TESTIMONY

United States Senate
Committee on Governmental Affairs
March 7, 2002

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, chaired by my neighbor 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 field of environmental law as well as a former EPA General Counsel and a practicing environmental lawyer, I must respectfully disagree with the assessment of the environmental record of the Bush Administration offered by my good friends Professor Tom McGarity of the University of Texas and Greg Whetstone of NRDC, who I first got to know during his many years as a staffer for Democratic Congressman Henry Waxman.

When I last testified before the Committee last July, it was to support elevation of EPA to cabinet status. That is a good idea that has not yet been enacted despite bipartisan support and measured debate over substantive issues. As the mid-term Congressional elections approach, however, I regret that the spirit of bipartisanship, and mutual respect for those with whom we have honest disagreements over public policy seems to be getting lost in the hyper-charged rhetoric of an election year.

The Environmental Double-Standard.

It is ironic that just a little over year into the Bush Administration -- when several key appointments at EPA are still not yet confirmed -- and less than a month after the President announced the most far-reaching and progressive legislative proposals to reform the Clean Air Act in our history -- his Administration is now being denounced ii overheated rhetoric for "rollbacks" and "gutting" protection of the environment. On close examination, those charges turn out to be misleading political rhetoric. The Bush Administration occupies the sensible center on environmental policy. In my judgment, its policies are well-balanced and designed to protect the environment while also promoting economic development.

There is a fascinating double standard that is applied by some to environmental policies, particularly in election years. In many instances, policies that were praised as "reforms" when proposed under the Clinton-Gore Administration are now denounced as "rollbacks" or "gutting protection of the environment" when continued by a Republican President. Take for example the charge by NRDC in "Rewriting The Rules: The Bush Administration's Unseen Assault on the Environment" that "the most telling indication of this administration's intentions is the role played by the OMB. The Bush administration has given unprecedented new power to the OMB to gut existing environmental rules and bottle up new ones indefinitely." It simply isn't true that OMB's role in reviewing regulations is "new" or "unprecedented." It has been in place for the past five presidential Administrations, including two Democratic ones, as this Committee well knows from its work in the regulatory reform field.

What is really "new" and "unprecedented" about OMB under this Administration is that OMB is sending "prompt" letters to agencies urging them to make regulations tougher in some instances, upgrading its scientific expertise, increasing transparency by putting documents onto the internet and through regular press releases, and aggressive actions to cut the backlog of overdue reviews of regulations to not languish "indefinitely." But does NRDC mention any of these actual initiatives? Of course not. This is "Environmental Enron" -- charges are made in lurid language and then the mere existence of the charges is claimed to constitute the "issue."

When Al Gore proposed a less adversarial approach to environmental regulation based on trading, more stakeholder involvement and more use of incentives rather than litigation, it

was broadly hailed as "re-inventing government."[2] When the Bush Administration actually tries to implement these same progressive policies in its proposed "Clear Skies" legislation, it is denounced as a "rollback" and creating "loopholes" in existing law. The basic idea behind the President's proposal to is substitute modern, efficient cap-and-trade programs that will get massive pollution reductions quickly and reliably for the multiplicity of antiquated, slow and inefficient "command and control" programs that we have failed for the last 30 years. There is a strong, bi-partisan centrist consensus that we need a "Next Generation" of environmental policies.[3] It is not a radical "rollback" or creating a "loophole" to reform existing law to get better results. Many academics and professional reports have endorsed these kinds of changes. Indeed, the basic idea of substituting trading systems for a multiplicity of antiquated command-and-control programs under the Clean Air Act was actually proposed by EPA itself under Clinton-Gore as the "Clean Air Power Initiative" (CAPI). In the eyes of some, apparently the same centrist reform policies are "progressive" when proposed by Democrats, but "rollbacks" when proposed by Republicans.

The NSR Cases.

This brings me to the core of my disagreement with my friend Eric Schaeffer, with whom I served at EPA. I understand that Eric is resigning from EPA to assume a fine new job funded by the Rockefeller Foundation as a professional critic of EPA enforcement policies, and I wish him well in his new role. In his interview with ABC New's "This Week" on Sunday, Eric stated: "compare the actual emission reductions we would get out of our [NSR] cases with this new bill … We can do better under current law than what they're putting on the table."

