EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., May 21, 1971.

Hon. EDWARD A. GARMATZ,
Chairman, Committee on Merchant Marine and Fisheries,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to submit the views of the Council on Environmental Quality on H.R. 49, a bill "to amend the National Environmental Policy Act of 1969 (NEPA) to provide for class actions in the United States district courts against persons responsible for creating certain environmental hazards."

H.R. 49 would authorize private suits against any person who is responsible for "any pollution of air or water or for the creation of any unreasonable noise." Such suits could be brought as class actions by "any persons representing the interest of a group or class of persons whose lives, safety, health, property, or welfare has been endangered or adversely affected in any way" by the pollution or noise.

The remedies available in suits under H.R. 49 would include both monetary damages and equitable or declaratory relief. The Federal district courts would be given jurisdiction over such suits without regard to the amount in controversy.

H.R. 49 appears to be founded upon a principle with which the Administration is in accord: that private citizens have a critical role to play in the implementation of our national environmental policies. The Council on Environmental Quality has taken a number of recent actions indicating its support to this principle. The Council has:

supported confirmation of the charitable tax status of public interest and environmental litigation groups;

aggressively implemented the requirements of Section 102(2)(C) of NEPA through the Council's guidelines and agency procedures which strengthen the position of citizens wishing to participate in agency determinations and to test administrative action in court;

supported the elimination of procedural barriers, such as narrow rules of standing to sue and sovereign immunity, to citizen litigation under Federal environmental protection statutes (the courts to date have accepted the Council's position);

supported Administration acceptance of the position that statutory provisions (such as Section 304 of the Clean Air Act and the similar provision in the Administration's water quality proposal) authorizing citizen suits to enforce clearly established Federal environmental standards are a useful supplement to our enforcement programs; and

supported court rulings under NEPA requiring that there be not only formal but also "adequate" compliance with Section 102 of NEPA.

Although H.R. 49 is an attempt to reinforce the citizen's role in implementing environmental policies, it shares with a number of other recent legislative proposals certain features that the Council is unable to support. It is not, like the citizen suit provision in the Clean Air Act and that proposed by the Administration for the Federal Water Pollution Control Act, directed to citizen enforcement of specified anti-pollution requirements or standards fixed by the responsible State and Federal agencies, after public hearings. Rather, it would entitle plaintiffs to sue to prevent "*any* pollution of air or water" or "*any unreasonable* noise" (emphasis added).

H.R. 49 does not specify how the suits it authorizes would be integrated with the existing Federal machinery for control of air and water pollution. The bill states an intent not to "preempt or otherwise interfere with" existing laws, but this leaves many questions unanswered. Would H.R. 49, as its language indicates, require the courts to prescribe substantive law in areas where the responsible agencies have not yet set standards, and even where, as with noise, Congress has not yet declared a Federal policy? Where pollution standards have been administratively set, would H.R. 49 authorize the courts to override those standards? Where a Federal authority has issued an anti-pollution order, for example under the Clean Air Act, would the court in an action under H.R. 49, disregard the order and determine the facts de novo? Or would it review the order, and under what standard of review?

The failure of H.R. 49 to provide satisfactory answers to these questions prevents the Council from endorsing the bill. The reasons for the Council's position were set forth generally in the statement of Timothy Atkeson, General Counsel, on April 15 before a Senate subcommittee on S. 1032, a bill similar in many respects to H.R. 49. These reasons are as follows:

1. The lack of any standards for determining what pollution would be actionable under the bill would force upon the courts the task of determining what levels of pollution should be tolerated, and of making the difficult technical findings prerequisite to such a determination. Despite the use of the term "any pollution," the bill cannot be intended to forbid all pollution of the air or water, regardless of amount. Rather, it would require the courts to balance the effects of various pollution levels against the feasibility and cost of reducing pollution, in order to determine the reasonableness of requiring abatement in a particular case.

This task involves both technical and political questions for which the courts are institutionally ill-equipped to provide answers. The courts themselves have repeatedly stated this fact. The New York Court of Appeals said only last year: "[I]t seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. . . ." *Boomer* v. *Atlantic Cement*, 26 N.Y. 2d 219, 257 N.E. 2d 870 (1970). The Supreme Court of the United States recently expressed a similar conclusion. *Ohio* v. *Wyandotte Chemical Corp.*, 39 U.S. L.W. 4323 (1971). An effective attack on pollution problems requires careful policymaking on the part of Congress and implementation of congressional policy by agencies capable of sustained development and application of the necessary technical expertise. The balancing of environmental against other values will thus be in the hands of representatives ultimately responsible to the wishes of the electorate. A citizen suit provision such as that in the Clean Air Act would supplement Federal and State enforcement efforts without displacing the policymaking functions of the legislative and executive branches.

