S. Hrg. 107–157

S. 159—A BILL TO ELEVATE THE ENVIRONMENTAL PROTECTION AGENCY TO A CABINET-LEVEL DEPARTMENT

HEARING

BEFORE THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

S. 159

TO ELEVATE THE ENVIRONMENTAL PROTECTION AGENCY TO A CABINET LEVEL DEPARTMENT, TO REDESIGNATE THE ENVIRONMENTAL PROTECTION AGENCY AS THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AFFAIRS, AND FOR OTHER PURPOSES

JULY 24, 2001

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE

75–478 PDF WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON GOVERNMENTAL AFFAIRS

JOSEPH I. LIEBERMAN, Connecticut, *Chairman*

CARL LEVIN, Michigan
DANIEL K. AKAKA, Hawaii
RICHARD J. DURBIN, Illinois
ROBERT G. TORRICELLI, New Jersey
MAX CLELAND, Georgia
THOMAS R. CARPER, Delaware
JEAN CARNAHAN, Missouri
MARK DAYTON, Minnesota

FRED THOMPSON, Tennessee
TED STEVENS, Alaska
SUSAN M. COLLINS, Maine
GEORGE V. VOINOVICH, Ohio
PETE V. DOMENICI, New Mexico
THAD COCHRAN, Mississippi
ROBERT F. BENNETT, Utah
JIM BUNNING, Kentucky

JOYCE A. RECHTSCHAFFEN, *Staff Director and Counsel*
SUSAN E. PROPPER, *Counsel*
HANNAH S. SISTARE, *Minority Staff Director and Counsel*
PAUL R. NOE, *Minority Senior Counsel*
DARLA D. CASSELL, *Chief Clerk*

CONTENTS

	Page
Opening statements:	
Senator Lieberman	1
Senator Collins	3
Senator Voinovich	4
Senator Thompson	13
Senator Stevens	15
Senator Carper	17

WITNESSES

TUESDAY, JULY 24, 2001

Hon. Barbara Boxer, a U.S. Senator from the State of California	5
Hon. Sherwood L. Boehlert, a Representative in Congress from the State of New York	7
Hon. Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency	9
Hon. Carol M. Browner, Former Administrator, U.S. Environmental Protection Agency	20
Hon. William K. Reilly, Former Administrator, U.S. Environmental Protection Agency	22
Hon. E. Donald Elliott, Former General Counsel, U.S. Environmental Protection Agency	24

ALPHABETICAL LIST OF WITNESSES

Boehlert, Hon. Sherwood L.:	
Testimony	7
Prepared statement	42
Boxer, Hon. Barbara:	
Testimony	5
Prepared statement	37
Browner, Hon. Carol M.:	
Testimony	20
Prepared statement	46
Elliott, Hon. E. Donald:	
Testimony	24
Prepared statement with an attachment	55
Reilly, Hon. William K.:	
Testimony	22
Prepared statement	48
Whitman, Hon. Christine Todd:	
Testimony	9
Prepared statement	44

APPENDIX

Hon. Robert Smith, a U.S. Senator from the State of New Hampshire, prepared statement	65
Copy of S. 159	68

S. 159—A BILL TO ELEVATE THE ENVIRONMENTAL PROTECTION AGENCY TO A CABINET-LEVEL DEPARTMENT

TUESDAY, JULY 24, 2001

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Joseph Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Collins, Voinovich, Thompson, Stevens, and Carper.

OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. Good morning and welcome to this hearing today on S. 159, a bill introduced by two of our colleagues, Senator Barbara Boxer of California and Senator Susan Collins of Maine, who I am pleased to say is serving as the Ranking Member for this hearing. I apologize to all in attendance. I am suffering from a summer cold, undoubtedly aggravated by air pollution, which would undoubtedly be alleviated by the elevation of EPA to cabinet status. So I should probably start my opening statement there.

I have been a Member of this Committee since I came to the Congress in 1989, and we have twice held hearings in 1990 and 1993 on raising EPA to the cabinet. I have been an enthusiastic supporter of this legislation and was generally disappointed when it failed to be enacted. Today, I continue to believe strongly that EPA should be made a cabinet department. The time is really right for our Nation to say that we hold protection of our environment so high that we want to put it on a par with other agencies that have cabinet status, such as those that defend our national security or work to improve the quality of our education system. In fact, I do think that if we elevate EPA to cabinet status, we will be reflecting what has become an expression, a consensus expression, of our national values.

We have come a long way since the 1970's and the first Earth Day, from the creating of EPA by President Nixon in 1970, driven by the vision and the insights originally then, that we were acting with disrespect toward our environment, and while there was a time in which we thought that would have no consequences, it obviously was having serious consequences on the state of our magnifi-

cent natural resources in this country, but also on our own health, as a result of pollutants in the air and in the water.

That led to the first generation of environmental protection laws at the Federal and State level, which, in turn, as occasionally happens in the history of civilization, the law reflected the value that Americans placed on the protection of the environment, but it also broadened the acceptance of those values such that we now have a very wide consensus in our society that cuts across every demographic and certainly every political describer, in favor of environmental protection. It seems to me that conferring cabinet status on EPA reflects that very profound and widely held American value of environmental protection.

Second, I would say that EPA's status ought to be elevated as a way of making sure that the reality follows the status and the symbol, which is to say that environmental concerns are put, structurally and every other way, on an equal par with other concerns with which they occasionally confront. I am thinking of the recent California power crisis, but generally the concern about meeting our energy needs, which so often impacts questions of environmental protection. So the bottom line is, I think, we need an EPA that has equal standing in the cabinet and in our government with, for instance, the Department of Energy in developing a balanced policy to meet our energy needs.

There are other times when EPA needs to work with the Department of Defense, for instance, over toxic waste sites on military bases; or negotiate with the Department of Agriculture about the use of chemicals on farms. I think as a matter of status as well as reality, EPA ought to start those discussions and negotiations, which are important, on a level playing field.

Finally, I do think that elevating EPA to cabinet status would help it be more effective in dealing with matters of the environment on the international stage. Obviously, problems associated with the quality of our air, land, and water do not stop at the border. There is a global dimension to our most serious environmental concerns. It is a fact that as far as we could determine that of 198 nations in the world today, only 10, unfortunately including the United States, do not maintain a cabinet department or ministry devoted to the environment. So it is time for us to get with it. I, for the moment, resisted, but I cannot any longer resist one of those inevitable senatorial lines, which is, that puts us in the company of States like Libya and Myanmar. OK, I have done it.

One of the great challenges that we have, that both of the bills that have been put forward, both S. 159 and Congressman Boehlert's bill in the House, are, generally speaking, straight-ahead bills that deal with structure. One of the problems that has affected previous attempts to raise EPA to cabinet level is a lack of discipline in the Congress itself, which is to see these bills as an opportunity to attach any and all environmental riders, about whatever happens to be concerning a particular member of Congress at that particular time. That is the greatest threat to the enactment of this bill, and I hope that together, certainly across party lines as reflected in the sponsors of this bill, that we can work to say to our colleagues on both sides of the aisle, we know you are concerned about that, wait, there will be another day. Let's just get this bill

passed and put EPA where it belongs, which is into the cabinet. I am delighted that—Senator Collins has jumped a few seats and pushed Senator Thompson further away from me.

Senator THOMPSON. Mr. Chairman, do you get the impression I may be going in the wrong direction? I do not know.

Chairman LIEBERMAN. It is good to see you, Fred.

Senator Collins, I look forward to your opening statement now.

OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. I would be happy to defer to Senator Thompson if he wants to say some comments. Let me begin by thanking Senator Lieberman for convening today's hearing and for recognizing the importance of elevating EPA to cabinet-level status. The Chairman has a deep commitment and an appreciation for environmental protection, a commitment that I share. In fact, we frequently had the opportunity to work together on environmental initiatives. We are co-sponsors of many of the same bills. I want to thank him for convening today's hearing and also for selecting the Boxer-Collins bill for the Committee's consideration.

