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SENT VIA EMAIL ONLY

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President Donald J. Trump
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

RE: Executive Order 13927 Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities

Dear President Trump:

We, the undersigned Attorneys General of Maryland, Massachusetts, California, Colorado, Connecticut, Delaware, Illinois, Michigan, Minnesota, New Jersey, New York, Oregon, Vermont, Washington, Wisconsin, and the District of Columbia write to express our serious concerns with Executive Order 13927, which instructs federal agencies to use their emergency authority to bypass the important environmental review and permitting requirements of the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and Clean Water Act (CWA), among other laws, in order to “facilitate the Nation’s economic recovery” from the COVID-19 pandemic.

While we acknowledge the serious nature of the current economic downturn, the regulations that implement these bedrock environmental laws only authorize the use of emergency procedures when complying with the normal environmental review requirements would pose an immediate threat to life or property, situations like natural disasters or other unforeseen and suddenly destructive events. Broad, nationwide use of these emergency exceptions “to facilitate the Nation’s economic recovery” from a global, months-long pandemic is plainly unlawful and risks further harming the very communities that are already disproportionately affected by the virus and other environmental risks. We are also concerned that the Order lacks any guarantee of transparency. It is crucial that agencies allow for prompt public engagement on any projects or actions deemed eligible for emergency review.

These are unprecedented times. COVID-19 has laid bare the structural inequalities that pervade our society. Now more than ever, our residents need strong environmental protections. We therefore urge you to immediately withdraw Executive Order 13927.

Among other troubling commands, the Executive Order specifically instructs the federal agencies charged with implementing NEPA, the ESA, and the CWA to use emergency authority to approve “planned or potential actions to facilitate the Nation’s economic recovery.” Executive Order 13927. But each of these statutes requires comprehensive environmental review, and the regulations providing for emergency alternatives are narrowly tailored. The exceptions cannot be exercised beyond their explicit scope without running afoul of their authorizing statutes.

NEPA, 42 U.S.C. § 4321, *et seq.*, declares a national policy of environmental protection through informed, transparent decision-making. *See* 42 U.S.C. § 4321. It was passed over fifty years ago “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.” 42 U.S.C. § 4331(a). To achieve its important goals, NEPA requires that federal agencies take a “hard look” at the environmental impacts of their actions and demands that “the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989). Agencies must prepare and allow for public comment on a detailed environmental impact statement for any “major federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(c). Congress mandated that federal agencies perform these duties “to the fullest extent possible.” *Id.* § 4332.

Accordingly, NEPA’s implementing regulations provide that a federal agency may consult with the Council on Environmental Quality (CEQ) to establish “alternative arrangements” for NEPA compliance only “where *emergency* circumstances make it *necessary* to take an action with significant environmental impact without observing the provisions of the regulations.” 40 C.F.R. § 1506.11 (emphases added).¹ These emergency regulations only apply “to actions *necessary* to control the *immediate* impacts of the emergency.” *Id.* (emphases added). And CEQ has further clarified that “emergency circumstances” are those “involving immediate threats to human health or safety, or immediate threats to valuable natural resources.”²

Similarly, the Endangered Species Act protects our most threatened species of plants and wildlife through a statutory policy of “institutionalized caution.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1975). The ESA declares “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered ... and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA].” 16 U.S.C. § 1531(c). “Conserve” is broadly defined as “to use and the use of all methods and procedures which are necessary to bring any endangered ... or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”—*i.e.*, to the point of full recovery. *Id.* § 1532(3). The ESA requires that economic considerations play *no* role in determining whether

¹ CEQ has proposed moving this provision to 40 C.F.R. § 1506.12 without any substantive expansion of its terms. *See* 85 Fed. Reg. 1684, 1727 (Jan. 10, 2020).

² CEQ, “Emergencies and the National Environmental Policy Act” (2016), *available at* https://ceq.doe.gov/docs/nepa-practice/Emergencies_and_NEPA.pdf.

to add a species to the threatened or endangered species lists. *Id.* § 1533(b). In short, the ESA’s paramount conservation mission must override economic concerns.

A central pillar of the ESA is the requirement that action agencies consult with an expert agency prior to the authorization of any project likely to adversely affect a threatened or endangered species. 16 U.S.C. § 1536(a)(2). Only in emergency situations, those “involving acts of God, disasters, casualties, national defense or security emergencies, etc.,” may agencies engage in streamlined consultation, and agencies still must initiate formal consultation “as soon as practicable after the emergency is under control.” 50 C.F.R. § 402.05.