If it is feared that administrative agencies will be sluggish or unresponsive in executing congressional policy, more will be accomplished by legislative reform of outmoded procedures and by election and appointment of responsible administrators than by throwing the problems of pollution into the courts to set standards. For example, Congress can impose statutory deadlines for the promulgation of regulatory standards, as was done in the Clean Air Act Amendments of 1970, and authorize citizen suits to enforce the deadlines. The recent decisions by the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe*, 39 U.S.L.W. 4287 (1971), indicates that the courts will be diligent in applying procedural safeguards designed to protect Federal environmental policies.

2. Although H.R. 49 contains no definition of the "person" entitled to sue under its provisions, that term might be read to include Federal and State agencies with pollution-control responsibilities. The bill therefore creates uncertainty about which law the environmental protection agencies like EPA should enforce—the existing air and water quality status or H.R. 49's prohibition of "any pollution." In the absence of some correlation between H.R. 49 and the existing legislation, neither EPA nor industry would know which standards were to be enforced. This confusion could seriously hamper EPA's enforcement effort and reduce the incentive of industry to invest in equipment designed to meet air and water quality standards.

3. If H.R. 49 is read to permit de novo determination of facts in instances where an agency such as EPA has already issued an order, its enactment might lead to duplicative and possibly conflicting determinations involving the same facility or pollution incident. Where EPA has ordered compliance with specified standards in accordance with a prescribed timetable, effective government would not be served if a citizen could obtain an independent court order whose terms conflict with the administrative order. The possibility of conflict would be avoided if the suit authorized by H.R. 49 were styled as a review of the agency order. However, H.R. 49 does not so provide; it neither provides for a standard of review, nor relates its provisions to the existing review and enforcement provisions in the Clean Air Act and the Federal Water Pollution Control Act.

4. The difficulties faced by the courts in setting standards in suits under H.R. 49 would be exacerbated in the area of noise control, where Congress has yet to enact any general legislation prescribing Federal policy. The Admin-

istration has proposed legislation, introduced in the House as H.R. 5275 and H.R. 5388, which would declare a Federal policy and authorize EPA to establish noise standards for certain products. If that legislation is enacted, experience may indicate that citizen suits to enforce the standards set by EPA would provide an effective supplement to government enforcement action. However, the courts would be at a loss to set Federal policy on noise in the absence of the guidance such legislation would provide.

5. H.R. 49 does not specify whether the suits it authorizes may be brought against State or Federal agencies. We believe the intent of the draftsman in this regard should be clarified, and that, for reasons discussed below, there are serious questions about the advisability of authorizing suits for *damages* against Federal agencies. In addition, if the intent is to authorize suits against State agencies, consideration should be given to the proscription in the Eleventh Amendment to the Constitution of Federal suits by citizens against the States.

In addition to these difficulties, which are shared by a number of other bills including H.R. 5074, H.R. 5075, and H.R. 5076 also before this committee, H.R. 49 presents an additional problem that arises out of its provision of a class-action damage remedy in addition to prospective, equitable relief.

The thrust of the existing Federal pollution-control laws is preventive. These laws create mechanisms for the control of air and water pollution, including sanctions for noncompliance with pollution standards. They do not, however, attempt to provide a Federal compensatory remedy for persons injured by pollution. This is true as well as of the National Environmental Policy Act and of proposals such as H.R. 5076, now before this committee. H.R. 49, on the other hand, would provide a damage remedy for persons "whose lives, safety, health, property, or welfare has been endangered or adversely affected in any way by [air or water] pollution or noise." The Council believes that provision of such a remedy under Federal law would be an unwise departure from established concepts of Federal policy and Federal-State relations.

In many instances of air and water pollution, no individual or finite group suffers any injury not shared by other members of the public. For example, an inadequately controlled industrial plant may adversely affect the health or welfare of an entire community. In such a case the injury is properly regarded as public, and as a matter for redress by the community through control measures taken by its local, State, or Federal representatives. The injury suffered by any individual is generally not only too small to justify a suit for damages but incapable of any accurate estimation. Even where the availability of a class suit permits aggregation of small claims, the authorization of a damage action for such pollution-caused injury would require the courts to attempt to place a dollar value on such intangibles as a diffused reduction in the quality of life or a statistical increase in the likelihood of physical illness. If the courts, unable to accomplish this speculative task, awarded damages without regard to proof of actual injury, the award would not be compensatory—but rather punitive—in nature. The remedy provided would be simply an indirect means of imposing a fine for polluting activities, with the disadvantages that the courts would not, as under present law, have legislative guidance in setting the amount of the fine, and the fine would not accrue to the public treasury but would be a windfall to the plaintiffs in the suit.

