprehensible that this kind of wholesale destruction of pristine river environments can go unchecked, unreviewed and uncontrolled.

c. The CEQ finds Statutory Authority for the AHRI in NEPA, But Is It Really There?

The President finds authority for the creation of the AHRI in §101(b) of NEPA which states in pertinent part " . . . it 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, resources to the end that the Nation may . . . preserve important historic, cultural and natural aspects of our national heritage . . . ."[24] Ironically, some of this language appears in the President's Executive Order.[25] Unfortunately, the Administration's interpretation of §101 is both new and detrimental to the environment. The CEQ previously interpreted NEPA §§ 101 and 102(2) as "action-forcing provisions to make sure that federal agencies act according to the letter and spirit of the Act . . . [and force] [t]he President, the federal agencies, and the courts [to] share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101."[26] As such, NEPA is not enabling legislation although the language "to improve and coordinate . . . programs . . . [to] preserve important . . . natural aspects of our national heritage"[27] may appear, on its face, to be so.

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[23] See Clean Air Act, 42 U.S.C. §§ 7401-7671 (1955 & Supp.1990).

[24] 42 U.S.C. § 4331(b)(4) (1996).

[25] Exec. Order No. 13,061, §1(b), 62 Fed. Reg. 48,445 (1997).

[26] 40 C.F.R. § 1500.1(a) (1999).

[27] 42 U.S.C. § 4331 (b)(4).

However, when read with the regulations, it is clear that this language refers to the enforcement of the CEQ's responsibility to coordinate and produce reports on the environmental impact of major federal projects among the agencies and not to announce major federal projects within this broad scope. The Supreme Court in *Robertson v. Methow Valley Citizens Council*[28] supported the CEQ's original interpretation of §101 stating "... [o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed --- rather than unwise --- agency action."[29] Therefore, both the regulations and the judicial interpretation of the statute indicates that there is no authority for the AHRI in any provision of NEPA.

2. Constitutional Violation, One. Separation of Powers

a. The Separation of Powers Doctrine Requires a Clear Delegation by Congress to Create an AHRI-type Program

American jurisprudence recognizes that the Constitution implies a separation in the powers of the departments and branches of the federal government.[30] Congress appropriates money for various federal projects and the Executive Branch implements those projects without adding to or subtracting from what Congress has delegated to each of them. The Supreme Court has expressly determined that it is the province of Congress "not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation."[31] Further, the courts "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power."[32] The AHRI is a major initiative which has NOT been mandated by Congress, but was in fact expressly prohibited by Congress in the 1998 Budget Act (see section 5 in this paper).

b. Executive Orders --- Power to Create Programs ?

Executive Orders must have some authorization in statutes from Congress. The Supreme Court held in *Youngstown Sheet and Tube Co. v. Sawyer* that "the

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[28] 490 U.S. 332 (1989).

[29] *Id.* at 351.

[30] Hobson v. Hansen, 265 F.Supp. 902, 915 (D.C. Cir. 1967) ("[T]he doctrine of separation of powers, though essential to the nature of our constitutional system, is not set forth explicitly in the Constitution .... [i]t is implied in the federal system.").

[31] Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978).

[32] American Petroleum Institute v. U.S. E.P.A., 52 F.3d 1113, 1120 (C.A.D.C. 1995).

President's power, if any, to issue the [Executive] order must stem from an act of Congress or from the Constitution itself."[33] In *Youngstown Sheet and Tube*, President Truman issued an Executive Order during the Korean conflict to take possession and operate most of the country's steel mills. Because it was an emergency and the act was intended to divert a national catastrophe, it was argued that the President had constitutional authority to issue the Order; however, the Supreme Court found otherwise, holding that even with an impending disaster, the Executive Order could not be sustained as an exercise of Presidential authority because there was no statute which expressly delegated such power to the President. Since no delegation of authority for the AHRI has been made, the issuance of an Executive Order is a violation of the Separation of Powers doctrine.

