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## **Testimony of**

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before the

**Subcommittee on Energy Policy, Natural Resources,  
and Regulatory Affairs**

of the

**Committee on Government Reform**

**U.S. House of Representatives**

regarding

**EPA Cabinet Elevation**

Washington, D.C.  
June 6, 2003

Mr. Chairman and members of the Committee, thank you for the opportunity to appear before you today to testify on behalf of the Center for Progressive Regulation (CPR) regarding the elevation of the Environmental Protection Agency (EPA) to Cabinet status.

CPR is an organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR member scholars reject the idea that government's only function is to increase the economic efficiency of private markets. CPR's mission is to advance the public's understanding of the issues addressed by the

country's regulatory laws. CPR is committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment. It seeks to inform the public about scholarship that envisions government as an arena where members of society choose and preserve their collective values. You can learn more about our work at [www.progressiveregulation.org](http://www.progressiveregulation.org).

You have before you two very different pieces of legislation. While both would elevate the Environmental Protection Agency (EPA) to Cabinet status, H.R. 2138, introduced by Chairman Ose, would undertake an ambitious reorganization of the new department and could be read to fundamentally alter the standard for when the federal government could act to protect public health and natural resources. In contrast, H.R. 37, introduced by Representative Boehlert, is what is typically referred to as a "clean" bill that would accomplish elevation without making any other changes in EPA's legal mandates and organization.

CPR would like to make five distinct points about these legislative proposals and their potential impact on environmental protection in the United States.

### **Point One: Elevation Is Far Less Therapy Than This Gravely Ill Patient Really Needs**

There is a broad-based consensus among the Agency's major constituencies that it should be elevated to Cabinet status, and CPR agrees with that view. However, at this juncture, elevation has the flavor of fiddling while Rome burns. Opponents have laid siege to the Agency, which just lost Governor Whitman. A range of deregulatory initiatives imposed by the White House have undercut its daily work more drastically than at any point in the last 15 years. A ceremony in the Rose Garden celebrating its Cabinet status would convey a profoundly misleading impression about its stability and effectiveness.

Beginning with broken promises at Kyoto, this Administration has pursued a series of initiatives designed to roll back protections established by presidents, on a bipartisan basis, over three decades. Among the most troubling are those that undermine the work of the President's father, who led Congress to pass the 1990 Clean Air Act Amendments, among the most comprehensive environmental initiatives ever to be enacted in this country.

Thus, we have witnessed the rejection of badly needed tightening of the fuel emission standards that apply to motor vehicles. The Administration has effectively abandoned efforts to compel Midwestern power plants to stop smothering Northeastern cities. EPA, under pressure from OMB, has engaged in systematic attempts to avoid the deadlines and explicit instructions the law applies to the control of hazardous air pollutants. And, under the misleading rubric "Clear Skies," the Administration has proposed the substitution of market-based trading for proven facility-specific pollution limits, with trading to occur under overall caps on total emissions that are significantly

less ambitious than what is necessary to avoid losing ground, much less make affirmative progress.

Last week, the *New York Times* carried a front-page story detailing EPA's failure to update the data base it uses to track implementation of the Clean Water Act's flagship program – National Pollutant Discharge Elimination System (NPDES) permitting for major point sources. The Agency's Inspector General warned ominously that without a modernized database, EPA "cannot effectively manage" the program. To add insult to injury, the funding gap crippling EPA's completion of this vital task is in the ballpark of \$12 million.

Meanwhile, the political appointee in charge of the Office of Water has launched an expensive and time-consuming initiative to eliminate federal controls on pollution for 50 to 60 percent of streams and 20 percent of wetlands. Unless and until the states pick up the slack left by EPA and the Army Corps of Engineers' abrupt departure from the field, these vast and irreplaceable natural resources could be polluted, drained, or filled in by industrial dischargers, real estate developers, and sewage treatment plants. The cumulative impact of these changes will produce grave erosions in water quality, not just in the affected streams and wetlands, but also in the vast bodies of water into which they feed.

A final example of EPA's tragic condition is its failure to address a glaring threat to our national security: the prevention of terrorist attacks on chemical plants nationwide, many of which store acutely toxic chemicals in amounts that could kill millions if released. Despite abortive efforts to impose stricter government oversight on those facilities, as recently reported by the *Washington Post*, Administrator Whitman was foiled at every turn, and we remain dependent on a voluntary program initiated by a trade association that covers only about 30% of the industry.

