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USTR [United States Trade Representative] Comments on EPA [Environmental Protection Agency]
Bill S. 171 February 25, 1993

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**EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Legislative Reference Division
Washington, DC 20503**

TO:	AGENCY:
M. Foley	
K. McGinty	
B. Damus	
S. Neuwirth	
P. McElwee	
J. Quinn	
T. Stern	

FROM: Holly Fitter **PHONE:** (202) 395-3233 **FAX:** (202) 395-5691

DATE: 2/25/93

SUBJECT: USTR Comments on proposed amendments to S. 171, EPA
Cabinet Elevation Legislation.

We have just received the attached USTR comments on
international agreements language and the CEQ decision draft.

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OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20508

February 25, 1993

MEMORANDUM

TO: Ronald K. Peterson
Assistant Director for Legislative Reference

FROM: Frederick L. Montgomery *FLM*
Executive Director for Policy Coordination

SUBJECT: USTR COMMENTS ON AMENDMENTS TO S. 171 (Department of the Environment Bill)

The Office of the U.S. Trade Representative submits the following comments regarding the proposed amendments to S. 171, which would abolish the Council on Environmental Quality and transfer its functions to the proposed Department of the Environment, and which would clarify the international activities of the Department of the Environment.

Of greatest institutional concern to USTR is the EPA International Activities Amendment and Section 203(c) of the NEPA amendments (see below). Other comments are offered from USTR's perspective as part of the Executive Office of the President.

EPA International Activities Amendments to S. 171.

Section 103(f)(D)(ii) (authorizing the Secretary, "with the concurrence of the Secretary of State and in cooperation with such Federal Agencies as may be appropriate", to "improve the quality of the environment through . . . the use of . . . international agreements". We recommend amending to read "international environmental agreements" to clarify that this does not include the authority to negotiate trade agreements.

Section 2(c) -- Transfer of Property and Records.

The transfer of "all books, papers, materials. . ." from within the Executive Office of the President to an Executive Agency may remove those materials from the purview of the President's Executive Privilege. We defer to the White House Counsel and the Department of Justice on whether such would be the case, and whether it presents an issue of concern.

Section 201 -- Environmental Quality Report.

In the limited time available for review we have not conducted a detailed comparison of the various environmental reporting requirements contained within S. 171 and its proposed amendments. There may be, however, significant overlap between

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the former CEQ Annual Report function (Section 201) and the annual report to the President on the state of the environment (Section 202)(6) (both of which would be delegated to the Office of Environmental Policy by Section 205(b)), and the proposed annual statistical report to be required of the Bureau of Environmental Statistics (S. 171 Section 108(c)). Costs might be reduced by coordinating or combining those functions.

Section 201(5), requiring the Secretary to transmit legislative recommendations to Congress as part of an annual Environmental Quality Report, should be modified to make the submission of legislative recommendations discretionary. As was noted in the Draft Administration Technical Corrections package, in reference to Section 117 of S. 171: "Article 11, Section 3 of the Constitution confers on the President plenary authority to submit whatever legislative proposals he deems 'necessary and expedient' at any time that he chooses."

Section 202(8) -- requiring the Secretary to "provide for the integration of sustainable development principles in the development and implementation of Federal policies."

We are unsure how a single Federal agency could "provide" for this unilaterally, and are concerned that the language implies that the Department of the Environment would be the only agency seeking to integrate sustainable development principles into its policies. In light of the need to coordinate with those agencies responsible for developing and implementing relevant federal policies, the language should be changed from "provide for" to "facilitate".

Section 203 -- Policy Review Functions of Secretary.

We share the concerns of other Federal agencies and offices regarding the extraordinary authority given to the Secretary in Section 203(c), in which a single agency is granted the unilateral authority to determine whether other agencies' legislation, projects, regulations, and other major agency actions may go forward, and in which the only way to reverse an adverse determination is a written appeal to the President. Moreover, we question the constraints placed on the President by the short time frame and requirement that the President's decision be in writing. The additional requirement that the President must submit the agency's appeal and the President's written order to certain Senate and House committees seems like an unusual intrusion into executive privilege and the separation of powers.

We note that this legislation does not define what is an "agency" for purposes of the requirements of Sections 203 and 204. Assuming for the purposes of commenting on this legislation that Executive Office entities would be "agencies" subject to

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these provisions, the result would be to give the Secretary (or, more accurately, an office director below the Secretary, given the mandated delegation of authority in Section 205(b)) veto power over USTR and every other entity within the EOP (including the NSC, NEC, OMB, the new Office of Environmental Policy, etc.).

These concerns may counsel for giving the Office of Environmental Policy within the White House, rather than the Department of the Environment, the decision regarding whether a project should go forward. If this authority is to reside within a particular agency, it may be appropriate to clarify the meaning of "unsatisfactory" or to raise the standard. In addition, an exclusion for EOP entities may be advisable.

As a technical matter, we also note that the authority given the Secretary in Section 203(a) and (b) was already granted to the EPA Administrator by Section 309 of the Clean Air Act. Accordingly, a conforming amendment to the Clean Air Act would be needed.

Section 204 -- Regulatory Functions of Secretary.

This amendment appears to give the Secretary authority to promulgate regulations binding on other Federal agencies. The reference to "this Act" is ambiguous in light of the fact that this language is proposed as an amendment to S. 171 (i.e., does "this Act" refer to S. 171 or to NEPA?). Moreover, the language appears overly broad, possibly implying a grant of authority to the Secretary to promulgate regulations binding on other federal agencies for a wide range of implementing activity (e.g., regulations regarding data collection by other agencies to implement the Secretary's report writing functions).

It might be useful to clarify that the Secretary would be responsible only for generally applicable NEPA regulations, while reserving federal agencies' existing authority to promulgate their own, agency-specific, supplemental NEPA regulations.

Section 205(b) -- Functions of the Office of National Environmental Policy.

We question the mandatory delegation of the Secretary's new authorities to the head of the Office of National Environmental Policy, an apparently subordinate officer within the same Department. This would appear to be a matter best left to the head of the agency.

COMMENTS.171
February 25, 1993