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September 9, 2003

The Honorable Doug Ose
Chairman
Subcommittee on Energy Policy, Natural Resources
and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Re: Subcommittee Hearing on H.R. 2138 and H.R. 37, both known as the
“Department of Environmental Protection Act”

Dear Mr. Chairman:

On behalf of the American Bar Association (“ABA”), I write to express our support for pending legislation that would elevate the Environmental Protection Agency (“EPA”) to Cabinet-level status and that would restructure the EPA to further improve the quality of scientific and other data upon which the agency’s environmental policies and regulations are based. Accordingly, we are pleased to submit these comments regarding H.R. 2138 and H.R. 37, both known as the “Department of Environmental Protection Act,” and we ask that this letter and attachment be included in the record of your subcommittee’s September 9, 2003 hearing regarding this legislation.

As the largest association of attorneys in the United States with over 400,000 members nationwide, the ABA has a strong interest in working with Congress to ensure that federal environmental law, and the federal agencies that enforce it, are as effective as possible. In an effort to play a meaningful role in this area, the ABA’s policy-setting House of Delegates recently adopted several resolutions that are directly relevant to the issues raised by H.R. 2138 and H.R. 37. In particular, in August, 2003, the ABA adopted policy supporting legislation to elevate the EPA to Cabinet-level status. Previously, in August, 1995, the ABA adopted detailed suggestions for improving the reliability of scientific information that is used in environmental policymaking. Copies of both ABA policies are attached for your consideration.

Elevating the EPA to Cabinet-Level Status

The American Bar Association strongly supports those provisions in H.R. 2138 and H.R. 37 that would elevate the EPA to Cabinet-level status and that would re-designate the new entity as the "Department of Environmental Protection." In our view, protection of the environment is and should remain a high governmental priority, and one of the most effective ways to accomplish this is to grant the EPA the department-level status and related resources that it needs to effectively fulfill its mission.

Thirty-three years ago, President Richard Nixon formed EPA with ribs from the Departments of the Interior, Agriculture, Health, Education and Welfare and other governmental entities through Reorganization Plan No. 3 of 1970. In explaining his decision, President Nixon said on July 9, 1970, "The Congress, the Administration and the public all share a profound commitment to the rescue of our natural environment, and the preservation of the Earth as a place both habitable by and hospitable to man. With its acceptance of the reorganization plans, the Congress will help us fulfill that commitment." More than three decades later, it is time for Congress to accept the need to elevate the EPA to Cabinet status to be on a par with the departments from which it sprang more than 30 years ago.

Under our current governmental structure, a number of federal agencies have specific responsibilities for protecting certain aspects of the nation's environment. For example, the Department of the Interior is responsible for protecting national parks through the National Park Service and wildlife species through the U.S. Fish and Wildlife Service. In addition, the Department of Agriculture is in charge of protecting wetlands and critical farmland resources from being harmed by the over-application of fertilizers and chemicals. Furthermore, the Department of Labor, through the Occupational Safety and Health Administration, is responsible for protecting the health and well-being of workers from chemical pollution in the workplace. In addition, the U.S. Army Corps of Engineers, as part of the Department of Defense, is responsible for protecting waters of the United States under Section 10 of the Rivers and Harbors Act and wetlands under Section 404 of the Clean Water Act. It is ironic that, while each of these federal agencies currently enjoy the status and resources associated with Cabinet departments, the EPA, which has the overall responsibility for the environment, does not.

As the primary federal agency responsible for protecting human health and the environment throughout the United States, the EPA certainly should have Cabinet status. With an annual budget exceeding \$7 billion and a staffing level of over 18,000 employees, the EPA is larger than several of the existing Cabinet-level departments in the federal government. Because the importance of the EPA's mission and the size of its budget and staff already equal or exceed that of many existing departments, it makes sense to recognize this reality by according the agency departmental status. Accordingly, the ABA strongly supports those provisions in H.R. 2138 and H.R. 37 that would elevate the agency to Cabinet-level status.

Enhancing EPA's Scientific and Statistical Capabilities

The American Bar Association also supports several key provisions in H.R. 2138 that are aimed at improving the EPA's ability to gather, analyze, and disseminate scientific data on important environmental matters.

In addition to elevating the EPA to department-level status, H.R. 2138 would restructure the agency in a number of specific ways. Section 8 of the bill would establish a new Bureau of Environmental Statistics within the new department for the purpose of providing "such environmental quality and related public health and economic information, and such evaluation and analysis of such information, as may be appropriate, to meet adequately and fully the needs of the Department in carrying out its functions under applicable law, and the Congress." A new "Undersecretary of Science and Information" would manage and oversee the Bureau, and a new "Director of Environmental Statistics" position would also be established. Both individuals would be appointed by the President and confirmed by the Senate. In addition, to help ensure that the scientific information produced by the Bureau is reliable, H.R. 2138 would also require that the Bureau's statistical procedures and methodology be subject to peer review every two years.