I would also like to extend my gratitude to Senator Thompson. He knows how much this issue means to me and with his customary grace, has allowed me to serve in his stead as Ranking Member for today's hearing. Senator Thompson has always done a terrific job in leading this Committee and I sincerely hope that I can fill his shoes today. I mean that metaphorically, of course.

Perhaps most important, I would like to recognize our two colleagues, Senator Boxer and our colleague from the House side, Congressman Boehlert, for their leadership on this important issue. I am very pleased to join Senator Boxer, the architect of the Senate bill, in bringing S. 159 before the Committee, and I look forward to working with her closely to ensure that this legislation becomes law.

There are many good reasons to elevate EPA to cabinet status. We will hear about many of these reasons today, so I am not going to go through a full litany now. Instead, let me just say why I believe this bill is so important. In a sentence, it comes down to ensuring that the environmental implications are front and center when decisions are made by this or any other administration. Elevating the EPA to cabinet-level status will give the agency the status, the resources and the voice to do a better job for the environment and our economy.

In order to achieve the cleanest environment in the most efficient manner possible, today's problems require innovative solutions that span State and international boundaries. Let me cite just one example that is a very important issue in the State of Maine, and that is mercury pollution. In Maine, every lake, river, and stream is subject to a State mercury advisory warning of the health risks for pregnant women of consuming fish from these waters. However, much of the mercury originates from outside of the State of Maine and a significant fraction comes from beyond the borders of the United States. To address problems such as these, EPA will need a strong relationship with the Secretary of State and with other members of the President's cabinet. The EPA will need ready ac-

cess to the President and EPA will need to have the best possible people to devise innovative and flexible solutions.

S. 159 will help EPA achieve those goals. In short, elevating EPA to cabinet level will help the agency acquire the resources necessary and command the attention needed to do the best possible job of protecting human health and preserving our environment. I would note that Congress has tried many times before to elevate EPA to cabinet-level status. The congressman and I were talking before the hearing, and he told me he had been working on this issue since 1988, I think it was. I am hopeful that this time, we will finally be successful.

Each time in the past the effort has failed, not from opposition to the idea itself, but as a result of extraneous baggage that was added to each effort and eventually sunk each effort. Each of us has criticisms of the EPA and can think of mistakes that the EPA has made, and of ways in which Congress could restructure the agency to make it work better. The trouble is that it is very difficult to achieve consensus on these ancillary issues.

So what I hope is that we can concentrate on the issue before us today, and that we can all agree that EPA should be included in the President's cabinet. I would like to hear from my colleagues on both sides of the aisle on other ways that we can improve the EPA and make it more effective. Let's talk about improvements and think about additional ways as we move forward, but let's not get so mired down in other issues that we are unable to get this important initiative enacted.

S. 159 and the House bill stand on their own merits and they deserve to be passed and signed into law. I hope that our colleagues will join us in doing what many previous Congresses have tried to do before, but failed. I hope that we will elevate EPA to cabinet-level status.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Collins, for an excellent statement and for your kind words. It has been the practice of the Committee just to have the Chairman and Ranking Member make opening statements, but seeing Senator Thompson over there, I wonder if either Senator Voinovich or Senator Thompson would like to say a word or two before we go to our witnesses.

Senator THOMPSON. Thank you, Mr. Chairman. I will wait for the questioning round to make any comments. Thank you.

Chairman LIEBERMAN. Senator Voinovich.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. I just want to say that I am very supportive of this legislation and would hope to be included as a co-sponsor of the legislation. There is no question that EPA has an enormous impact on our Nation's competitive position in the world marketplace, on our national security, our foreign policy, and it permeates many aspects of the Federal Government, and I believe that it is appropriate that it now join the cabinet officially, so that it can have more influence and be more a part of the team.

Chairman LIEBERMAN. Thanks, Senator Voinovich.

I am delighted to welcome our colleagues today. Senator Boxer, thanks so much for your leadership in this matter. I am glad we

could take it to an early hearing, and I hope we can report this bill out soon and see if we can get it on the floor in the fall. I look forward to hearing from you now.

TESTIMONY OF HON. BARBARA BOXER,[1] A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you so much, Senator. Mr. Chairman, Senator Collins, Senator Thompson, and Senator Voinovich, I have had the pleasure of working with Senator Collins and Senator Voinovich on this bill. Senator Voinovich is tough to get on a bill, because he really thinks it through, and his announcement today that he will be a co-sponsor is very exciting to me. I think it adds a great balance to our bill, which is co-sponsored by Republicans, Democrats and one independent, so we are very happy.

Before I get into my testimony, and I will go through it quickly for you, I want you to know that the bill that I authored is really based on a bill that was introduced by the wonderful Senator John Glenn back in 1993, in the 103rd Congress, but as has been stated by you, Mr. Chairman, and by Senator Collins, that effort was weighted down, and even though it got out of this Committee in a bipartisan way, we lost the fight. I hope we can stick together and work with both leaders to make sure this bill stays clean, and if there is anything in this bill of Senator Collins' and mine, and Senator Voinovich's now, that you feel, Mr. Chairman, or anyone feels weighs it down, we will be glad to take a look at it.

But essentially what we do in the bill is we take the way the EPA is running right now and we put that into the statute. We do not make judgments about it. We just say the assistant secretary shall be put into place, etc. We add nothing new in terms of the statute. Mr. Chairman, just to let you know how much this means to me, on the first working day of this new Congress, I introduced a bill to address the energy crisis in California. On the second day, I introduced this bill. So it ranks right up there with things that matter to me, and it matters to me because—I think Senator Collins said it well, "We need a place at the table for the environment."

There are always arguments about it. Put it at the table and let's work together so we can make progress. I think that is the best way. You are going to hear from former EPA Secretary Reilly, and we came over on the plane together, and I do not want to steal anything from his testimony, but I think he will tell you how important the work of the EPA is around the world, and how much it means to people around the world who is actually heading the EPA, and I think that argues for cabinet-level position and he will tell it to you in a much better way than I can.

As we all know, the EPA was created by President Nixon over 30 years ago, in part because there were so many problems in our environment. The President felt we needed to give more attention to those problems. The waters were too polluted to drink. The air was getting too dirty to breathe, and we realized then very clearly that clean air, waste and water pollution do not respect State boundaries, that, in fact, this is a national issue.

[1] The prepared statement of Senator Boxer appears in the Appendix on page 37.

As you look at the history of the EPA, I think it has played a critical role in ensuring that all Americans enjoy the same basic level of public health and environmental protection, and at the same time, the world has changed a great deal. In many ways, the world is catching up with our recognition of these issues, again arguing for moving toward this cabinet-level position.

So I do not want to put unnecessary words on the table now, because I sense there is a good deal to support and one thing I know is if you have a lot of support, do not say too many things. So I ask unanimous consent that all my words be placed in the record that are in this statement, and I would simply say that what we do is we codify what is really happening at the EPA, and I will add a couple of countries to what Senator Lieberman said.

The wonderful Senate method here of arguing: According to CRS, 198 countries were surveyed; only 10 do not afford cabinet or ministerial status to their highest environmental official. So we do, in fact, by virtue of having no cabinet-level position, we join nations such as Libya, Yemen, Qatar and Uzbekistan in failing to grant permanent status to our EPA. We can change all this. I think, if you will, the ingredients are here to change it.

Mr. Chairman, with you as the Chairman and Senator Thompson as the Ranking Member, with Senator Collins and Senator Voinovich joining in this effort, I just see only good things, and again I want to particularly thank Senator Collins for coming out there. She could have held out for a different bill. She read the bill. She felt it was good, and we will work with you to change it, amend it in whatever way you see fit, Mr. Chairman and Members of the Committee.

Thank you very much.

