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Attorney General Memo on EPA [Environmental Protection Agency] Elevation Bill March 18, 1993

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Office of the Attorney General

Washington, D. C. 20530

March 18, 1993

MEMORANDUM TO: JACK QUINN
COUNSEL TO THE VICE-PRESIDENT

FROM: Webster Hubbell *WH*
Assistant to the Attorney General

SUBJECT: EPA ELEVATION LEGISLATION

Attached is a mark-up of the proposed EPA Elevation Legislation reflecting the comments of the Department of Justice. As you will see, we would suggest striking the words beginning with "concerning" on the first line through the word "and" on the fifth line of the first subpart b.

We believe this text is not necessary to the proposed legislation and may only serve to confuse. Section 309(b) is the mechanism for the resolution of interagency NEPA disputes, and we believe the intent of the legislation would be served by referencing that provision only. There is no corresponding mechanism in NEPA (Section 102(2)(C)), and a reference to that section may only create an issue for parties to litigate down the road.

Please call me (514-3892) or John Rogovin (514-5611) if you have any questions or comments.

Attachment

cc: John Rogovin
Assistant to the Attorney General

Myles E. Flint
Acting Assistant Attorney General
Environment and Natural Resources Division

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SEC. ____ TRANSFER OF FUNCTIONS OF THE COUNCIL ON ENVIRONMENTAL QUALITY.

(a) Except as provided in subsection (b) of this section, all functions of the Council on Environmental Quality under titles I and II of the National Environmental Policy Act (42 U.S.C. 4321 et seq.) and under any other law, are transferred to the Secretary. The Secretary is authorized to take all necessary action, including the promulgation of regulations, to carry out these functions.

(b) Referrals of interagency disagreements concerning proposed major federal actions significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 102(2)(C)) and concerning matters under section 309(b) of the Clean Air Act (42 U.S.C. 7609(b)) shall be made to the President for resolution.

SEC. ____ TERMINATION OF THE COUNCIL ON ENVIRONMENTAL QUALITY.

(a) Section 204 of the National Environmental Policy Act (42 U.S.C. 4344) is amended by striking out "Council" and inserting "Secretary [of the Environment]."

(b) Sections 202, 203, 205, 206, 207, and 208 of the National Environmental Policy Act (42 U.S.C. 4342, 4343, 4345, 4346, 4346a, and 4346b) are repealed.



We suggest using the same solution to address our concern with the new language to transfer the CEQ authorities to the Department of the Environment. Thus, a sentence could be added to the end of subsection (a), as follows: "In carrying out the functions of the Council on Environmental Quality, the Secretary will not duplicate the information-gathering functions of other Federal agencies." In addition, the Administration should seek report language stating that, in carrying out the CEQ functions, the Department of the Environment also should not duplicate analysis and archiving functions of other Federal agencies.

III. Third, we note that section 108 of the EPA elevation bill contains a provision stating that the EHS is not authorized to require the collection of any data by any other governmental entity. Because the EHS provisions contain such a limitation, the lack of a similar limitation in the new draft language might be construed to imply that the transferred CEQ authorities carry with them the authority to require the collection of data from other government agencies. To avoid any confusion, the identical language from section 108 of the EPA elevation bill should be incorporated into subsection (a) of the new language to transfer CEQ authorities. Therefore, also add to the end of subsection (a) the following sentence: "Nothing in this paragraph shall authorize the Secretary of the Environment to require the collection of any data by any other Department, State or local government, or to establish observation or monitoring programs."



In addition, we would like to add to the new language to transfer CEQ authorities a subsection taken from the discussion draft which was circulated for review in February. The new subsection would read as follows:

(c) The Under Secretary of Commerce for Oceans and Atmosphere shall assist and advise the President in policies and programs of the Federal Government affecting environmental quality by reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources.

This language recognizes and takes advantage of NOAA's programs and expertise in monitoring and predicting environmental changes. The language is taken from section 203(d)(3) of the Environmental Quality Improvement Act of 1970 (EQIA) [42 U.S.C. 4372(d)(3)], which establishes an Office of Environmental Quality to support CEQ. We also note that EQIA may need to be repealed.

Finally, we note that while we agree with the language of subsection (b), which provides that referrals of interagency disagreements arising under NEPA and section 309(b) of the Clean Air Act should be made to the President for resolution, the policy may result in an unmanageable number of cases. A statutory mechanism requiring the agency heads to attempt to work out differences could encourage interagency cooperation and could potentially stem the case load. Therefore, we suggest adding to subsection (b) the following language: "Referrals of interagency disagreements shall be accompanied by certification in writing from each agency involved regarding the attempts at reconciliation and the reasons for failure to reconcile interagency disagreements."

Minor Edit: We also note, for your information, that subsection (b) of the new draft language contains an incorrect citation [42 U.S.C. 102(2)(C)] for section 102(2)(c) of NEPA. Section 102(2)(C) of NEPA can be found at 42 U.S.C. 4332 (2)(C).