

TESTIMONY



United States Senate
 Committee on Governmental Affairs
 July 24, 2001
Testimony of E. Donald Elliott^[1]

Mr. Chairman and Distinguished Members of the Committee:

It is a great pleasure to be testifying again before this distinguished Committee, now chaired by Senator Lieberman from my home state of Connecticut, just as it was equally a pleasure to testify in the past when it was chaired by Senator Thompson.

As an academic working in the fields of environmental law, administrative law and law and science, as well as a former EPA official and practicing environmental lawyer, I strongly support the bi-partisan proposals to elevate EPA to cabinet status. The two previous Administrations, one Republican and one Democrat, have both treated EPA as part of the Cabinet de facto. It is time – perhaps long past time – to make our environmental department part of the President’s Cabinet. As stated in S.159, co-sponsored by Senators Boxer and Collins, “protection of public health and the environment is a mission of at least equal importance to the duties carried out by cabinet-level departments.”^[2] I agree. Creating a Cabinet-level environmental ministry will send a signal to our friends in Europe and elsewhere that we as a nation are second to none in the importance that we give to protecting the environment for future generations.

Some of my friends in industry have expressed to me privately their concerns that elevating EPA to the Cabinet might further politicize its decisions and undermine their already meager scientific basis. This need not be the case, but we do need to build into the structure of the new DEPA a provision for a high-level “chief science officer” to assure that

science will play its proper role in environmental decisions.

In government, of course, “the best can be the enemy of the good.” We all understand the importance of a “clean bill” that is more likely to become law if stripped of controversial positions. Each of us would undoubtedly like to see his or her pet project written into Cabinet-status legislation. I, for example, am a long-time supporter of “Next Generation” or “Alternative Compliance” legislation^[3] such as that introduced in the past by Senator Lieberman and now supported by the Business Roundtable. Such legislation would give environmental regulators flexibility to move beyond “one size fits all” solutions in order to achieve superior environmental performance. I would dearly love to see such authority written into Cabinet-status legislation, but I reluctantly recognize that this is not the time or place for substantive revisions.

Nonetheless, within this spirit that Cabinet-status legislation should be restricted to structural and organizational issues, I think that there is still plenty of room to designate a high-level “Chief Science Officer” at DEPA-- in the same way that pending proposals already designate chief legal officers, chief financial officers and chief information officers. Science is conspicuous by its absence from mention in some of the pending bills.

Perhaps the single greatest failing in the current structure of EPA is the absence of a high-level advocate for good science at the Agency’s highest echelons. The role of science must be enhanced and built into the foundations of the new DEPA. My mentor Bill Reilly was fond of quoting a remark Senator Moynihan made to him during his confirmation process: “Young man, do not allow your programs to become based on middle-class enthusiasms.” The greatest danger for the Department of Environmental Protection Affairs, as for EPA at some low points in the past, is that it will be taken over by some passing political “enthusiasm” – of either the right or

the left -- that is not grounded in science. "Science is the antidote for enthusiasm and superstition," wrote Adam Smith, the political philosopher and father of economics.

Administrator Reilly repeatedly made much the same point by reminding us at EPA that we always needed "rigor to match our enthusiasm."

Of course, science alone cannot make environmental decisions. There are always uncertainties and environmental decisions always involve values and policy judgments as well as science. But the risk today is NOT that we will have too much science and not enough politics in our environmental decisions, but the rather just the opposite. As Georgetown University law professor Steven Goldberg aptly put it: "Regulatory agencies are regularly accused of being 'captured' by industry, consumer groups, members of Congress or bureaucratic inertia. They are never accused, however, of being captured by scientists."[\[4\]](#)

I applaud many recent efforts to upgrade the role of science at EPA, including the development of a world-class Science Advisory Board, the STAR program, enhanced peer review and an enhanced role for scientists on the working groups. These are all good steps forward. The problem that remains, however, is not that EPA lacks accurate scientific information, but rather that science is not often heard in the top councils of the Agency when decisions are made. I have addressed this issue in more detail in an article called "The Science Debacle at EPA" (31 ELR 10125) which I attach and request be made part of the record.

