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February 4, 2004

The Honorable Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20510

Dear Mr. Chairman:

Pursuant to your request, we are writing to provide you our views on H.R. 2138, which elevates the Environmental Protection Agency to cabinet-level status, redesignates the agency as the Department of Environmental Protection, and makes significant changes to EPA's mission, structure, and authorities.

Mr. Chairman, we appreciate your invitation to provide you our views on this legislation. We took your invitation seriously and have taken the time to develop a comprehensive and detailed presentation of our views. We agree that this could be an area in which cooperation could produce good results, and we thank you for your interest in working with us on this matter. We also commend you for recognizing the importance of ensuring that EPA is a strong and effective force for environmental protection.

We believe you share our view that the purpose of elevating EPA to a cabinet-level department should be to enhance the agency's stature, here and abroad, and to improve the agency's ability to protect human health and the environment. However, we regretfully must express to you our sincere concern that, in its current form, H.R. 2138 fails to further the fundamental goal of environmental protection.

Our concerns include: (1) the effects of elevating EPA to cabinet-level status without addressing recent EPA actions that undermine the agency's ability to carry out its mission to protect public health and the environment; (2) the absence of provisions that would strengthen EPA's ability to carry out its mission, such as provisions to protect the health of vulnerable populations, including children and the elderly; and (3) a number of

specific provisions of the bill which would sharply limit EPA's mission, impede EPA's ability to function, and reduce public access to environmental information.

There has been considerable debate about whether legislation to elevate EPA should be a "clean" bill or an "unclean" bill. We think that is the wrong dichotomy. What we should be striving for is a "good" bill that furthers the protection of health and the environment. We would be pleased to provide any assistance we can to you in developing legislation that achieves this goal.

Addressing Recent EPA Actions Weakening Environmental Protection

Under the Bush Administration, EPA has taken repeated actions that undermine the agency's ability to protect public health and the environment. These actions have stripped EPA of enforcement and regulatory tools that are essential for achieving its mission. We believe that any legislation that elevates EPA to cabinet status should restore these authorities to EPA.

The list of recent EPA actions with which we disagree is long. We disagree with EPA's decisions in January and October 2003 not to ban atrazine, a widely used toxic weed-killer.¹ We think EPA made the wrong choice in August 2003 to reverse a 25-year policy that furthers the clean-up of PCB-contaminated land.² We believe that EPA missed a critical opportunity to protect public health in July 2003, when it declined to regulate the toxin perchlorate in drinking water, which has been found at high levels in millions of Americans' drinking water supplies.³ And we think the agency made a serious error in October 2003 when it announced a decision not to regulate dioxin levels in sewage sludge.⁴ But we respect the view of those who argue that legislation to elevate EPA is not the proper vehicle for correcting specific policy choices made by EPA.

It is a different matter, however, when EPA actions fundamentally impair the ability of agency to protect public health and the environment. As much as we want to elevate EPA to cabinet level – and we have been leading proponents of elevation for years – it would be a mistake to elevate a crippled agency to cabinet rank.

¹ U.S. EPA, *Availability of Atrazine Interim Risk Management Decision Document*, 68 Fed. Reg. 9652 (Feb. 28, 2003); U.S. EPA, *Atrazine: Notice of Availability of Revised Atrazine Interim Reregistration Eligibility Decision (IREDD)*, 68 Fed. Reg. 63085 (Nov. 7, 2003).

² Robert E. Fabricant, General Counsel, U.S. EPA, *Memorandum: Interpretive Statement on Change in Ownership of Real Property Contaminated with PCBs* (Aug. 14, 2003); *EPA Switch Allows Sale of PCB-Tainted Sites*, Los Angeles Times (Sep. 3, 2003).

³ See U.S. EPA, *Announcement of Regulatory Determinations for Priority Contaminants on the Drinking Water Contaminant Candidate List; Notice* 68 Fed. Reg. 42898 (July 18, 2003).