3. Constitutional Violation, Two. Tenth Amendment State Sovereignty.

Sovereignty of the states is recognized in the Tenth Amendment of the Constitution which notes that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[34] The power of the states over their own property issues has long been recognized and fiercely guarded since the formation of the United States. In *Hodel v. Virginia Surface Mining Reclamation*[35], the Supreme Court held that a legislative program violated the Tenth Amendment if the state's compliance with the statute would directly impair their ability [SAM TO SAM, CHECK THIS QUOTE] "to structure integral operations in areas of traditional functions."[36] Zoning and land use are two areas which have traditionally been reserved to the states as being the proper functions of state and local governments. To the extent that the AHRI exerts federal regulatory control over zoning and land use issues, there is a Tenth Amendment violation.

Before 1965, the federal executive branch proposed another wide sweeping program, very similar to the AHRI, which met with many of the same objections including a Tenth Amendment objection. This development occurred within the Department of Interior under Secretary Udall, in the Water Resources Council, which was associated with the Federal Water Pollution Control Act. The Water Resources Council (WRC) wanted to cover the entire United States with contiguous river basin commissions. These commissions would each be chaired by a federal official, much like the "River Navigator" of the AHRI is the chair of the local river community committee. Opposition to the WRC's plan was very high. Texas fought

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[33] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

[34] U.S. CONST., amend. X.

[35] 452 U.S. 264 (1981).

[36] *Id.*

the appointment of any federal official to any River Basin within the state. One of these river basin commissions, the Delaware River Basin Commission, however, was successfully established, but after long debates and pockets of major opposition on a nationwide basis, the program was dropped.[37]

4. "No new rules!" [38] — Saying it, Does Not Make it So — The Administrative Procedure Act and Rulemaking.

The Administrative Procedures Act (APA) requires a public "notice and comment" period on any rule making activity. The fact that the CEQ did not call the AHRI a rule making activity or that they claimed to add "[n]o new regulations or rules" is irrelevant and little more than Washington spin. APA §551(4) defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[39] The extensive description of the AHRI program printed in the Federal Register certainly met this definition of "rule." Therefore, the fact that the claim is made that there will be "no new regulations" . . . is a case of saying it does not make it so.

The first publication of the AHRI proposal was May 19, 1997.[40] This proposal required that comments must be received by June 9, 1997. This period, 21 days, fell significantly short of the statutorily required 60 days for comments. The CEQ came under immediate pressure from Congress because of this shortened period, and as a result, the CEQ, on June 20, 1997 issued a Federal Register notice which provided for an extension of the comment period until August 20, 1997.[41] Comments were received in the form of 1,727 personal letters, e-mail messages, phone messages, faxes, petitions and form letters. The comments were received from individuals (58.5%), elected officials (12.1%), ranchers or farmers (4.2%), and members of environmental groups (3.9%).[42] Their concerns included every part of the program, and these concerns were discussed by CEQ and the Clinton Administration. For example, where there were concerns about private property rights, the Administration responded that the Executive Order already mentioned private property rights

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[37] Interview with Joe G. Moore, Jr., former Program Director, Water Commission, Department of Interior, 1968-1970 (April 3, 1998).

[38] By following the definition of a rule under 5 U.S.C. Section 551(4) (1996), the AHRI would be defined as a rule by reading Exec. Order No. 13,061, 62 Fed. Reg. 48,445 (1997). Thus, the AHRI is outside the authority of the Executive Branch.

[39] 5 U.S.C. §551(4) (1996).

[40] American Heritage Rivers Initiative; Proposal With Request for Comments, 62 Fed. Reg. 27,253 (1997).

[41] American Heritage Rivers Initiative, 62 Fed. Reg. 33, 647 (1997).

[42] Description of American Heritage Rivers Initiative, 62 Fed. Reg. 48,860 (1997).

would not be interfered with! Again, saying it does not make it so.

5. 1998 Budget Act, Misappropriation of Funds and the Spending Clause.

The Report accompanying the June 1997 Budget Act from the Committee on Appropriations,[43] stated that the implementation of the AHRI would "directly contradict Congressional intent." The Executive Branch ignored this directive and forged ahead.