Suffice it to say that science needs a high-level voice at DEPA, just as law has a high-level voice through the General Counsel. I support the recent recommendation by the National Academy of Sciences for a high-level chief science officer who would advise the Administrator – hopefully, soon the Secretary --whether proposed policies are consistent with science, just as

the General Counsel advises the Administrator whether proposals are consistent with law: “Just as the advice of the agency’s legal counsel is relied upon by the Administrator to determine whether a proposal is ‘legal,’ an appropriately qualified and adequately empowered science official is needed to attest to the Administrator and the nation that the proposed action is ‘scientific’—that it is consistent, or at least not inconsistent, with available scientific knowledge”[\[5\]](#)

Whether the chief science officer should be at the Deputy Administrator/Deputy Secretary level, or given some other title, is a controversial issue on which I take no position. Perhaps a compromise would be to take the National Academy’s analogy seriously and name the new chief science officer the “General Counsel for Science” paralleling the “General Counsel for Law.” What is important, however, is that the Congress send two unmistakable and permanent signals in Cabinet-status legislation: (1) that science is important and its role should not be based on the whim of a particular Administrator or the personality of a particular Assistant Administrator (“AA”) for the Office of Research and Development (“ORD”), and (2) that the Chief Science Officer *should* properly review and question the underlying scientific basis of proposals developed by other parts of the agency or department.

The second point is particularly important. A strong norm of “turf” has developed over the years at EPA. It is part of the culture that AA’s are expected to maintain their silence about matters that are within another AA’s bailiwick. Thus, in my experience, ORD usually maintained its silence even when its scientists understood that a proposal had little scientific support, or even was blatantly unscientific.

Some technical language in S.159 is particularly troubling in that it might be read as reinforcing this unfortunate norm of silence by prohibiting one assistant secretary from

“supervising” another.^[6] In my view, the Department’s chief science officer – whatever his or her title – *OUGHT* to “supervise” other assistant secretaries to prevent them or their programs from distorting or misusing science.

I also have similar concerns that seemingly innocuous language in S.159 may also unintentionally narrow the role of the General Counsel. Current EPA regulations provide that the General Counsel’s office not only provides legal advice to the Administrator, but also to all of EPA’s program offices.^[7] By cutting this mandate back to merely “shall provide legal assistance to the Secretary concerning the programs and policies of the Department,”^[8] this language might be read as undermining the General Counsel’s historic role. I assume that neither of these effects is intended, and am raising these points merely so that the Committee may consider whether clarifying its intentions might be desirable.

In conclusion, let me thank the Committee for this opportunity to testify. I am very proud of my service with EPA, and I strongly support its elevation to Cabinet status. I do believe, however, that science needs a clearer – and yes, a louder -- voice in the highest councils of the new DEPA. I hope that in one way or another, the legislation reported out by this Committee will provide that missing voice.

^[1] Co-Chair Environmental Practice Group, Paul, Hastings, Janofsky & Walker; Professor (adj) of Law, Yale and Georgetown Law Schools; Former General Counsel, Environmental Protection Agency.

^[2] S.159, §2(1).

^[3] E. Donald Elliott, *Toward Ecological Law and Policy*, in *THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY* 170 (ed. M. Chertow & D. Esty, Yale Univ. Press, 1997); E. Donald Elliott and Gail Charnley, *Toward Bigger Bubbles*, 13 *Forum for Applied*

Research and Public Policy 48–54 (Winter 1998); E. Donald Elliott, *Beyond Environmental Markets: or Three Modest Proposals for the Future of Environmental Law*, 29 CAPITAL U. L.REV. 245 (2001).

[4] Steven Goldberg, *The Reluctant Embrace: Law and Science in America*, 75 GEORGETOWN L. J. 1341, 1365 (1987).

[5] National Research Council, *Strengthening Science at the U.S. Environmental Protection Agency* (2000).

[6] “NONDELEGATION. The Secretary may not assign duties for or delegate authority for the supervision of the Assistant Secretaries ... to any officer of the Department other than the Deputy Secretary.” S.159, §3(b)(2), at p. 3, lines 6-9.

[7] 40 C.F.R. Part 1.31 (EPA Office of General Counsel "serves as the primary legal advisor to the Administrator. The office provides legal services to all organizational elements of the Agency with respect to all Agency programs and activities and also provides legal opinions, legal counsel, and litigation support; and assists in the formulation and administration of the Agency's policies and programs as legal advisor.")

[8] Section 6 of S.159 (at p. 11, lines 11-13).

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