Eric's position reminds me of the old expression "when you're a hammer; everything looks like a nail." Eric is a hammer. He believes in controlling pollution the old-fashioned way by suing polluters one by one to get court orders requiring each individual plant to install air pollution controls based on best available control technology. We have been doing this for the last 30 years, and as Eric himself points out, many plants remain uncontrolled or under-controlled.

In my opinion, if we follow the course that Eric advocates, they'll still be largely uncontrolled 30 years from now after years and years of litigation. Eric's position is based on the assumption that EPA is going to win all of the NSR cases brought under his supervision quickly and there won't be any appeals or setbacks along the way. That's not how litigation really works in my experience. Congressional hearings are not the appropriate place to try lawsuits, but not in my view, the NSR issue is a little more complicated than Eric acknowledges. Despite all the sanctimonious rhetoric about utilities "violating the law," no court has yet ruled in EPA's favor in any of EPA's NSR enforcement cases against the utilities. EPA has staked out a bold new theory in these cases. The statute itself requires emissions "increases" for a modification and past EPA interpretations required showing a causal relationship between the physical changes and the emissions increases. EPA is now asserting creative new interpretations of these concepts. In my opinion, EPA is not likely to prevail on every point in every case. With commendable honesty, Eric's own resignation letter even states "*Most* of the projects our cases targeted involved big expansion projects that pushed emission increases many times over the limits allowed by law." "Most," but not all. Some companies are being sued even though they did not violate the law as it had traditionally been interpreted. EPA may well lose some of those weaker cases, while winning others, and after another 10-15 years of litigation and a few appeals to the Supreme Court, we may all finally understand what the very complex and convoluted NSR rules really mean. But is it worth going down that road? I don't think so.

Of course we need to maintain strong environmental enforcement as one tool, but if the last 30 years have taught us anything, it is that slogging thru case-by-case litigation is not the best way to get pollution reductions. Over the last decade, one small program involving less than ½ of one percent of EPA employees produced more pollution

reductions than all the rest of EPA's air pollution control program combined (including all of Eric's enforcement cases), and with virtually 100% compliance; that was the Acid Rain Trading program that forms the model for the President's "Clear Skies" proposal.[4] We should build on what works well rather than investing more resources in what doesn't. The NSR program is broken and it should be replaced. The Clinton-Gore Administration proposed reforms to NSR in the Federal Register in 1996 and again in 1998, and there were no howls from environmentalists about creating loopholes. Only now when a Republican Administration is nearing completion of the NSR reform process that was begun under Clinton-Gore are these partisan charges now being heard.

NSR is an antiquated regulatory technology that just doesn't work very well. It makes no policy sense to discourage modernization of plant and equipment, or to regulate plant-by-plant, or to require installation of expensive technology for technology's sake regardless of whether there are air quality problem in the area. NSR is slow, costly and ineffective – and those are the kindest things that one can say about it! It is the least successful of all the programs under the Clean Air Act. NSR represents the past of the Clean Air Act, not its future.

There is a strong progressive, centrist coalition to update antiquated parts of our environmental laws with newer programs that work better. The Bush Administration's environmental policies are part of that centrist coalition for sensible reforms that get real results, not symbolic victories. This is the road to real environmental progress, not a "rollback."

---

[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] Al Gore, *Improving Regulatory Systems: Accompanying Report of the National Performance Review* (Washington, D.C., September 1993).

[3] See, e.g. 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).

[4] The White House, Executive Summary – The Clear Skies Initiative February 14, 2002 ("The acid rain cap and trade program created by Congress in 1990 reduced more pollution in the last decade than all other Clean Air Act command-and-control programs combined, and achieved significant reductions at two-thirds of the cost to accomplish those reductions using a "command-and-control" system. … The Acid Rain program enjoys nearly 100 percent compliance and only takes 75 EPA employees to run – a track record no command-and-control program can meet.")

Committee Members | Subcommittees | Hearings | Key Legislation | Jurisdiction
Press Statements | Current Issues | Video of Select Hearings | Sites of Interest