Article I, Section 8 of the United States Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and expenditures of all public Money shall be published from time to time." One of the purposes of Section 8 has been articulated by the Supreme Court in *Office of Personnel Management v. Richmond,*[44] wherein the Court held that "public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents . . . ."[45] The political purposes of the AHRI have been called into question with the appearance of a White House memorandum which read: "Selection committee will recommend more AHR's (American Heritage Rivers) than are actually designated, giving someone else (the President?) a further choice. This could ensure that designated AHR's: Serve Political Purposes; are located where agencies can staff them; and are diverse (river, landscape, community, geography, etc.)." [46]

This is exactly the kind of discretion the Court in *OPM v. Richmond* opined to be unconstitutional and a violation of Article I, Section 8.

6. Private Property Rights — Potential Fifth Amendment Takings Issues

Private property rights will be affected for any private property owner within the watershed area of the river chosen in this competition. The area will fall under the control of both the river community committee and the federally appointed "navigator." The private property owners within the area will run the risk of limitations being placed upon the use of their property which could conceivably result in a Fifth Amendment, constitutional "taking" of property, requiring compensation. Although the CEQ has specifically denied that there are any Fifth Amendment issues, "wishing" does not make it so.

The western states have developed complex state-based, water-use rights laws which allow for the distribution of scarce water resources. These laws have been

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[43] H. R. REP. NO. 105-36 (1997).

[44] 496 U.S. 414 (1990).

[45] *Id.* at 428.

[46] 144 CONG. REC. E2184 (daily ed. October 15, 1998); *See* H. R. REP. NO. 105-36 (1997).

developed and adopted over the past several decades and are carefully guarded by local lawmakers and citizens alike. The AHRI would create a quasi-jurisdictional regulatory overlay which will preempt these laws and deny many citizens their property rights.

Although the jurisprudence of government takings was established in 1921 with *Pennsylvania Coal Co. v. Mahon*[47], it was not until recently that the Supreme Court undertook to address the issues of regulatory takings in its landmark decision *First Evangelical Lutheran Church v. Los Angeles.*[48] The Supreme Court recognized that even a temporary taking can be compensable under the Fifth Amendment. The compensation remedy was held to be "fair value for the use of the property during such period."[49] Again, the movement away from physical taking was supported by the recognition that a taking could occur without permanency. In that same year, in *Nollan v. California Coastal Commission,*[50] the Court heightened the standard for governmental action in a compensable taking to include a requirement for an "essential nexus"[51] between the legitimate state interest and the state action.

Five years later in 1992 in *Lucas v. South Carolina Coastal Commission,*[52] the Court, for the first time, found that an environmental regulation had effected a compensable taking where a governmental action essentially removed all value from the property.

Lucas was the basis the U.S. Court of Appeals for the Federal Circuit needed to address the issues in *Florida Rock Industries v. United States.*[53] The denial of a §404 permit on private property resulted in a finding of a *partial* taking. Through the application of the Takings Clause, governmental action was limited by requiring compensation for not only full takings as in *Lucas*, but also for a partial diminution of value resulting from a partial taking. The Supreme Court denied certiorari, and partial takings for wetlands preservation under the Clean Water Act were permitted to stand. In another case involving the denial of a section §404 permit, *Loveladies Harbor v. United States,*[54] which was decided later the same year, the test for partial takings was sharpened. The takings jurisprudence provides compensation for regulatory takings due to changes in regulations which diminish the uses and the investment-backed expectations of the owner. The scope of the AHRI will extend to private property beyond any federal land, because they are committed to

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[47] 260 U.S. 393 (1922).

[48] 482 U.S. 304 (1987).

[49] *Id.* at 314.

[50] 483 U.S. 825 (1987).

[51] 438 U.S. 825, 834 (1987).

[52] 505 U.S. 1003 (1992).

[53] 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

[54] 28 F.3d 1171 (Fed. Cir. 1994).

protecting the "water basin" around the river,[55] potentially taking in significantly more land mass than the river area.

7. Constitutional Violation, Three. Even If There Is a Proper Delegation of Authority Through Other Statutes — the AHRI is a Violation of the Commerce Clause.