⁴ U.S. EPA, *Standards for the Use or Disposal of Sewage Sludge: Decision Not To Regulate Dioxins in Land-Applied Sewage Sludge; Notice*, 68 Fed. Reg. 61084 (2003).

Unfortunately, a series of recent Administration actions have sabotaged EPA's ability to function effectively, undermining its ability to reduce air pollution, clean up rivers and streams, protect wetlands, and address global warming. For example:

- In December 2002 and August 2003, EPA issued regulations that will eviscerate one of the agency's most effective means of reducing air pollution: the new source review requirements.⁵ If the new Administration policy withstands legal challenges, thousands of older power plants and other facilities will be able to upgrade without installing pollution controls, as the regulations previously required. The result will be large and ongoing increases in pollution, as the lives of the oldest and dirtiest facilities in the nation will be extended indefinitely while they continue to emit pollution virtually uncontrolled.
- In March 2003, EPA abandoned a long-term effort to address the biggest remaining source of uncontrolled water pollution: nonpoint source pollution such as agricultural and urban runoff.⁶ As of the mid-1990s, the states had largely failed for over two decades to identify and clean up water bodies polluted by nonpoint sources. In response, EPA developed, and in 2000 issued, a rule on total maximum daily loads (TMDLs) of pollutants.⁷ The TMDL rule substantially strengthened the requirements for states to identify acceptable maximum pollutant levels for water bodies and to implement programs for cleaning up impaired waters. The withdrawal of the TMDL rule leaves EPA without an effective way to clean up these long polluted water bodies.
- In January 2003, EPA, with the Army Corps of Engineers, issued guidance that could have the practical effect of stripping EPA of its authority to protect millions of acres of wetlands and thousands of miles of streams.⁸ The guidance interprets

⁵ See U.S. EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80186 (2002); U.S. EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Routine Maintenance, Repair and Replacement*, 68 Fed. Reg. 61247 (2003).

⁶ See U.S. EPA, *Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation*, 68 Fed. Reg. 13608 (Mar. 19, 2003).

⁷ U.S. EPA, *Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation*, 65 Fed. Reg. 43586 (July 13, 2000).

a Supreme Court decision on the scope of the government's jurisdiction over wetlands (and hence authority to protect them from pollution discharges and development). Specifically, it addresses streams and wetlands that could be considered isolated, intrastate, non-navigable waters, which comprise roughly 20% of the wetlands in the lower 48 states -- approximately 20 million acres. The guidance reads the court's decision very broadly to invalidate the government's jurisdiction over these types of wetlands under most circumstances. In situations where agency staff believe there is still a basis for jurisdiction over these wetlands, the guidance requires them to seek formal approval from Headquarters before asserting it.

- In August 2003, EPA reversed its position that CO₂ is a pollutant under the Clean Air Act and that EPA has authority to regulate CO₂ if necessary to protect public health or the environment.⁹ EPA's prior position on this issue was laid out in a 1998 legal opinion from the General Counsel interpreting EPA's legal authority under the Clean Air Act. Under the new legal opinion, EPA now claims it has no authority to reduce emissions of the leading cause of global warming.

Policies such as these tie EPA's hands behind its back. We strongly support elevating EPA to cabinet level. But when we do so, we must ensure EPA can carry out its mission effectively. The policies of EPA under the Bush Administration have stripped the agency of some of its most important means of promoting environmental protection. These powers need to be restored as part of any legislation to elevate EPA.

Improve EPA's Institutional Capacity to Protect the Environment

H.R. 2138 redefines EPA's mission, extensively reorganizes the agency, and amends EPA's authorities. We believe that any legislation that imposes such sweeping changes on EPA should include provisions to enhance the agency's ability to carry out its mission and counteract recent pressures on EPA to curtail environmental protections.