## **Point Two: Clean Bill or Proverbial Christmas Tree?**

Many of EPA's critics, especially on the business side of the spectrum, have grown extremely frustrated by their inability to persuade Congress to undertake radical surgery on its core authorizing statutes. Efforts to impose similarly radical changes in the form of generic, across-the-board regulatory reform legislation have also failed. You will face a great deal of pressure to load the Cabinet bill up with yet another series of reform measures. This approach is likely to – and without a doubt should – doom passage. The only democratic and sufficiently transparent way to accomplish such reform is to undertake the difficult debates that are necessary to determine how much and how fast we will protect our air, our water, and our land, as well as the condition of the environmental legacy we will leave to our children.

That said, CPR has its own ideas of what types of reforms are needed to make EPA operate more effectively. As just one example, EPA's use of science is dominated by scientists funded by companies with a direct financial stake in the outcome of the Agency's decision-making. In our view, efforts to reform EPA's statutory mandates must address these concerns. Congress should consider four separate reforms:

- EPA should not rely on scientific studies submitted by regulated industries until all of the underlying data, modeling methodology, and other techniques and protocols are publicly disclosed.
- All such studies should be subject to peer review by panels that eliminate any person with a financial conflict of interest in the outcome of its deliberations.
- Peer review panels should be carefully composed to ensure that members represent a full and balanced range of views, taking into consideration not only their members' expert opinions, but also their organizational affiliations.
- EPA should not use research conducted under contracts that place limits on the disclosure of results adverse to the interests of the study's corporate sponsors.

H.R. 2138 addresses the need for EPA to use “sound” science at some length without ever reaching such crucial reforms. For EPA science to be really sound, these reforms are necessary.

CPR also has ideas about which reforms are *not* necessary. For example, we believe that the imposition of strict cost-benefit analysis as a threshold to action is both illegal and misguided. The vast majority of environmental statutes, crafted after years of debate and covering thousands of carefully considered pages, require EPA to regulate in a cost-effective manner. But they do not allow misleadingly precise efforts to monetize costs and benefits to establish insurmountable barriers to EPA's determinations of what steps must be taken to protect human health and the environment. Not only is the Office of Management and Budget (OMB) imposing such illegal methodology, it is basing its own review of regulations on highly unreliable and technically unsound data, in clear violation of the Data Quality Act. If Congress were to undertake a careful and deliberate reevaluation of each of EPA's individual statutory mandates, we would urge legislation barring such practices.

### **Point Three: “Unreasonable Risk” of Undermining Democracy**

Perhaps as a reflection of the pressure to reform EPA through Cabinet elevation legislation rather than the normal legislative process, H.R. 2138 would define EPA's mission as protecting the public from “unreasonable environmental risks.” This standard is borrowed from the Toxic Substances Control Act, the least effective and least protective of all of the statutes that EPA administers. If this standard was read to trump the more protective provisions of such vital laws as the Clean Air and Clean Water Acts, EPA would be crippled, perhaps beyond repair. H.R. 2138 contains a “savings clause” announcing its intent not to “alter,” “affect,” “amend,” or “modify” any other federal environmental law. If this last statement is truly the bill's goal, the unreasonable risk standard announced in its mission statement must be eliminated. If, on the other hand, the unreasonable risk standard is intended to govern the Agency's regulatory policies, H.R. 2138 represents among the most devastating proposals yet advanced to deregulate harmful industrial practices.

The most prominent interpretation of the “unreasonable risk” standard is the Fifth Circuit’s decision in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5<sup>th</sup> Cir. 1991). The case struck down an EPA regulation banning most uses of asbestos under Section 6 of the Toxic Substances Control Act (TSCA). Among other things, the Court noted with approval that the unreasonable risk standard requires EPA to consider how much money should be spent on saving a human life by regulatory intervention. It also held that under TSCA’s section 6, must discount human life be discounted if death as a result of asbestos exposure would not occur for many years. Thus, the question becomes not whether we should act to save lives, but rather whether the money we would need to invest today to come up with the amount life might be worth in 30 years justifies the expense to industry of preventing pollutants from harming people.