Chairman LIEBERMAN. Thank you, Senator Boxer, for an excellent statement. We will certainly print the statement in full in the record, and thanks to you and Senator Collins for your leadership on this. If you have to depart, we certainly understand.

Senator BOXER. Yes, we have a hearing on another subject that is a favorite of yours, missile defense.

Chairman LIEBERMAN. Oh, yes.

Senator BOXER. So I will go over to the Foreign Relations Committee.

Senator THOMPSON. At least we are keeping the Chairman here.

Chairman LIEBERMAN. I think you may want to keep Senator Boxer here. [Laughter.]

Senator BOXER. I am going to leave this in your good hands. Thank you very much.

Chairman LIEBERMAN. Thank you. OK. Thanks very much.

Congressman Boehlert, you have been an extraordinary leader on matters of environmental protection and really have created a bridge in the House time and time again, when it has not been easy, I know, politically, although I honestly believe, if I can take Connecticut as a measure and my occasional trips around the country, particularly last fall, I do not think there is a partisan divide on matters of environmental protection at all, once you get out and talk to people. I always say I can go into a room in Connecticut and, on environmental protection, I cannot pick out who the Republicans and Democrats are. They are pretty much people of like

minds. So you have really stood for that, as others have here on the panel with me. I welcome you and thank you once again for your leadership in this matter.

TESTIMONY OF HON. SHERWOOD L. BOEHLERT,[1] A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. BOEHLERT. Thank you very much, Mr. Chairman. Senators, I really appreciate the courtesy you are extending to me to allow me to testify, and I will extend to you the same courtesy. I will do you a favor. I will say the four words that you most welcome: I will be brief. That challenge can be real difficult, given the importance of the subject and my long and sometimes tortuous legislative experience with this effort, dating back to 1988, when, in anticipation of your arrival the next year, then-Congressman Jim Florio and I first introduced the elevation bill.

Chairman LIEBERMAN. Very far-sighted of you.

Mr. BOEHLERT. But, alas, it did not succeed, so we are still at it. You know and the Senators know the importance of elevating EPA, not just to Senator Boxer and me, but to the administration, the previous administration, and the Nation as a whole. So I will get right to the point, and actually there are three points. The first point is Congress should elevate EPA to the cabinet-level status it deserves and needs. I will not play a game of trivial pursuits with you or Senator Boxer, but I notice you both neglected to mention that Monaco also is in the same boat.

Chairman LIEBERMAN. My apologies.

Mr. BOEHLERT. All right. [Laughter.]

Every major country in the world, with apologies to Monaco and Yemen and Uzbekistan, all the others, the nine, every major country in the world has accorded cabinet-level status to the top environmental agency, and it is about time we did the same thing. Today, more than ever before, we need to make EPA an official member by statute of the President's cabinet. This has nothing to do with the stature or capability of governor—soon to be secretary—Ms. Whitman, who I think is doing an outstanding job. Instead, it is a question of timing and national and global conditions. Environmental issues are becoming more complex, more international, and more global. Climate change, widespread toxic pollution and invasive species are obvious examples.

The House Science Committee, which I am privileged to chair, is looking precisely at such issues. There are also growing complexities involving natural resource damages and environmental challenges among many Federal agencies, such as the Department of Energy and the Department of Defense. I think it is important that our top environmentalist deal with the Secretary of Energy and the Secretary of Defense on an equal standing.

Mr. Chairman, the stars may have finally aligned to make EPA elevation a reality, and as Chairman of the Science Committee, which has jurisdiction over NASA, I will do all of my power to ensure that the stars stay properly aligned. As Chairman of this Committee, you are in a position to do all the hard work and to

[1] The prepared statement of Representative Boehlert appears in the Appendix on page 42.

help get the bill to the President in an acceptable form. The second point I wish to make, and you have said it well, is do not be tempted by side issues or diversions. We need discipline. Based on my previous experiences with cabinet-level legislation, I cannot overemphasize the importance of staying focused. Let's not forget the lessons of 1993 and 1994, when elevation bills addressed wide-ranging and controversial issues and became magnets for further controversy. The effort ultimately failed.

Republican, Democrats, conservatives, and liberals alike, they all recognized what all of us should recognize today, only a straightforward, clean elevation bill can make it through the process. The third point is that S. 159 and H.R. 2438 are both on the right track. Both are bipartisan, excellent bills, although I must say the Boehlert-Borski bill is a little more excellent than S. 159. In all seriousness, Mr. Chairman, there is not a large difference between the two bills. Both bills can be called clean, although S. 159 includes more detail in housekeeping, findings, and related provisions. The 25-page bill includes several provisions that some may question the need for or view as new grants of authority—for example, non-delegation or international responsibilities—or they will argue they should trigger multiple referrals to other committees.

The five-page Boehlert-Borski bill is an attempt to cover the bare minimum of housekeeping and conforming changes to get the job done. I trust you will find an appropriate middle ground, keeping in mind that some provisions, no matter how legitimate in their own right, may provoke needless or mischievous debate.

Thank you again, Mr. Chairman, and Senator Collins, Senator Thompson, Senator Stevens, for the courtesy of allowing me to participate in this most important hearing. I hope a markup of a clean, bipartisan bill will follow very soon. You and I, Mr. Chairman, have worked together on many important environmental issues over the years, ranging from multi-pollutant controls—let's hope we get them this year, finally, under the Clean Air Act. Superfund reform, that should be on the front burner, too—restoration of Long Island Sound. I am confident that with your help, the support of the administration, and the bipartisan teamwork of Boxer and Collins and Boehlert and Borski, and we want to add Lieberman to that list, we can make this important effort a complete success.

Let me close, Mr. Chairman, by saying people often say to me, as I am sure this happens to Senator Collins, "What do you get so excited about the environment for?" We live in a town that takes a poll every nanosecond, and in every poll, when the American public is asked an open-ended question, what concerns you most, they say the economy, health-care delivery, education. And so the doubters say, "Look at this, Boehlert, it is way down at number 25, the environment. Why is that?" And I say, "That is easy to explain. The American people do not think we are going to take leave of our senses and undo a quarter-century of progress, with the Clean Air Act, the Clean Water Act, the Endangered Species Act."

Let's add this to that list. This is very important for all the right reasons, and I appreciate your allowing me this courtesy, and I will be brief, as I said at the beginning.

Chairman LIEBERMAN. Very well said. Thank you. If you ask on those polls, as you know, do you think the government should be playing an active role in protecting the environment, the numbers go way off the charts.

Mr. BOEHLERT. The other thing I point out, let somebody get up on the floor of the Senate or the House and propose something that is going to do damage to the environment, and, quite frankly, all hell breaks loose. Our faxes are on overdrive. The phones start ringing. The letters come in. This is a very important issue. The American people expect us to protect the air we breathe and water we drink and food we eat, and the Environmental Protection Agency is a very important steward.

Chairman LIEBERMAN. Amen. I do not have any questions. Any of the panel? Congressman, thanks a lot. Persistence is sometimes rewarded with success here, and this ought to be the year.

Mr. BOEHLERT. Thank you very much.

Chairman LIEBERMAN. We look forward to working with you. You have been great. Our next witness on our second panel will be the Hon. Christine Todd Whitman, Administrator of the Environmental Protection Agency. Thank you so much for being here.

Ms. WHITMAN. A pleasure.

Chairman LIEBERMAN. We look forward to your testimony.

TESTIMONY OF HON. CHRISTINE TODD WHITMAN,[1] ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. WHITMAN. It is a pleasure to appear before you, and thank you very much for this opportunity. This is a topic that is of obvious importance to the environment, and that is really why I am here in support of these efforts, of the two bills, particularly in this instance the Boxer-Collins bill that is being considered.