The Commerce Clause gives Congress the authority to "regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."[56] The Supreme Court determined in *Gibbons v. Ogden*[57] that the Commerce Clause included navigable interstate waters. The Court held that states could not control navigable routes of trade and commerce, within their borders, because the ultimate effect would be a restraint of free commerce among the states.

In addition to the plenary power of Congress concerning commerce, the Clean Water Act specifically states that its goal is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters,"[58] on the basis of the Commerce Clause authority exercised by the Congress. From the Clean Water Act, the §404 wetlands permitting regulations were also found to have a valid base in the Commerce Clause in *United States v. Riverside Bayview Homes*,[59] which extended the Clean Water Act based on the Commerce Clause to those wetlands adjacent to navigable waters. Later, this authority would be extended to isolated wetlands in *Leslie Salt Company v. United States.* [60]

The recent case of *United States v. Lopez*[61] created a limitation on the plenary power of Congress through the Commerce Clause. The reach of the Commerce Clause through the Clean Water Act may be under new scrutiny with the *Lopez* decision, which identified the regulated matter, possession of guns near schools, as an area that should be regulated by the states. The *Lopez* test requires that the activity to be regulated by Congress must "substantially affect[] interstate commerce."[62] While the ability to regulate the navigable rivers will not be in question, reaching the property within the water basin raises the issue of land use planning and zoning on property located potentially far from the river. Land use planning and zoning have been activities traditionally regulated by the states and is an interest which is very important to states to protect and maintain. The higher

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[55] Exec. Order No. 13,061, 62 Fed. Reg. 48,445 (1997).

[56] U.S. CONST., art. I, § 8, cl. 3.

[57] 22 U.S. 1 (1824).

[58] 33 U.S.C. § 1251(a).

[59] 474 U.S. 121 (1985).

[60] 55 F.3d 1388 (9th Cir. 1995).

[61] 514 U.S. 549 (1995).

[62] *Id.* at 559.

standard requiring the regulated activity to "substantially affect[]" interstate commerce would also make it more difficult to regulate these issues utilizing the Commerce Clause. Without authority from Congress to regulate all of these areas, the AHRI is in violation of the Commerce Clause.

8. Constitutional Violation, Four. Property Clause Violation is Claimed by Members of Congress in a Motion for Preliminary Injunction.

The Property Clause of Article IV of the U.S. Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."[63]

Federal lands have been specifically identified as under the exclusive control of Congress in *Kleppe v. New Mexico*[64] where the Supreme Court held that Congress has complete sovereign power without any implicit limitations. Congress reasserted its authority over federal lands and eliminated any question as to whether the President could withdraw, designate or dedicate federal lands when it passed the Federal Land Management and Policy Act. [65] There is no area left for the President to control, and there is clearly no acquiescence from Congress on the issue of federal lands.

9. The Implementation Process Begins, and Now ---Federal Advisory Committee Act (FACA) Violations

Once the AHRI program proceeded, the President issued a second executive order which provided for a federal advisory committee for the AHRI.[66] Such a committee is regulated by the Federal Advisory Committee Act (FACA).[67] The FACA requires meetings to be open to the public except in exceptional circumstances. Those exceptions must be included in the notice of the meeting which is required to be published in the Federal Register.

Again, the CEQ proceeded as if it were free of all legal constraints. The Committee formed under the statute by Executive Order met on May 11-12, 1997 in a closed meeting and neither published a notice of the meeting nor put forth a basis for closing the meeting. Members of Congress were understandably outraged and sent a letter, signed by sixty Members, demanding that the Administration comply with the FACA requirements and open the meetings. Representatives Chenoweth

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[63] U.S. CONST. art. IV, § 3, cl. 2.

[64] 96 S. Ct. 2285, 2292 (1976).

[65] 43 U.S.C. § 1701 (1996).

[66] Exec. Order No. 13,080, 63 Fed. Reg. 17,667 (1998).