Not content to simply require monetization and discounting in the context of such deceptively rigorous cost-benefit analysis, the Court further held that it was entitled to ask whether EPA had considered every “less burdensome” regulatory alternative that could conceivably be imposed before deciding to ban asbestos products. Not only did it need to dream up and then quantify the costs and benefits of such alternatives, it needed to conclude that *none* of the weaker alternatives would provide *any* adequate level of protection. If the Court could envision any other regulation that would achieve an acceptable level of risk, it was justified in striking down the regulation. This approach is a very sharp departure from the usual standard of judicial review, which asks whether the regulation is consistent with the statutory mandate and supported by a reasonable basis as document by the rulemaking record.

It is worth noting in this regard that this harsh interpretation of the TSCA standard has paralyzed EPA’s efforts to eliminate asbestos from the marketplace, with potentially devastating results for thousands of consumers. For example, the Agency just posted a new warning on its web site concerning vermiculite attic insulation, which is heavily contaminated with asbestos. The warning reads:

What should I do if I have vermiculite attic insulation? DO NOT DISTURB IT. Any disturbance has the potential to release asbestos fibers into the air.

Thus, EPA recognizes what the court in *Corrosion Proof Fittings* did not: asbestos presents an “unreasonable risk” to human health throughout all the stages of its life cycle. The enshrinement of the “unreasonable risk” standard in the Cabinet elevation bill threatens to stymie EPA efforts under other statutory regimes just as it has stymied efforts under TSCA.

#### **Point Four: Reorganizing into More Bureaucracy, Less Enforcement**

The reorganization plan for the new Department set forth in H.R. 2138 fragments its core regulatory missions and creates a new layer of bureaucracy that will further congeal proactive efforts to enforce the law. The draining task of implementing this plan will cost EPA at least two years of progress on other aspects of its mission, as positions

and policymaking jurisdiction are shuffled and turf wars fought. The environment and public health cannot afford such delays, especially given EPA's central role in addressing the threats posed by terrorism in such arenas as chemical plant safety and federal facility decontamination.

The legislation would create three, presumably co-equal under-secretaries: one to police EPA's use of science and other information; a second to develop policy, including regulations; and a third to implement such policies and enforce the law, primarily by riding herd on the new Department's regional offices. The legislation would retain the five senior officials now known as Assistant Administrators, and the ten senior officials now known as Regional Administrators. But the five newly minted Assistant Secretaries would report first to the Under Secretary for Policy, Planning, and Innovation, next to the Deputy Secretary, and finally to the Secretary. The ten Regional Administrators would report to the Under Secretary for Policy, Planning, and Innovation, next to the Deputy Secretary, and finally to the Secretary.

It is difficult to see how this approach solves the supposed problem of EPA's "stovepipe" organization identified by some of the witnesses at the Subcommittee's previous hearings on Cabinet elevation. Further, because the Secretary retains authority to determine what each of the five Assistant Secretaries will do, the reorganization contemplated by H.R. 2138 does not necessarily accomplish the goal of forcing EPA to regulate by industry sector, across all media, as recommended by some of the Agency's more thoughtful critics.

CPR believes that proposals to promote cross-media regulation are well worth exploring, outside the context of a clean Cabinet elevation bill. The reorganization envisioned by H.R. 2138, however, is highly unlikely to achieve those goals, and instead will drain energy and resources desperately needed to implement EPA's core mission.

### **Point Five: Environmental Statistics and the States**

CPR supports the concept of an independent Bureau of Environmental Statistics, but believes it should be pursued via a free-standing piece of legislation. Comparable entities throughout government, such as the Bureau of Labor Statistics, have made significant contributions to sound policymaking.

Unfortunately, however, H.R. 2138 fails to recognize that much of the data that would be gathered and analyzed by such an entity originates at the state level. Much of this data must be gathered by monitoring equipment that is expensive to install and operate. The legislation fails to address the severe resource constraints that afflict the states and, if recent history is any guide, without such funding, they are likely to strenuously resist any effort to improve the quality of the data they gather.

Performance-based regulation is a promising development that must be pursued actively by all participants in the ongoing debate over EPA's appropriate role. But such alternative systems must be based on sound data, as H.R. 2138 recognizes. Until and

unless Congress commits significant resources to this vital effort, performance-based systems will be exceedingly vulnerable to abuse.

Thank you for the opportunity to appear before you today. I would be pleased to answer any questions you may have.