When the Environmental Protection Agency was created in 1970 by Richard Nixon, it was a combination of 10 different units from five departments and agencies. In a message to the Congress, President Nixon submitted his reasoning for the reorganization plan that would establish the EPA, and at that time, he said, "As concern with the conditions of our physical environment have intensified, it has become increasingly clear that only by reorganizing our Federal efforts can we effectively ensure the protection, development and advancement of the total environment." This statement still rings true, I believe, more than 30 years later.

The environment continues to gain prominence and is routinely ranked among the public's most important national concerns, as we have heard from you, Senator, and from Congressman Boehlert. Without an organic statute of its own, there continues to be a need for an institutional framework to protect the environment that is equal in scope and significance to the pervasive nature of this issue. Establishing EPA as a cabinet department is not a new idea, again something that has been pointed out time and time again. The first bill to elevate EPA to cabinet-status level was introduced in the Senate in June 1988, and since that time a dozen similar proposals have followed.

[1] The prepared statement of Ms. Whitman appears in the Appendix on page 44.

Former President Bush was the first President to support elevating the EPA to cabinet level, mentioning it in his State of the Union address more than a decade ago, and inviting then-Administrator Reilly to attend cabinet meetings. President Clinton and President George W. Bush have followed suit with both Presidential support for the legislation and with a seat at the cabinet table for the administrator of the Environmental Protection Agency. Without legislation that codifies these practices, however, there is no guarantee that future administrations will do the same and accord the same status.

The mission of the EPA is vital to all of our lives. The actions of this agency protect our environment and the public health by ensuring the most basic of life's necessities: Clean air to breathe and safe water to drink. In the short history of this agency, its work has helped transform the way Americans view the environment, planting in the American consciousness a clear sense of environmental stewardship and its importance. The EPA has helped underscore the universal agreement that our natural resources are valuable, not just for economic prosperity, but for a sustained quality of life.

No longer do we debate whether or not to act to protect the environment, rather now our discussions are about how we can keep America green while continuing to grow our economy. The EPA is a natural fit among other cabinet-level departments. Our mission, to protect human health and safeguard the environment, both complements and contributes to the overall service of the cabinet. Already I will say that I have found my participation at the cabinet level helpful in navigating many of the important issues that overlap between and amongst the work of the EPA and the other departments, including, as has already been mentioned, Energy, Agriculture, Interior, Housing and Labor. Quite frankly, I cannot think of a department that the EPA does not interact with.

I would consider it vital to the work of future administrators and vital to our country to ensure similar cooperation and participation in the future. The time has come to establish the EPA as a full member of the cabinet, and doing so would be consistent with the observation of State governments, and as well as our international counterparts. All of you have mentioned the other nations who have elevated their environmental protection to cabinet level. As Governor of New Jersey, I will tell you I felt it very important to have my Secretary of the Environmental Protection Agency as part of my cabinet, and I find it instructive that all but five States of those that have cabinets have, in fact, elevated their environmental agency to cabinet status.

As President Bush calls for increased cooperation between Federal environmental regulators and State and local governments, it is appropriate, I believe, to follow their leadership on this issue. Further, as has been mentioned over and over, the environment continues to play a central role in international relations. This legislation would bring the United States on a par with the rest of the G–8 and more than 60 others by establishing a Secretary of the Environment. I am pleased that Congress supports this important step. Both the Boxer-Collins bill, S. 159, and the Boehlert-Borski bill, H.R. 2438, would elevate EPA to cabinet status and both pro-

vide for the orderly transfer of responsibilities from the agency to a department.

Moreover, both bills are clean bills, in that they exclude extraneous policy issues that in the past have derailed the legislative process, to establish a Department of the Environment. While the Boxer-Collins bill is more prescriptive, technical changes are easily made. It is nothing that is a show-stopper, and I believe that the Boehlert-Borski bill provides the agency with the flexibility that it needs to ensure that the transition to cabinet status goes smoothly and as efficiently as possible.

The justification for placing EPA in the cabinet is compelling. Creating a Department of the Environment will ensure that our country prioritizes this issue today and long into the future. As I have said repeatedly, my aim for this agency is to leave America's air cleaner, water purer, and land better-protected than when I took office. I enjoy the full support of the President in the pursuit of these goals. Elevating the EPA to cabinet-level status will ensure that future administrators are able to set and achieve similar goals for the future. Taking this step will be a reflection of the importance the Congress and the President place on the environment in America today.

Thank you for allowing me to appear before you, and if you have any questions, I would be happy to answer them.

Chairman LIEBERMAN. Thanks very much for that excellent statement and the support that you give to the proposal. Just a few questions; I know it is hard to evaluate in real terms, but I take it from your statement that you feel that elevation to cabinet level would enhance your standing, both among your international peers and perhaps even in your relationship with the States of the United States; is that true?

Ms. WHITMAN. I think it would be very helpful. I am fortunate to enjoy a very good relationship with the States, and the international community has been very polite. But, as we know, particularly with the international community, they set high store on titles and how a particular department or agency is viewed by an administration. So it means more to them to have that cabinet-level status. It would be sending a strong message.

Chairman LIEBERMAN. I take it, also, that you agree with the statements that just about all of us have made, in that the administration will work with us as this bill goes forward to try to, as we have been saying, keep it clean; in other words, keep it focused on this, the change in status, and try to keep off unrelated matters.

Ms. WHITMAN. Absolutely, and we are certainly willing to work with anyone in the Senate and the Congress that has other ideas, as Senator Collins indicated, to improve the work that we do. But for the purposes of this bill, I think it is very important to keep it to what it is about, raising the level to cabinet status.

Chairman LIEBERMAN. I have no further questions.

Senator Collins.

Senator COLLINS. Thank you very much, Mr. Chairman.

First, Administrator Whitman, let me say how fortunate I think we are that you are leading this important agency, and it was a great appointment by the President and I look forward to continuing to work with you. I also want to thank you for your en-

dorsement of our legislation and for your emphasizing that we do need to keep this a clean bill, so that it can pass and it is not weighed down by other, more contentious issues. Some of the critics of this legislation have expressed concerns that making EPA a cabinet-level department would somehow expand government bureaucracy or increase cost to taxpayers.

Just for the record, could you address that criticism? Do you think there would be any sort of expansion of bureaucracy or increased cost to the taxpayer if we were to elevate EPA?

Ms. WHITMAN. Both bills are clean bills, in that they just take what is already occurring now and put it into statute at cabinet level, at a department level. They do not call for expanded responsibilities in the sense of requiring more investment. I think I might get a raise, but other than that, I do not think there is much of a financial impact.

Senator COLLINS. Well, that would be well-deserved. You have mentioned that you have excellent lines of communication with our President, but that, obviously, might not be the case for future EPA administrators, and one of my goals is by instituting the EPA at the cabinet level, I believe it would lead to increased communication and coordination on environmental issues within the Executive Branch. And it seems to me that having better communication and coordination, by instituting EPA as a cabinet-level agency, might well produce better decisions and perhaps even avoid duplication of efforts; would you agree with that?

Ms. WHITMAN. Senator, I would. I would say again that, in this administration, and I believe my two immediate predecessors will testify to the same in their experience, that they were accorded that kind of courtesy and they were at the table as cabinet decisions were being made. But it is clear that our relationships are based on the access that you are given, and should a future administration not choose to have the Environmental Protection Agency at the table, there would be an enormous amount of lost opportunity; there would be duplication of effort, and I think it would be detrimental to the overall environmental health of the country.

Senator COLLINS. Finally, I think you raised an excellent point about the status of the EPA administrator in dealing with your counterparts in other nations. One of the things that our bill does is specifically recognize the growing global role of environmental issues by listing the international responsibilities of the Secretary of Environmental Protection. Could you comment on some of the international challenges that you believe we will be facing and how it would be helpful to you to have the status of a cabinet secretary in dealing with your counterparts?