The American Bar Association believes that the federal government should take account of all appropriate scientific knowledge when regulating environmental matters or initiating appropriate precautionary measures. In addition, when scientific consensus on important environmental matters does not exist, the ABA believes that efforts should be made to encourage research on such matters, and make the resulting information available within the scientific community and to the public at large. In order to implement these important principles, the ABA believes that the Executive Branch and Congress should, through administrative and legislative means, as appropriate, provide for a suitable scientific body to undertake the on-going assessment of the state of scientific environmental knowledge, the on-going identification of environmental issues for which research is necessary, the oversight of such research, and the dissemination of environmental scientific findings and information throughout the federal government, the scientific community, and the public at large.

Broadly speaking, there are two possible approaches to improving the process by which reliable scientific information on environmental matters is generated, i.e., *internal* reorganizations of the current administrative structures and the development of *new organizations* and functions outside of the current administrative structures. Although reasonable minds can disagree over which of these two approaches is the best means to accomplish the goal of increasing the reliability of scientific information on environmental matters, the ABA believes that any administrative structure is acceptable if it (1) effectively and economically assesses the current state of scientific environmental knowledge, (2) identifies issues for which additional research is necessary, (3) oversees such research, and (4) disseminates that information to governmental and administrative agencies, the scientific community and the public at large.

The Honorable Doug Ose
September 9, 2003
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The ABA believes that the provisions in H.R. 2138 that would restructure the EPA by creating a new Bureau of Environmental Statistics charged with collecting, gathering, reporting, evaluating, analyzing, and disseminating environmental data—while subjecting the Bureau’s statistical procedures and methodology to peer review every two years—would be an effective means of improving the reliability of scientific information on environmental matters. By encouraging focused research, impartial analysis, and credible review, these internal reforms could help place environmental law policy-making and implementation on a firmer scientific footing, resulting in more legitimacy and, in some instances, more effective and/or cost-effective environmental rules for the benefit of all Americans.

While the ABA generally supports these provisions of H.R. 2138 outlined above, the Association takes exception to several of the congressional “Findings” contained in Section 2 of the bill. In particular, the ABA disagrees with Finding (3), which states in part that the EPA’s current “...stovepipe organization results in the Agency’s inability to effectively address cross-media environmental protection...[and that] the Agency lacks adequate oversight and coordination of its offices to ensure that science, policy, and implementation are integrated throughout the Agency.” Similarly, the ABA disagrees with the statement in Finding (4) that “the Environmental Protection Agency lacks statistical data on current environmental conditions necessary to measure whether the Agency’s policies and regulations efficiently and successfully protect the environment.” We also take exception to the statements in Finding (5) that “currently, the Environmental Protection Agency lacks scientific leadership and critical science for decisionmaking...[and] scientific activities take place in both the Office of Research and Development and the program offices without sufficient coordination and intraagency dissemination of information.”

In the ABA’s view, the EPA has proven itself to be a highly-effective agency over the years that has done an admirable job of protecting both human health and the environment, often under difficult circumstances. Although the ABA supports the reforms discussed above and believes that these measures will further improve the quality of the scientific information that the EPA will use to craft its environmental policies and regulations in the future, we believe that these Findings in H.R. 2138 are inaccurate and unhelpful to the reform effort. Accordingly, we urge Congress to delete them from the legislation.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA’s positions on these issues, please contact our legislative counsel for environmental law issues, Larson Frisby, at (202) 662-1098.

Sincerely,



Robert D. Evans

Attachments

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cc: All members of the House Government Reform Committee

The Honorable Sherwood L. Boehlert
Chairman
Committee on Science
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Marianne L. Horinko
Acting Administrator
Environmental Protection Agency
Room 3000, Ariel Rios Building, MC1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-0001

**RESOLUTION ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION
AUGUST 2003**

RESOLVED, That the American Bar Association urges Congress and the Administration to elevate protection of the environment of the United States to its highest level by enacting legislation elevating the U.S. Environmental Protection Agency to Cabinet-level status.

RESOLUTION ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION
AUGUST 1995

RESOLVED, That federal, state, tribal, territorial and local governments, should take account of all appropriate scientific knowledge when regulating environmental matters or initiating appropriate precautionary measures; and

FURTHER RESOLVED, That in environmental litigation and other forms of dispute resolution, efficiency and justice are aided by the availability and utilization of the latest and most reliable scientific knowledge; and

FURTHER RESOLVED, That in matters of international commerce and environmental regulation, treaties and other agreements should be based upon all appropriate scientific knowledge and, if it exists, consensus among scientists; and

FURTHER RESOLVED, That where scientific consensus on important environmental matters does not exist, efforts should be made to encourage research on such matters, and make the resulting information available within the scientific community and to the public at large; and

FINALLY RESOLVED, That the Executive Branch and Congress should, through administrative and legislative means, as appropriate, provide for a suitable scientific body to undertake the on-going assessment of the state of scientific environmental knowledge, the on-going identification of environmental issues for which research is necessary, the oversight of such research, and the dissemination of environmental scientific findings and information to federal, state, tribal, territorial, and local governments, the scientific community, and the public at large.