[67] 5 U.S.C. App. (1996).

and Schaffer specifically asked the Administration to state which FACA exceptions were relied upon to close the meeting. At this point, the CEQ decided not to close the next meeting, but told committee members that they intended to hold a conference call the next day to finish a discussion of their business! To no one's surprise (except the CEQ), Congress was, again, outraged and emphasized to the CEQ that conference calls constituted a meeting, and as such, fell under the requirements of the FACA.[68]

IV. Congressional Opposition

Congressional opposition to the AHRI has included a request from 55 Members of Congress and 15 Senators to extend the comment period on the abbreviated Federal Register notice published by the Council on Environmental Quality, which was refused by Ms. McGinty in a letter to the Senate. Further opposition took the form of a provision in the 1998 Budget Act prohibiting the use of funds for the AHRI, and later, a bill to prevent the implementation of the AHRI which was introduced in September, 1997.[69] Additionally, Senator Hutchinson sponsored a bill which would require congressional designation of any river which participated in AHRI, but it too, was defeated.[70] Finally in December 1997, four members of Congress [71] filed a motion for a preliminary injunction in the U.S. District Court for the District of Columbia. The suit was dismissed for lack of standing early in 1998, and it has been appealed. It is unlikely that the Members will succeed in getting a favorable determination of standing, and so the substantive issues in the complaints will never be reached by the court.

The opposition from Congress was significant enough to produce concern within the Administration and lead to the CEQ providing an "opt out" policy whereby a member of Congress could "opt out" of consideration of any river or portion of a river in their district or state. The policy requires a letter to be written from the Member or Senator to achieve that opt out. The policy was issued only May 8, 1998 [72] and is itself of questionable Constitutional validity, since the policy provides a negotiation process between Congress and the Administration whenever there is a disagreement on the opt out. The separation of powers issue is sure to be raised whenever the opt out process is first used.

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[68] Interview with Kurt Christiansen, Staff Member, Committee on Resources, U.S. House of Representatives (May 15, 1998).

[69] H.R. 1842, 105th Cong. (1997).

[70] S. 1196, 105th Cong. (1997).

[71] Representatives Helen Chenoweth (R-ID), Richard Pombo (R-CA), Bob Schaffer (R-CO) and Don Young (R-AK).

[72] 63 Fed. Reg. 25,479, 25,480 (1998).

V. Recommendations

If the Clinton Administration had the goal of simply identifying rivers for economic, cultural and environmental preservation and development, and awarding designations accordingly, how might such a presidential initiative been planned so as to avoid the current plethora of problems? As a former Assistant Director of the Office of Science and Technology Policy, I was responsible for the implementation of six major Presidential Initiatives. Each was painstakingly identified, line-by-line in each of the participating agencies' budgets and approved by Congress. This was, for example, the groundwork that resulted in the crafting and subsequent congressional passage of the one billion dollar, U.S. Global Climate Change Research Program. Not one congressional dime would have been appropriated for these coordinated Presidential Initiatives without seeking bi-partisan congressional approval. Although all of the programs and budgets for each of the components of the coordinated initiatives had to be approved by Congress, line-by-line, congressional committee-by-congressional committee, a further approval process was required for the approval of the Presidential Initiative, itself. For example, the approval of the Mathematics and Science Education Presidential Initiative first received separate approvals of all line items through each individual agency budget cycle and congressional hearing process. Then, a joint congressional committee hearing for the major congressional committees having jurisdiction for the Mathematics and Science areas was specifically held to hear and vote on the initiative. This was an unprecedented process, but one which resulted in an initiative which was one of the most completely coordinated and fully supported efforts throughout the federal government. This takes time, and it takes compromise, but it is legal and effective.

There are many overlapping statutes from which the CEQ claims authority for the AHRI. The Wild and Scenic Rivers Act, enacted in 1968, provides that rivers with "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and . . . they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations."[73] The Act includes power to acquire land, to prevent construction of water resource projects, withdrawal of public lands from entry, restrictions on mineral development, and the reservation of water rights. With these existing authorities, what does the AHRI add for the Clinton Administration? The usefulness of having the federal government direct the local component of this effort is useless at best. If local communities had the ability to develop the massive coordinated application package needed to apply for AHRI designation, they would not need the federal government to direct their coordination and communica-

[73] 16 U.S.C. §§ 1271-1283 (1996).

tion efforts or provide a direction for local historical research.[74] Local communities who need this kind of guidance would be the communities who were *not* capable of putting together an application package for this designation.