⁸ See Department of Defense and U.S. EPA, *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," Appendix A, Joint Memorandum*, 68 Fed. Reg. 1995 (Jan. 15, 2003).

⁹ See U.S. EPA, Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998); U.S. EPA, Memorandum from Robert E. Fabricant, General Counsel to Marianne L. Horinko, Acting Administrator, *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act* (Aug. 28, 2003).

Cost-Benefit Analysis

EPA has come under increasing pressure to regulate pursuant to the results of cost-benefit analyses. This raises two concerns that should be addressed. First, the vast majority of EPA's statutory authorities do not direct the agency to base policy choices on the outcome of cost-benefit analyses. Any elevation legislation should reinforce the primacy of the underlying statutory authorities. This will ensure that EPA continues to base its policy choices on the statutory criteria and is not driven to make or justify such choices on cost-benefit grounds.

Second, to the extent that cost-benefit analysis continues to be an informational tool used in the policy context, the elevation legislation should institute reforms to correct, to the extent possible, the systematic bias in this analytical tool to overstate costs and undervalue benefits. For example, cost estimates are commonly based heavily on information derived from entities with a strong built-in incentive to identify relatively high costs. Cost estimates also often fail to account for the basic free-market principle that increased demand (as is created through pollution control requirements) drives competition and technical innovation and consequently lowers costs. Moreover, these cost estimates are rarely independently validated either at the time or after-the-fact. In addition, numeric benefit estimates fail to include large categories of benefits that cannot be quantified or monetized, and hence benefits estimates are systematically understated. Finally, while environmental issues frequently involve tradeoffs with very long time frames, the use of discount rates devalues and in some cases eliminates benefits that accrue further in the future. To take a fairly stark example, the destruction of habitat and consequent elimination of a species is a policy choice that once made, is irreversible. The benefits of avoiding that outcome continue to be enjoyed by future generations, while the costs are concentrated in the near term.

Minimizing these inherent problems of cost-benefit analysis would require a variety of technical fixes and larger shifts in emphasis. Some of these reforms might be specified in legislation, while others could be addressed through more general directives to EPA. For example, this bill should include the language recently adopted by the House prohibiting EPA from discounting the premature death of elderly persons compared to the premature death of others. In addition, the bill should require that cost-benefit analytical techniques and protocols used by the agency be revised to explicitly address and account for the systemic biases identified above.

Protection of Children

Another area where we need improvement is in protecting children from environmental harms. We now know that the metabolism, physiology, diet, and exposure patterns of children to environmental pollutants differ from those of adults and can make children more susceptible to harm from these pollutants. Yet a paucity of child-specific

data and inadequate focus by EPA means that children's greater susceptibility to harm from environmental pollutants is rarely explicitly addressed in agency decision-making. This legislation should require EPA to ensure that each environmental and public health standard for an environmental pollutant protects children and other vulnerable subpopulations with an adequate margin of safety.

Integrity of Science

This legislation should also address growing concerns about how EPA science and the agency's use of science is being increasingly influenced by industry. H.R. 2138 focuses on establishing a high level appointee responsible for science in the agency. Yet that change alone will not correct the problem that EPA is increasingly dependent upon scientific research funded, performed, or reviewed by industry-associated entities with a strong stake in the outcome.

We agree with the goal of bolstering the integrity of EPA's development and use of scientific information. One key reform would be to improve the integrity of EPA's peer review process. The bill should exclude from peer review panels any person who has a financial stake (including receiving funding from any entity with a financial stake) in the outcome of the decision being reviewed. The bill should also require that EPA and the public have adequate access to the data upon which industry-performed and industry-sponsored studies are based.

Remove or Correct Harmful Provisions in H.R. 2138

H.R. 2138 also makes several fundamental changes to EPA's mission, structure, and authorities that we believe should not be included, in their present form, in an EPA elevation bill.

