



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-278224

November 10, 1997

The Honorable Conrad Burns
United States Senator
324 W. Towne Street
Glendive, Montana 59330

Dear Senator Burns:

This is in response to your letter of September 17, 1997, requesting our opinion as to whether the American Heritage River Initiative is a "rule" under the Small Business Regulatory Enforcement Fairness Act. 5 U.S.C. § 801 *et seq.*

In his 1997 State of the Union address, President Clinton announced that he was directing his Cabinet to design an initiative to support communities' efforts to restore and protect their rivers. The American Heritage River Initiative (AHRI) was published as a notice by the Council on Environmental Quality in the Federal Register on May 19, 1997 (62 Fed. Reg. 27253). According to the notice, the AHRI was developed by an interagency task force.¹

On September 11, 1997, President Clinton signed Executive Order No. 13061 entitled, "Federal Support of Community Efforts Along American Heritage Rivers," in which he announced the policies of the executive branch and the nomination and selection processes for designating an American Heritage River. The order also established an interagency committee to institute guidelines for designation and to review and report to the President on the progress and effectiveness of the program.

The AHRI's goal is to support communities by providing them with better access to information, tools, and resources and encouraging private funding of local efforts deserving of special recognition. The President will designate, by proclamation, 10 rivers in calendar year 1997 from those rivers nominated by the local communities. Each "River Community" will have a "River Navigator" assigned to provide access to the federal agencies and existing programs and to simplify

¹The task force was composed of the Departments of Agriculture, Commerce, Defense, Energy, Interior, Justice, and Housing and Urban Development; the Environmental Protection Agency; Advisory Council on Historic Preservation; Army Corps of Engineers; and the National Endowment for the Humanities.

delivery of these programs. Both the Federal Register notice (62 Fed. Reg. at 27253) and section 1(d) of the executive order state that no new regulatory authority or requirements are established or created as a result of the AHRI.

Chapter 8 of title 5, United States Code, entitled, "Congressional Review of Agency Rulemaking," is designed to keep Congress informed about the rulemaking activities of federal agencies and to allow for congressional review of rules.

The Initiative did not follow the normal rulemaking procedures contained in the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) but was published as a notice in the Federal Register. This is probably explained by the fact that the courts have held that the Council on Environmental Quality, which announced the Initiative, does not have any regulatory function. The Council was established under the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) to review federal programs and activities so as to keep the President informed on the extent to which these activities may affect the policies set forth in the act. The Council's function is in no way regulatory. National Helium Corporation v. Morton, 455 F. 2d 650 at 656 (1971).

Therefore, it took the issuance of the executive order by the President to establish the Initiative and put it in motion by directing executive agencies to take certain actions. Prior to the issuance of the order, the Initiative appears to have been merely the recommendation of an interagency task force.

The Congressional Review Act requires a "federal agency" to submit rules to each House of Congress and to our Office before the rule can become effective. Section 804(1) of title 5 states that "federal agency" means any agency as that term is defined in section 551(1), which contains the definitions for the Administrative Procedure Act (APA).

The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia;" 5 U.S.C. § 551(1).

The United States Supreme Court found in Franklin v. Massachusetts, 505 U.S. 788 at 800 (1992), that the President is not an "agency" under the APA and is not subject to the provisions of the APA. The Court noted that while the President is not explicitly excluded from the APA's purview, he is not explicitly included, either. In view of the separation of powers and the constitutional position of the President, the Court held that it would require an express statement by Congress before assuming the President's actions are subject to the APA. See also Dalton v. Spector, 511 U.S. 462 at 469 (1994).

Accordingly, since the President is not an "agency" under the Congressional Review Act, Executive Order No. 13061, which implemented the notice issued by the Council on Environmental Quality, need not have been submitted to Congress and our Office under section 801.

We trust this responds to your inquiry.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Robert P. Murphy".

Robert P. Murphy
General Counsel