Finally, the Clean Water Act was passed “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters,” 33 U.S.C. § 1251(a), and executes that goal by, among other things, barring discharges into navigable waters except in accordance with an appropriate permit. 33 U.S.C. §§ 1311, 1344. The statute again contains only narrow exceptions to its core requirements. No permit is needed for the “*emergency* reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.” 33 U.S.C. § 1344(f)(1)(B) (emphasis added). Regulations further authorize special processing procedures in emergency situations, narrowly defined as those “which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if *corrective action* requiring a permit is not taken.” 33 C.F.R. § 325.2(e)(4) (emphasis added).

True to their narrow scope, these emergency provisions have historically been invoked only when a physical emergency necessitates immediate agency action, like responding to an imminent dam failure,³ repairing roads damaged by a landslide,⁴ or cleaning up an oil spill.⁵ For example, each of these provisions helped speed the response to Hurricane Katrina.⁶ But such emergency authorizations have always been narrowly tailored to respond to a catastrophe with a specific geographical scope that posed imminent threats to human life and existing property.

³ See 72 Fed. Reg. 5020 (Feb. 2, 2007).

⁴ See Letter to Ms. Alexandra Velazquez Delgado, Director, Programming and Special Studies Area, Puerto Rico Highway and Transportation Authority, U.S. Fish and Wildlife Service- Endangered Species Act Emergency Section 7 Consultation Best Management Practices (BMPs) for Federally Listed Species in Relation to Emergency Works on Various Roadways in Puerto Rico due to Hurricanes Irma and Maria, *available at* <https://www.fws.gov/southeast/pdf/guidelines/puerto-rico-emergency-road-repair.pdf>

⁵ See Emergency Biological Opinion, Mt. Erie, IL Marathon Pipe Line Spill Emergency Response, Apr. 30, 2010, *available at* https://www.fws.gov/midwest/endangered/section7/batbo/10_IL_MarathonPipelineSpillEmergencyBO.pdf.

⁶ See, e.g., Colonel Albert M. Bleakley, Jr., Deputy Commander, Department of the Army Mississippi Valley Division Corps of Engineers, Emergency Permit Procedures for the States of Louisiana and Mississippi within the Boundaries of the Mississippi Valley Division (Sept. 3, 2005), *available at* <https://www.hSDL.org/?abstract&did=456265> (Invoking 33 C.F.R. § 325.2(e)(4) in response to Hurricane Katrina); 72 Fed. Reg. 11337 (Mar. 13, 2007) (Invoking 40 C.F.R. § 1506.11 in response to Hurricane Katrina); Letter from Sam D. Hamilton, Southeast Region Director, FWS, to Federal Agencies Affected by Hurricane Katrina Response and Cleanup, *available at* <https://www.fws.gov/southeast/pdf/guidelines/hurricane-response-letter.pdf> (Providing guidance to federal agencies concerning emergency ESA consultation on projects responding to Hurricane Katrina).

Waiting for the completion of environmental review under such conditions would have stalled life-and-death federal government responses.⁷

The state of the *national* economy, even a downturn related to an extended pandemic, is simply different in kind from such imminent emergency situations and cannot provide a lawful basis to broadly trigger the emergency provisions of NEPA, the ESA, and the CWA. Attempting to justify the use of these emergency regulations by invoking the economic effects of the COVID-19 crisis stretches these narrow exceptions well beyond their lawful limits.⁸ We therefore urge you to withdraw Executive Order 13927 and commit to recovering the economy by other lawful means.

If you do not withdraw the Executive Order we urge you to emphasize the importance of transparency and public participation throughout the emergency identification, review, and approval of infrastructure projects. The Executive Order instructs federal agencies to provide the heads of the relevant expert agencies, as well as the Director of the Office of Management and Budget (OMB), the Chairman of CEQ, and the Assistant to the President for Economic Policy, with lists of projects which may benefit the Nation's economic recovery, but does not specify how agencies will determine which projects to include in these lists and whether the project lists and status reports will be released to the public. In the interest of transparency, we urge you to require that agencies make their decision-making processes, project lists, and status reports publicly available and to allow for public comment on such actions. Specifically, we encourage you to instruct CEQ to publish all relevant agency determinations on its website and to update that list regularly.