Ms. WHITMAN. Well, I was able to participate in the signing of the Persistent Organic Pollutants Treaty recently, and clearly there are now many steps that we need to take to help enforce that and to look at what the next round of pollutants is, to which we need to turn our attention, and it will be helpful. That is definitely an international exercise. As Senator Stevens knows, there are enormous impacts from what happens in other parts of the globe on citizens of the United States, and we need to be involved. And certainly, as we work with some of our counterparts around the world, it is helpful to have that kind of status behind you, which tells the

rest of the world that, yes, in fact, the administration does take this seriously, and when the administrator or, at that point, secretary, talks, they are talking with some level of authority behind them. We are looking at an upcoming event in Johannesburg in 2002, on sustainability. It is going to be a very comprehensive conference. It is going to be one of enormous importance, and it will be very helpful again to have the kind of status that would allow us to have the impact that we think is important for this country as we discuss these issues.

Senator COLLINS. Thank you. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Collins. Senator Thompson.

OPENING STATEMENT OF SENATOR THOMPSON

Senator THOMPSON. Thank you very much, Mr. Chairman, and congratulations to you, Senator Collins, for your leadership in this area. I think it is an important bill. Clearly, environmental considerations and issues are not only national issues now, they are international issues. We deal with them here on a daily basis, whether they be in the national-international arena or locally. We have a real big concern back in my State: The Smoky Mountains. All these issues converge. The energy issues and the environmental issues now are coming together, and we are going to have to make some hard decisions and trade-offs with regard to the pollution in State parks.

We always point out, with due regard to my friends from New York, that the top of the Smokies on some days is more polluted than downtown New York City. So this is all, I think, a step in the right direction in elevating these considerations. There is one thing that I would like to pursue with you, though. I hear what everyone is saying about a clean bill and keeping it simple and so forth—but I think if we are going to elevate the EPA to a cabinet-level position, it is legitimate to ask whether that same set-up is necessarily one that should be carried over intact to the cabinet-level position. I am specifically referring to the role of science in the EPA's decisionmaking process.

I have been somewhat concerned, and I think others have been too—that we sometimes get into a trade-off with the politics versus the science, and the politics oftentimes wins. We see an extraordinary number of EPA regs being overturned by the courts, and sometimes it is because we have neglected the science. We do not want to start a negative process with regard to this bill. I am wondering whether or not we should take the opportunity to institutionalize science in EPA's decisionmaking process here. I think it is such an integral part and the department is going to become more and more important. It is more and more important that they do what they do right.

I know that you have undertaken some in-house initiatives to beef up science and economics at the EPA. Others have suggested that we have perhaps an assistant secretary. We have a chief information officer for these departments and a chief financial officer. What about a chief science officer? Why not institutionalize that? It is such an integral part and, in some cases, a legal requirement so perhaps it is appropriate to take this opportunity to ask our-

selves that question. What do you think about that? What do you think can be done, short of a statutory embodiment of some kind, and what would be wrong with a provision in this statute that would, in some way, institutionalize what I think many of us think should play a larger role than it has in times past in the process?

Ms. WHITMAN. Well, Senator, I could not agree with you more that science needs to be at the heart of the decisionmaking process at the agency, and without sound science we do not have the credibility we need to support the regulatory actions we take, and it is at the heart and must be at the heart of everything that we do. As you have mentioned, I have undertaken certain steps internally to ensure that we do start to consider the science up front, to ensure that it is part of the process, and we are institutionalizing that.

I have no conceptual objection to having a discussion about the importance of science and how to ensure that it is always there at the forefront of decisionmaking. My concern is that we do not lose the objective of this bill at this time. The importance here is to raise the agency to cabinet level. That, in and of itself, I believe, brings the importance of the science, because that is behind the environment, to a higher level, and then engage, perhaps, in discussions as to whether there are other changes that need to be made to fine-tune the agency or better ensure that changes that we might recommend, if agreed to by that Congress, are things that want to be institutionalized and embodied in law or regulation. But my concern really is that we have seen this bill since 1988. Versions of this bill come through and get lost because of very good and important issues that needed to be discussed that got added to it, and every time the bill has then gone down, because once one thing is added, then another thing—and they are all important. They are all good points to be argued, but I just hesitate to incorporate it now, open it up now, simply because of the what the past history has shown us might well happen then to the bill itself.

Senator THOMPSON. I understand that. In looking back over it, I know Senator Bennett had an amendment back some years ago that required for each major rule the cost/benefit analysis and risk assessment and all of that. While maybe laudatory, that is getting pretty far down into the weeds, and I can see why that would have complicated things. It looks to me like there might be a way of doing it that would not complicate things that much, nor defeat the bill. But you make a good point, and I understand that. My concern is, if it is something that ought to be done, we are losing an opportunity to do it. You know how it is around here. The opportunities, the windows to get things done, open rarely and close quickly. So that is my concern.

You mentioned the front end of the process. I think that is what I am getting at. We have a mechanism whereby, after something has been kicked around for a few years, the guy at OIRA takes a look at it, and by that time all the forces that can be brought to bear in this town are there on his desk. Oftentimes there are a lot of political considerations there that have to be taken into account. The question is whether or not we should have someone in the front end of the process, as we have in the back end now. It concerns me and it is something that I want to talk to my good friend,

the Chairman, and Senator Collins about as we go along, as we consider markup here in our Committee. I am not sure I have the answer to that, but it is something I think we all ought to be thinking about.

Thank you, Mr. Chairman.

Ms. WHITMAN. Senator, I would only share your window-of-opportunity concern for the bill as a whole.

Chairman LIEBERMAN. Thanks, Senator Thompson.

Administrator Whitman, I appreciate very much your answer to that question. The question of whether EPA should have a deputy administrator for science or science and technology is an interesting question, and, in fact, Senator Voinovich has a bill in on it, but I can tell you that it will make this bill more controversial, because as you have suggested—because I have already begun to receive, particularly from environmental groups, expressions of concern and opposition to the idea of a deputy administrator, on the argument that OIRA already performs that function and why do it? That is a debate that we ought to have and I am happy to have a hearing separately on Senator Voinovich's bill, but I do think it will complicate our desire to pass this legislation.

Senator THOMPSON. Mr. Chairman, if I may ask your indulgence just for a second?

Chairman LIEBERMAN. Sure.

Senator THOMPSON. You very well may be right, and I do not intend to do that. I must say I find it somewhat depressing that any time anyone wants to inject some objective, peer-reviewed science into this process, some of these groups come out of the woodwork and immediately start raising Cain about it. Surely we can sit down together and see what makes sense. I do not like this anti-science prejudice that we see every time we try to do something that makes a little bit of sense at a time when I have heard estimates that over half of the regulations coming out now are getting overturned by the courts. So I apologize for mounting my soapbox here for a second, but let's work together and see if we can come up with something that makes sense.

Chairman LIEBERMAN. It is your senatorial privilege to mount your soapbox whenever you want, and I look forward to working with you on that idea.

Senator Stevens.

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Thank you very much, Mr. Chairman. It is nice to see you this morning. I have some other reservations. I really do not think we have a road map of what is going to happen on the other departments when EPA becomes a department. Almost every department now has a whole series of people that are involved in environmental activities, and I do not know who is going to be setting the real trend for what is the decision, based upon, as Senator Thompson said, some scientific involvement, as well as some basic environmental concerns expressed by people who are in these enormous environmental organizations.

Take wetlands, for instance. Wetlands, when it was a doctrine announced in the country by President Bush he pointed out—41; is that right? He pointed out that over half of the wetlands had

been used. That statement was only valid if it applied to the South 48, as we call it, the contiguous 48 States. In Alaska, we had used less than half of one percent of our wetlands, but suddenly we were burdened with regulations that were issued for the Nation that were attacking those who had used already more than 50 percent of their wetlands. We have tried and tried and tried to get some understanding of that. In my State, if you start to pave your driveway, you have to go to EPA. When the St. Vincent DePaul Society in Juneau wanted to pave a parking lot in order to save having people tramp in mud into their second-hand store, not-so-new store, they had to wait a year-and-a-half for EPA approval.