The Council believes that the aim of Federal anti-pollution legislation—abatement of pollution in excess of prescribed standards—can be accomplished by the more direct means of Federal enforcement actions supplemented by citizen suits for injunctive relief under provisions such as Section 304 of the Clean Air Act.

On the other hand, there are instances in which a polluting activity inflicts particular harm on certain individuals such as neighboring landowners. In such instances, State law has generally made available private remedies, including compensatory damages. The vehicle for such recovery is often a common law action for private nuisance. The difficulties faced by the State courts in devising standards to govern such suits may be alleviated by the availability of Federal air and water pollution standards, which may be treated as prima facie evidence of nuisance or negligence in the common law action. Moreover, suits of this type are often not proper vehicles for class actions, whether in State or Federal courts, because difficult questions—such as causation and severity of a respiratory disease—would have to be adjudicated separately for each member of the class. Rule 23(b)(3) of the Federal Rules of Civil Procedure recognizes that where individual issues predominate, class actions case to be an economical or efficient means of resolving disputes.

Therefore, damage claims for pollution-caused injury do not appear to present a need for a new Federal damage remedy. The adjustment of private claims arising out of tortious injury has historically been the business of State law and the State judiciaries, and, while Federal statutes may alter the rules of liability applied in these cases, there is little to be gained by authorizing the transfer of such primarily local disputes *en masse* into the Federal court system.

Finally, H.R. 49 must be considered in the context of the alternative legislative routes available for protection of environmental quality. Your committee played a key role in drafting NEPA, which, the Council believes, is proving to be an effective means of enforcing national environmental policy. We are concerned that your committee not take a position that would prejudice our position that NEPA allows for a strong citizen role in its implementation. We must also avoid creating any impression that citizen suit provisions can substitute for the tough, innovative, wide-ranging environmental protection program the Council has helped prepare and only Congress can enact. We ourselves see an important role for citizen suits, which I have tried to outline above. But we think it a mistake to throw into the courts environmental issues on which Congress should set policy and which will require administrative regulation to get uniformity and effective follow-up.

In short, we must ensure that legislaiton to expand the citizen's role in environmental protection does not actually hinder such protection by disregarding the special competencies of the different branches of government and an appropriate division of labor between Federal and State courts.

The Office of Management and Budget advises that submission of this report is in accord with the President's program.

Sincerely,

RUSSELL E. TRAIN, *Chairman.*

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., November 9, 1971.

Hon. JOHN D. DINGELL,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. DINGELL: I am writing in response to your request that the Council submit its views on each of the citizen suit bills pending before your Subcommittee. To our knowledge, those bills include:

1. H.R. 8331 (and H.R. 9583, which is identical in content; and H.R. 5074, H.R. 5075, H.R. 5076, and H.R. 9564, which are very similar in content);
2. H.R. 49 (and H.R. 4517 and H.R. 8050, which are identical in content); and
3. H.R. 6862.

The Council has already informed your Subcommittee of its views on H.R. 8331 and its companion bills, all of which are adapted from the Michigan Environmental Protection Act of 1970. Our views on those bills were set forth in Chairman Train's letter to you of April 22, 1971; my testimony before your Subcommittee of June 9, 1971; and my letter to you of July 19, 1971, which was a response to the views of Professor Joseph Sax.

The Council has submitted its views on H.R. 49 in a report dated May 21, 1971.

There remains H.R. 6862. That bill would amend the National Environmental Policy Act in three respects: First, it would authorize citizen suits in Federal court against anyone violating "any Federal law, regulation, or standard relating to environmental quality," specifically including the Federal air and water quality laws. The remedies available in these suits would include equitable relief and, except where the defendant is a governmental agency, court costs and "punitive damages of up to $5,000,000."

Second, the bill would direct the Council on Environmental Quality to compile all existing Federal laws, regulations, and standards relating to environmental quality and to make the compilation available to the public. The Council would also "recommend to the Congress Federal criteria in areas of pollution not already covered by such criteria."

Third, the bill would authorize citizen suits in Federal court against any person "responsible for unreasonably adversely affecting the plaintiff's interest in a