Indeed, the COVID-19 crisis underscores the importance of comprehensive and transparent environmental review. To date, the disease has infected over 2,500,000 people and killed more than 125,000 in the U.S. alone.⁹ The severity of the pandemic, however, has not been felt uniformly across all segments of society. Infection rates are disproportionately higher among low-income communities, and people of color are far more likely to die of COVID-19 than white Americans in their same age range.¹⁰ As we continue to gather data on the disease's prevalence, a correlation between race, exposure to pollution, and the severity of COVID-19

⁷ There may be circumstances where it is appropriate to use these emergency provisions to speed the construction of life-saving infrastructure, like field hospitals or testing sites, in response to an imminent public health crisis like a localized outbreak of COVID-19. Executive Order 13927, however, does not address such emergency circumstances.

⁸ These concerns hold true for emergency provisions in other environmental statutes. Regulations implementing the Coastal Zone Management Act (CZMA), for example, allow federal agencies to deviate from full consistency with a state's management program if justified by "exigent circumstances." 15 C.F.R. § 930.32(b). But the regulations also require that "any deviation shall be the minimum necessary to address the exigent circumstance" and that full consistency is required as soon as the exigent circumstance has passed. *Id.*

⁹ CDC, *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, available at

<https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited June 29, 2020).

¹⁰ Tiffany Ford, Sarah Weber, and Richard V. Reeves, *Race Gaps in COVID-19 Deaths are Even Bigger than They Appear*, Brookings, June 16, 2020, available at <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/>.

infections has become increasingly clear. Indeed, studies now link lifetime exposure to air pollution with an increased risk of death from COVID-19 infection.¹¹

Ordering agencies to expedite the environmental reviews for infrastructure projects, like oil and gas pipelines, natural gas compressor stations, and other polluting industrial facilities, which are commonly located in low-income and minority communities, ignores these realities and threatens to place additional burdens on those already hardest hit by the disease and disproportionately burdened by a damaged environment. Rigorous environmental review with ample time for community input and public comment provides an indispensable layer of protection for these at-risk communities.

Make no mistake, environmental health is public health and instructing federal agencies to take an end run around measures that protect the environment betrays the public welfare. Broadly using emergency exceptions to avoid the normal review required by NEPA, the ESA, and the CWA to respond to the economic effects of the COVID-19 pandemic is unlawful and risks disproportionately impacting communities that are already facing inequitable environmental harm. That harm may be further compounded by a lack of transparency and public engagement when selecting, reviewing, and approving projects for emergency treatment. Requiring proposed infrastructure projects to complete the normal requirements of environmental review does not mean that they will not be built. It simply means that the agencies will have to account for the projects' impacts on public health and the environment, consider alternatives that may avoid those harms, and mitigate the worst effects of their chosen course. We therefore urge you to immediately withdraw this harmful Executive Order.

Sincerely,



Brian E. Frosh
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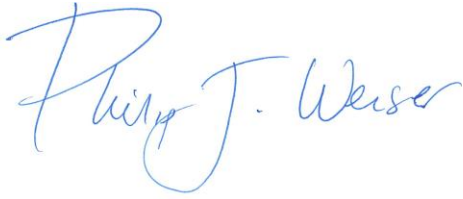


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¹¹ Xiao Wu, et al., *Exposure to air pollution and COVID-19 mortality in the United States: A Nationwide cross-sectional study*, medRxiv (pre-print) (Apr. 27, 2020), available at <https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2>. For a state-specific analysis of the pandemic's unequal impacts on communities of color which have long been among the most polluted, see Office of Massachusetts Attorney General Maura Healey, *COVID-19's Unequal Effects in Massachusetts: Remediating the Legacy Of Environmental Injustice and Building Climate Resilience*, May 2020, available at <https://www.mass.gov/doc/covid-19s-unequal-effects-in-massachusetts/download>.



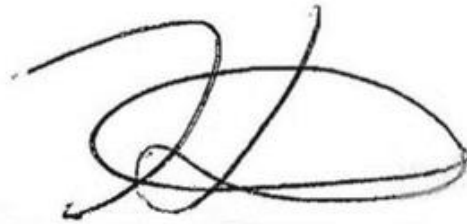
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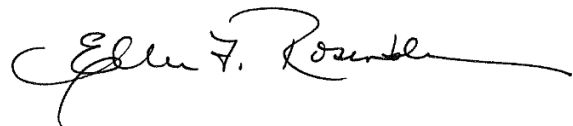
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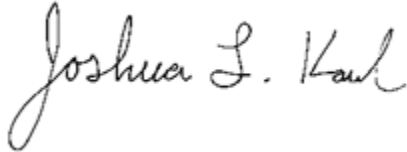
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