Mission Statement

We strongly oppose the current language in H.R. 2138 laying out a mission statement for EPA. EPA's statutory authorities provide broad and protective goals for the agency. For example, the Clean Air Act states that its purpose is "to protect and enhance the quality of the Nation's air resources." The Clean Water Act's goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." EPA's existing mission statement, developed by the agency, states: "The mission of the U.S. Environmental Protection Agency is to protect human health and to safeguard the natural environment – air, water, and land – upon which life depends." These comprehensive goals aim to protect the integrity of the environment that we inherit and will pass on to our children.

In contrast, H.R. 2138 includes language limiting EPA's mission to protecting the public and the environment from "unreasonable environmental risks." This is a far narrower mandate, and one which, based on interpretations of such language in case law, incorporates a cost-benefit test. Using cost-benefit analysis to define the boundaries of EPA's mission appears unworkable and is certainly unacceptable. In our view, references to "unreasonable risk" must be removed from the agency's mission statement.

Information Withholding and Bureau of Environmental Statistics

We have concerns about the current language establishing a Bureau of Environmental Statistics. H.R. 2138 prohibits EPA from releasing any "corporately identifiable" information collected by the Bureau of Environmental Statistics. Yet EPA currently has very broad authority to collect and release "corporately identifiable" information. In fact, it is required to make large categories of such information available to the public under current law. Entire programs, such as the Toxic Release Inventory, rely on providing public information in lieu of establishing control requirements. These "right to know" functions should be strengthened – not undermined – in elevation legislation.

We also have concerns regarding the effect of this step on EPA's current capabilities and resources. Establishing a Bureau of Environmental Statistics could be helpful in improving the quality and availability of information about environmental conditions. However, the Bureau will also require substantial resources to function. It is critical that establishing this new entity does not, in practice, divert resources from EPA's core regulation and enforcement activities. If we do not simultaneously provide new additional resources to support the Bureau, the net effect of its establishment may well be that we have better information about a more degraded environment.

In addition, we have several concerns with the structure and function of the Bureau of Environmental Statistics as specified in H.R. 2138. As the Administration points out, the Director of the Bureau should report directly to the Secretary, rather than report through an intermediary political level. This is consistent with the structure of other statistical agencies such as the Bureau of Transportation Statistics and the Bureau of Labor Statistics. This direct reporting relationship would also ensure that statistical information is communicated directly to the Secretary, independent from any assessment of potential regulatory or enforcement program interests. To support the Bureau's independence and expertise, it would be preferable to require that the Director be appointed for a fixed term of five years, and that the qualifications for the Director include experience in environmental statistics.

It is not clear that it is necessary or appropriate to legislate the requirement for a periodic outside review of the methodologies used by the Bureau.¹⁰ If this is included, however, the review should be conducted by the National Academies of Science rather than by colleagues within the executive branch. The Academies are able to draw on the leading experts in both the public and private sector and can provide focused review of specific methodologies. Also, rather than the two year period specified in H.R. 2138, conducting the periodic review every five years would better ensure the quality and relevance of agency products and the efficiency of the agency structure.

EPA Reorganization

We have serious concerns about whether the provisions of H.R. 2138 that fundamentally reorganize EPA will hinder rather than help the agency in carrying out its mission.

For example, section 7 of H.R. 2138 lays out a new organizational structure for the Department of the Environment. Currently, EPA has Assistant Administrators who run the national programs and conduct EPA's nationwide rulemaking activities, as well as Regional Administrators who oversee each of EPA's ten regions and work with the states to implement the programs. Both the Assistant Administrators and the Regional Administrators report to the Administrator and Deputy Administrator.

H.R. 2138 establishes an additional layer of management by creating three new Under Secretaries who would report to the Administrator and Deputy Administrator. The various Assistant Administrators and Regional Administrators would report to one of the three Under Secretaries. Thus, the Assistant Administrators would report to the Under Secretary for Policy, Planning, and Innovation, while the Regional Administrators would be placed under the Under Secretary for Implementation, Compliance, and Enforcement. The separate reporting tracks for the Regional Administrators and the Assistant Administrators responsible for rulemaking and guidance seems likely to diminish critical coordination between these entities. Because the EPA Regions carry out many of the rules developed by the national program offices, extensive interaction should and does occur between the Assistant Administrators and Regional Administrators during the rulemaking and implementation processes.