The CEQ should review its actions taken to date, reassess the goals of the AHRI, and implement the statutory authority which has been delegated through existing statutes, no more than what has been delegated. Appropriating taxpayers' money for projects which have become suspect of having political motivation detracts from any genuine efforts to protect and preserve environmental and cultural resources.

VI. Conclusion

The continuing history of legal bungles in the Council on Environmental Quality, with the new addition to this list of the American Heritage Rivers Initiative, puts the status of the nation's environmental protection in question.

The National Environmental Policy Act requires environmental assessments for major federal actions, but this has been waived or ignored by the CEQ. The utilization of NEPA to find authority for the AHRI is a misreading of the statute, a disregard for its judicial interpretation, and even a disregard for the agency's own prior interpretation of the very provisions upon which the Administration rely. The major impact on the environment, which is the very goal of the AHRI, is exactly the kind of environmental impact which NEPA was designed to protect against, not designed to authorize.

The Administration has violated the Separation of Powers Doctrine by delegating authority to its agencies to create the AHRI when no such power has been given by the Congress. Additionally, the Administration has exceeded its constitutional authority as well by issuing Executive Order to launch the AHRI. Further constitutional violations include that of the Tenth Amendment and state sovereignty. The AHRI flies in the face of current congressional interest in revitalizing Tenth Amendment protections and is poorly conceived.

The effort to claim there are "no new rules" is laudable. However, the actions taken by the Administration probably constitute rulemaking under the Administrative Procedure Act, thereby violating the notice, comment and due process requirements of the APA and destroying the protection those requirements afford those citizens who will be affected by the AHRI.

The 1998 Budget Act specifically directs the Executive Branch not to appropriate any money for the AHRI, and the Spending Clause gives Congress the ultimate authority to make such determinations. These prohibitions have been completely ignored by the Administration.

Private property rights, in terms of potential Fifth Amendment takings issues, are

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[74] American Heritage Rivers Initiative, 62 Fed. Reg. 48,860, 48864 (1997).

serious concerns. The large number of individual private property owners who will be affected by the AHRI will likely raise these issues, repeatedly, in federal court which is likely to expose the constitutional violations of the Commerce Clause and the Property Clause which lie at the heart of the problem with the AHRI.

Finally, in what is only the beginning of the implementation of the AHRI, the Administration has violated the Federal Advisory Committee Act by holding meetings without notice, closing meetings without stipulating specific exceptions required to hold closed meetings and continues to threaten to hold such illegal meetings.

The existence of congressionally delegated authority under other statutes with goals more specifically directed to the preservation of natural and cultural resources, such as the Wild and Scenic Rivers Act would be legal and more credible on the part of the Administration.

Representative Christopher Cannon (R-UT) has estimated that three to five congressional districts could be covered by each of the ten rivers designated by President Clinton. Using those figures, it has been calculated that by the next Presidential election in 2000, the President would have targeted federal funds to go to between 90 and 150 political districts.[75] Given the memorandum which sets forth the goal of serving "political purposes" for the AHRI, this cannot be overlooked in analyzing the motivation for a program fraught with such serious constitutional and statutory violations and contradictory goals and purposes.

The failure to provide any checks on the environmental impact these projects will have on the environment as an effort to "cut red tape" is not within the authority of the Executive Branch. As CEQ attempted to abolish the statute creating the CEQ and the National Environmental Policy Act implementation authority, it failed to recognize the Separation of Powers Doctrine and the impossibility of the task. So, too, CEQ has failed to recognize the impossibility under the Separation of Powers Doctrine to waive the requirements of the National Environmental Policy Act to accomplish its self-defined goals more expeditiously!

The inherent disingenuousness of the President's concern with river quality, given his history of failure to have protected almost every tributary of the White River of Arkansas from poultry industry pollution, may contribute to the questions raised about the contradictory goals of the AHRI.

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[75] Alex Annett, "Good Politics, Bad Policy: Clinton's American Heritage Rivers Initiative," 171 F.Y.I. 9 (Feb. 2, 1998).