You spend more time regulating Alaska, your agency does, than you do looking at things like POPS. As you know, most of the pollutants are coming down in the Arctic, and most of the EPA people spend their time in town trying to say: Why are you paving that parking lot? Why are you building this road? Why are you putting up this building? I see enormous malls in Seattle, San Francisco, Denver, wherever I go. We tried to build a mall, it takes us 2 years to clear the EPA. I am not going to go so easy on this bill this year unless we get something in this bill that says that concepts of EPA, including wetlands, shall be applied evenly across the country. I do believe we have been held hostage by the EPA since the wetlands doctrine was announced, which was intended to be primarily for Florida, and why should Alaska be hostage to that?

I think that this concept that Senator Thompson has mentioned, Ms. Whitman, is absolutely correct. Too much of environmental protection is prejudiced and not based on science. I think that amendment, Mr. Chairman, is going to be offered and it is going to be debated and we are going to find out why we cannot listen to the scientists. Why can't we listen to them with regard to the permanent—organic pollution concept in my State, for instance? We know that a lot of people are being harmed up there right now. As a matter of fact, there is a killer whale dead in Prince William Sound right now because of pollution that came from Japan. Those chemicals were never used in Alaska and yet this killer whale is dying because of pollution that came through the winds, apparently, into the Prince William Sound.

I think we ought to listen to science and your agency ought to be bound more by it than by the lobbying and the extreme political aspirations of so many people out there in this radical environmental world, and I hope that people will listen to us as we go forward. I believe your agency should be a department, but it should not be a department that does not have authority over these other agencies in terms of laying down some sound scientific guidelines and how to deal with the problems we face in the future.

I do not have any questions. I appreciate your visit to my State. I hope you will come back again and again, because I think that the more that people come to our State, they understand how some of these extreme positions that are being announced are retarding our ability to deal with environmental problems. I hope that the result of having a Department of the Environment will give us more strength to deal within government with this extreme radical lobby that is out there who they just set goals without knowing what they really mean, or how they really impact our environment, but

that is their goal without regard to science. I think science ought to be our guideline for the future in dealing with environmental problems.

Thank you very much, Mr. Chairman.

Chairman LIEBERMAN. Would you like to respond?

Ms. WHITMAN. I will simply say to the Senator that from his eloquent expression, he could think that things could not get a whole lot worse, so making us a department might, in fact, make it better as far as interaction with other departments. But a large part of what you are talking about, Senator, as you and I have discussed, goes to the application of regulations as much to the science behind them. I would say that part of the problem we all suffer with from Washington is that we tend to think in global concepts and think from the perspective that what we know here is right for everybody in exactly the same way. As we well know, what happens in Alaska is very different from what happens in Arizona, and the way we apply our regulations, the way we apply our standards, it needs to take into effect the fact that there are real differences that have real impacts on environmental regulations and on environmental outcomes. We need to be better about that as much as we need to be better about ensuring that science forms the basis of any decision and regulation that we make.

Senator STEVENS. I only have one thing, as former chairman of Appropriations, you should take a look at where your money is spent. It is spent where the population is, not where the problems are. I really question that sincerely. You look at the Arctic. The Arctic has warmed seven degrees; the rest of the world, one degree. Do you know how many people we have working in Alaska, working on trying to find the answers to some of the questions that come from the fact that the Northwest Passage is open, that the ice off our shores has thinned by three inches last year alone?

They are not looking at the science. They still are trying to consider how much more of our land ought to be withdrawn and how many more things ought to be laid down to prohibit us from doing things we have to do to live in Alaska, than to make the studies of what is happening to the globe because we do not understand what is going on in the Arctic. I think you spend most of your money along 50 miles of the coastline of the South 48. Look at it some time. Thank you.

Chairman LIEBERMAN. Thank you. I was just thinking about what a difficult job it is to be administrator of EPA, why it may be difficult to engender the raise in status, because of the many hearings I have sat through at this Committee on environmental protection looking at Carol Browner, Bill Reilly and yourself, where I have heard EPA criticized for its failure to do enough to protect the environment, based on the evaluation that the witnesses before is made of the science in those cases.

Senator Carper.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks, Mr. Chairman. Governor, welcome, how are you? It is nice to see you. Senator Stevens said that he hopes you will come to Alaska often. He says you are always wel-

come there. We would like for you to come to Delaware, too, even this week.

Ms. WHITMAN. We might be able to arrange that.

Senator CARPER. If we are not here voting, I hope to be there to welcome you to the Chrysler assembly plant where we build all the world's Durangos. Thank you for coming back to Delaware. I must say, Mr. Chairman, this is an aside here. Senator Stevens was talking about the effect of global warming and I do not mean to be flip about this, but he mentioned—what did he say? The temperature has risen by seven degrees?

Ms. WHITMAN. In the last 100 years, it has been seven degrees.

Senator CARPER. I am thinking spring break in Alaska for our college students instead of the Bahamas or Fort Lauderdale. That is pretty remarkable. That is remarkable. On page two of your testimony, Governor, I am going to ask you this because it is pretty short. It says, "While the Boxer-Collins bill is more prescriptive, I believe that the Boehlert-Borski bill provides the agency with the flexibility it needs to ensure that the transition to cabinet status goes as smoothly and efficiently as possible." I would just ask you if you would be willing to give us some idea of what you are talking about there with respect to this Boxer-Collins bill being more prescriptive?

Ms. WHITMAN. Actually, I changed that testimony slightly to say that there were technical changes that we thought were very easily made with it and I would be happy to submit those. I would be happy to work with the staff to make any changes. Some of them are technical changes. They have to do with language of things that are already in statute and the language used in the bill might put us in conflicts with some other laws and regulations that govern what happens. So they are not huge.

Senator CARPER. Good.

Ms. WHITMAN. It is the difference between 25 and 5. Is that what they said the number of pages were?

Senator CARPER. That is a lot of changes. All right, I want to go back to the point that the Chairman touched on, and that is this legislative proposal of Governor Voinovich and the junior Senator from Delaware with respect to science. I have been George Voinovich's No. 2 guy for a long time. He was chairman of the NGA when I was vice chairman. He was chairman of Jobs for America's Graduates. I was vice chairman. I get here to the Senate and he is Chairman of my Subcommittee and I am sick of it. Here I am, playing his second banana again on this legislation. I do not know if you are familiar with what we have proposed, but I would welcome any comments that you might have to share with us.

Ms. WHITMAN. Well, as I indicated before, I am in absolute agreement with all the comments that were made and the thinking behind the bill in the sense of the importance of science forming the basis of the decisionmaking down at the Environmental Protection Agency. It gives us our credibility. It needs to be at the heart of every decision that we make. My concern at the moment, and Senator Thompson expressed it well, although from a different perspective about having a window of opportunity, the window of opportunity for elevation of the Environmental Protection Agency to a cabinet-level position seems to be coming together now. Those

windows are brief. We have seen this bill attempted numerous times since 1988, when the first piece of legislation elevating the agency was first introduced.

It is one of those questions that I believe is deserving of a thorough review. It is deserving of a very comprehensive discussion. I am more than happy to have it. I have undertaken some internal changes within the agency to ensure that science is an automatic part of the front of decisionmaking as we start to look at regulations, that we incorporate science from the very beginning.

My concern is that by adding it at this point to this legislation, to what has been offered, will, in fact, start to shut that window on us. This is what has happened to the legislation in the past, when clean bills have been introduced, very legitimate interests, very legitimate concerns have been added to it in order to make it better, and in doing that other interests then have come forward and said that they needed to be added and at the end of the day the legislation grew so top-heavy that it was defeated. I would hate to see us lose that window of opportunity while at the same time saying that the concerns raised through the Voinovich-Carper bill are very real and ones that we need to continue to discuss.