Additionally, H.R. 2138 appears to combine EPA's enforcement functions (currently under the Assistant Administrator for Enforcement and Compliance Assurance) with the Regional offices in reporting to a new Under Secretary for Implementation, Compliance, and Enforcement. This threatens the independence and viability of EPA's enforcement functions, which should be kept independent from policy functions to ensure non-politicized independent enforcement.

¹⁰ For example, the provisions authorizing the Energy Information Administration do not require such a periodic outside review.

H.R. 2138 also would require the Chief Financial Officer to “[ensure] that the budget, human resources, and regulatory costs imposed by the Department accurately reflect environmental and human health risks.” It does not appear that the CFO would have the experience, expertise, or resources to evaluate environmental risks or the costs and benefits of environmental regulations. Moreover, allocating EPA’s budget and resources among EPA’s multiple areas of responsibility and evaluating regulatory priorities are several of the Administrator’s most critical responsibilities. These key responsibilities should remain under the control of the agency’s top appointee.

In addition, we have concerns about how H.R. 2138 would reorganize science activities at EPA. EPA is primarily a regulatory agency, which also carries out extensive technical and scientific research activities. EPA’s “science” activities range widely, and it is critical that science continue to infuse EPA’s regulatory activities. At one end of the spectrum, there are numerous EPA employees with science degrees who run agency regulatory programs and draft guidance and regulations. At the other end of the spectrum, EPA provides grants for academic scientific research on a multitude of issues. In the mid-range of the spectrum, EPA staff carry out extensive scientific work in support of agency programs and rulemakings. This can include conducting a risk assessment, running an air quality model, and evaluating the strength of scientific data used in an agency rulemaking. There are also entire program offices, such as EPA’s laboratories, that both conduct research and develop regulations.

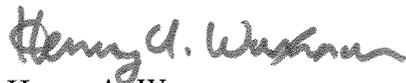
We support the goal of strengthening EPA’s scientific expertise and resources. However, as drafted, the provisions establishing an Under Secretary for Science and Information may well have the opposite effect. It is entirely unclear which functions and personnel currently located in EPA’s program offices would be shifted to offices reporting to the new Under Secretary for Science. Without clarification, this language could serve to slow or cripple EPA’s regulatory functions by diverting personnel and muddying lines of authority.

Finally, we oppose the provisions of H.R. 2138 that reduce EPA’s accountability to Congress by eliminating the requirement that a number of key appointees be confirmed by the Senate. Currently, Senate-confirmed appointees include: the General Counsel and the Assistant Administrators for Air and Radiation; Water; Solid Waste and Emergency Response; Prevention, Pesticides and Toxic Substances; International Affairs; Administration and Resources Management; Research and Development; and Environmental Information. H.R. 2138 would eliminate this requirement for all of these positions.

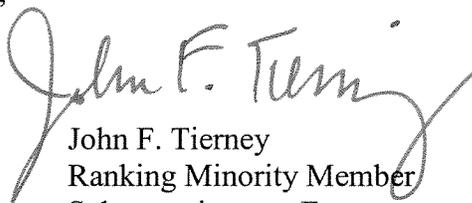
The Honorable Doug Ose
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Once again, we thank you for this opportunity to provide our views on H.R. 2138. We commend you for taking on this important, challenging, and long neglected issue, and we look forward to working with you on this bill.

Sincerely,



Henry A. Waxman
Ranking Minority Member



John F. Tierney
Ranking Minority Member
Subcommittee on Energy
Policy, Natural Resources
and Regulatory Affairs