Senator CARPER. I would very much like to be able to call you Secretary Whitman instead of Governor Whitman all the time, and I would like to see the Boxer-Collins bill be enacted and am pleased to be supportive of it. I would hope that George Voinovich and you and I and our colleagues here could put our heads together and figure out how to constructively address the concerns that are raised in our joint proposal as we go forward.

The last thing, I met with our former colleague, Tommy Thompson, last week, and I asked him, "How are you doing?" He said, "Well, I am pretty busy." I said, "Is there anything I can do to help you?" He said, "We are trying to get some folks confirmed before the August recess, and I have been working with our leadership on our side and the Finance Committee Chairman, to try to get some names moved along." How are we doing with respect to your key nominees before the August recess? Are there some that we need to be helpful on?

Ms. WHITMAN. Absolutely, Senator, I will take you at your word. In fact, I have four before your Committee tomorrow and I would hope that we would be able to move them forward. You do not recognize what a difference it makes having people aboard, confirmed, until you get them, and then you suddenly realize what an incredible difference it makes to have someone else who can come up here to testify to give you the technical expertise and answers that you need, as well as to appear and to negotiate with other outside groups and just take some of the burden off. Right now, I only have two confirmed people at the agency, my deputy and the head of the Office of Prevention, Pesticides, and Toxic Substances. So it would be enormously helpful if we can get these others through and to a vote on the Senate floor.

Senator CARPER. I would just ask your staff who are here to please communicate today with Jim Reilly on my staff, and we will do whatever we can to be helpful.

Ms. WHITMAN. We will do that.

Senator CARPER. Thank you.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Carper. Administrator Whitman, we have no further questions. Thanks for your testimony, for your support of the bill, and also for your steadfastness to the idea of working together to keep this a clean bill, and I think if we do we can achieve this and it will be significant, and, as Senator Carper said, we look forward to welcoming you back hopefully in this session of Congress as Secretary Whitman.

Ms. WHITMAN. Thank you very much.

Chairman LIEBERMAN. Thank you. The third panel will be Carol Browner, former Administrator, Environmental Protection Agency; Bill Reilly, former Administrator, EPA; and Don Elliott, former General Counsel, EPA. I really appreciate the trouble that you all took to be here today. I was thinking, as I looked over at the three of you sitting there, and I hope you do not take this the wrong way, that suggests that I think you are aging, because you are not. You all look wonderful. But I had the same feeling I had when I read the stories about old-timers day at the stadium; you know, like Yogi, Whitey and Willie. Anyway, you are all stars. You served our Nation. You belong in a—if I may continue this awkward metaphor—in an environmental Hall of Fame.

Senator CARPER. Mr. Chairman, if they are old-timers, they are rookie old-timers.

Chairman LIEBERMAN. They are very rookie old-timers.

Mr. REILLY. So long as it is not Lou Gehrig day.

Senator THOMPSON. Do we have an opportunity to disassociate ourselves with your remarks?

Chairman LIEBERMAN. I think it is self-evident. [Laughter.]

Thank you for being here.

Carol Browner—Hon. Carol Browner—we look forward to hearing your testimony now.

TESTIMONY OF HON. CAROL M. BROWNER,[1] FORMER ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. BROWNER. Thank you, Mr. Chairman, and let me thank all of you for the opportunity to appear before this Committee on this matter. Obviously, after 8 years of public service, there are a number of things I miss. You may be surprised to hear that one of the things I miss is testifying before Congress. I did a lot of it. There was 1 week when I testified five times, five separate committees, and five separate issues. But I always enjoyed the opportunity to engage in a thoughtful debate and discussion on matters important to the people of this country and I thank you for including me in this hearing today. It is a real pleasure to be here with one of my predecessors, William Reilly, and I have to say I look forward to calling my successor, Governor Whitman, Secretary. It is a long overdue elevation and I want to thank you, Senators Collins and Boxer, and Congressmen Boehlert and Borski for taking the initiative to bring this matter back before the Congress.

I was a part of President Clinton's cabinet from the day I took office at EPA, January 23. I had a seat, a chair at the table, as did Mr. Reilly and as does Administrator Whitman today. The time

[1] The prepared statement of Ms. Browner appears in the Appendix on page 46.

to make this a permanent chair on behalf of the Environmental Protection Agency is truly long overdue. I believe that making EPA a permanent member of the President's cabinet will guarantee EPA the stature and recognition that it deserves and it will reaffirm its position of importance in the health and welfare of the American people and the world today and into the future. I also want to say that I think it is a fitting tribute to the work of the 18,000 public servants who make up the EPA.

These are some of the most wonderful and committed professionals and staff that I ever had the opportunity to work for, and it would be a very fitting tribute to their commitment to public service. Many of the senior people at EPA have been there literately from the beginning. They helped give birth to the new agency and have led it through all of its tremendous successes and obviously through many challenges. When the Senate and House were considering the creation of EPA many years ago, Russell Train, who subsequently served as the second administrator of EPA, said, "The EPA will provide us with the unity and the leadership necessary to protect our environment," and I think in the last 30 years it is certainly true that EPA, working on behalf of the American people, working with members of this body, of the Congress, of the Senate, have certainly provided the leadership and the incredible progress that we have made in cleaning and protecting our air, our water, our land, the health of our families, and the health of our communities.

EPA has strengthened and improved air and water quality in communities across the country. It has set limits on dumping waste and cleaned up hundreds, literately hundreds now, of the largest Superfund toxic waste sites. EPA has met new challenges, creating cutting-edge programs such as Brownfields, which is a huge success, and I hope that legislation will also be passed this year. It is something I spent a lot of time supporting. Unfortunately, we were not able to see it all the way through, but I hope you will do that now—the STAR program, Science to Achieve Results, another cutting-edge program.

EPA has banned pesticides that are harmful to our children's health. It has honored the public's right to know about their community and environmental challenges in their community. When I came to EPA almost 9 years ago, the EPA web site got about a half-a-million visits a month. By the time I left EPA in January, it was 100 million visits a month. The American people care about the work of the EPA. They are interested and I will always believe that any decision EPA makes on behalf of the American people and their environment will be a better decision when the public is informed and engaged in that decisionmaking process, and fundamental to that is honoring the public's right to know.

As you heard, EPA works around the world. It is joined with countries to secure important global environmental agreements. I was very pleased when the current administration signed the convention on the persistent organic chemicals. We spent a lot of time negotiating that. I was very pleased that had been signed. The Montreal Protocol, another important international agreement that is reaping benefits—we are actually making progress and fixing the hole in the upper ozone. We have heard a lot of countries have

these agencies and they are cabinet level. I am just going to add two to the list of countries.

I just want to point out that the Bahamas and Kenya also treat their EPA as members of their cabinet. The United Nations has numerous Committee's now, recognizing that environmental policy is part and parcel of foreign policy, and nothing in that is going to change in the short-term. I believe that the United States is uniquely situated with the experience, the expertise of EPA, to provide important global leadership. When the EPA was being created, an alternative was actually proposed by some, and that was the creation of a more comprehensive cabinet-level Department of Environmental Quality.

Well, today, I believe that the EPA has become essentially that. It deals with matters spanning all types of environmental issues, government bodies. However, with every change of administration, EPA risks losing its voice in the cabinet at the table. Permanent conclusion, as I said, is long overdue. It will ensure that the work of the EPA is front and center in the work of any administration, and I can think of no finer tribute to the successes of EPA over the last 31 years, and a recognition of the challenges that still lie ahead when it comes to protecting the health of our citizens and our environment.

Thank you.

Chairman LIEBERMAN. Thank you very much, Administrator Browner. That was an excellent statement. I appreciate it. I am having trouble pulling away from baseball here.

Ms. BROWNER. My favorite sport.

Chairman LIEBERMAN. I know. Statistics are so important. Apart from the extraordinary accomplishments of your time at EPA, if I am not mistaken, you hold the record as the longest-serving administrator of EPA.

Ms. BROWNER. That would be correct. Someone was once introducing me and got to the point of wanting to point out that I had the record, and instead of saying serving, they said, "And she's the longest-suffering administrator."

Chairman LIEBERMAN. We can identify with that.

Ms. BROWNER. It was a great job and it was an honor.

Chairman LIEBERMAN. Thanks. Administrator Reilly, thanks for being here. It is great to see you, and in your case, maybe you are the one who engendered that baseball—the old-timer feeling—because I have recollection of those now fabled days and weeks we spent together with many others in that room off the then-Majority Leader George Mitchell's office, when we negotiated in painstaking and painful detail what became the Clean Air Act Amendments of 1990, which have really been such a remarkable success, and in no small measure due to your leadership. So a pleasure to welcome you back. Good to see you.

TESTIMONY OF HON. WILLIAM K. REILLY,[1] FORMER ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. REILLY. Thank you very much, Mr. Chairman. It is a pleasure and an honor, as it always is, to be consulted by the Senate

[1] The prepared statement of Mr. Reilly appears in the Appendix on page 48.

on a matter of importance. This is only the second issue I think I have testified on since I left office. The other was the establishment of the Presidio National Park and the Presidio Trust, to which President Clinton then appointed me, and that, for your information, parenthetically, is going swimmingly.

Let me first of all compliment you all. I have a statement that I have provided and ask that be included in the record.

Chairman LIEBERMAN. We have it and it will be printed in the record in full. Thank you.

Mr. REILLY. Let me first of all say that I congratulate you, sir, Senator Collins, Senator Boxer, Senator Thompson, and Senator Carper. Mr. Boehlert, of course, has been on this issue for a long time, as I have. As you recall, President Bush did, in fact, propose cabinet status for EPA. We had a run at it and the measure ended up being encumbered with a lot of good ideas, many of them, but too many to build a consensus necessary to pass it. I think that lesson is before us. I hope it is learned and I that this time we do keep the bill clean as you yourself had earlier suggested.

Many things have been said that make clear why the Environmental Protection Agency should be in the cabinet. Let me also say what a pleasure it is to appear with both my predecessor, Carol Browner, my friend and also my former general counsel, Don Elliott. This is old home week here. It is not Lou Gehrig day, though. Let me give you essentially three reasons why I believe EPA belongs in the cabinet, and in doing so will try to respond to some of the concerns that Senator Stevens has expressed.

I recall, before going to EPA, having a conversation with an old-time reporter who said to me, "Well," he said, "You know, you are going to the best agency, and I have covered them all." I said, "That is not exactly the reputation on the street." "Oh," he said, "Look, EPA will make two decisions a week that it would take Interior, Agriculture or HUD 6 months or the better part of a year to make." He pointed out that the decisions of EPA typically involve the intersection of science, health, economics, and thus require the most sensitive and sophisticated interrelationships of any agency, and EPA must do this as a matter of course and it must do it over and over again.

The job of the environment is essentially a task of integrating a variety of concerns with a broad environmental perspective. That brings the agency into conflict frequently with other interests and those who speak for them and who have a different sense of priority and turf. In one of the experiences I had, and I suspect Carol Browner had, and I know Russell Train had, because we talked about it, and Bill Ruckelshaus had, is of going early to a cabinet meeting and walking in and finding an otherwise congenial group suddenly looking warily at the EPA Administrator because he or she has an argument with every one of them. You are arguing with HUD about siting public housing in wetlands, and you are arguing with the Agriculture Department about pesticides and with Interior about water contracts, and so it goes.

At that moment, you very much need a President to say that is the nature of the job. I had one. It is not guaranteed one always will, and the fact of lacking parity of status in that room does, in fact, I believe, matter. It matters to some more than others. Obvi-

ously, the agency has more power than several of the domestic departments, but nevertheless that matter of status, that symbolism, is important. It is important also around the world, and perhaps is more important. I testified seven times for the North American Free Trade Agreement. I sent people to China to work on the recapture of methane from coal mines and on the suppression of cement kiln gas, and those relationships proved enormously important in winning China's support for the Montreal Protocol, which was a close-run thing. They were planning to bring 700 million refrigerators over the next 10 years into manufacture containing ozone-depleting CFCs.

Those international activities we undertook were important to our mission, and I particularly applaud the inclusion of the international responsibility very specifically in the Boxer bill. What we did, internationally we financed by stealth—we borrowed from the water program or the air program. We did that because the problems in different parts of the world, however much they seem egregious and difficult in the United States, are so vastly more serious, complicated, and much larger threats to health. Other nations desperately need our help. The agency will be in a far better position to provide that help if it is a cabinet department.

Finally, I think there is an issue that goes to Senator Stevens' concern, and it has to do with the self-understanding of the agency itself. The EPA is—first and foremost, its core responsibility is a regulatory responsibility. Protection is in the title, but that is, by far, not the full story. The agency, the department, in recent years has had to concern itself with information, with technology transfer, with partnerships with State and local governments, with advising on air conditioner technologies and dry cleaning establishments, a whole range of things, to say nothing of free trade, and, as you know, one dare not bring a trade bill before the Congress without attending to its environmental ramifications.

There is no one else to speak to those issues with the same perspective and authority as the EPA administrator. In fact, without that responsibility assumed by administrators, often it would not be often spoken for at all. I believe very much that cabinet status for EPA is an important issue. I think its time has come. It will send the right signals to the agency itself with respect to the range of responsibilities, the sensitivities it should display beyond regulation. It will send one to the international community and it will send one to those other cabinet officers who often have occasion to have conversations with the EPA administrator about things they are doing that he or she would rather they not.

Thank you, sir.

Chairman LIEBERMAN. Very well done. Thank you.

Don Elliott, welcome back.

TESTIMONY OF HON. E. DONALD ELLIOTT,[1] FORMER GENERAL COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. ELLIOTT. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Neighbor.

[1] The prepared statement of Mr. Elliott with an attachment appears in the Appendix on page 55.

Mr. ELLIOTT. It is a great pleasure to be testifying in front of this distinguished Committee, which is now chaired by Senator Lieberman from my home State of Connecticut, just as it was a pleasure to testify in the past when it was chaired by Senator Thompson. It is particularly a pleasure to be testifying on something that has more bipartisan support than some of the regulatory reform proposals that I testified on in the past. I strongly support the bipartisan proposals to elevate EPA to cabinet status. It is time, really long past time, to make our environmental department part of the cabinet.

Some of my friends in industry have expressed to me their concerns that in elevating EPA to the cabinet, we might further politicize its decisions. I think this need not be the case, but I do believe we should build into the structure of the new environmental department provision for a high-level chief science officer. So I support the Voinovich-Carper proposals for a chief science officer. I think they can be improved in some ways that we can talk about, perhaps in the questioning period, by creating an under secretary, rather than a deputy. I think two deputies would be a mistake.

We all understand the importance of a clean bill. There are a lot of things substantively that I would like to see. I have been a longtime supporter of substantive provisions for alternative compliance legislation, like Senator Lieberman has been supporting for a number of years. I think that would do a lot to deal with some of the one-size-fits-all problems that Senator Stevens and others have talked about, but I do not think that those kind of substantive provisions belong in this bill. So we will have to wait on those.

But I do think it is appropriate to discuss structural and organizational issues, and I think there is plenty of room in this bill to designate a high-level chief science officer, just as the pending bills designate chief legal officers, chief financial officers, and chief information officers. In a sense, science is conspicuous by its absence from mention in some of the current bills. I think 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 echelon.

The philosopher Adam Smith wrote, "Science is the antidote for enthusiasm and superstition." Good science can be very helpful in counteracting the enthusiasms, either of the right or the left, and making sure that the agency stays on a steady course. Now, of course, science alone cannot make decisions. There are always uncertainties and values, but the risk today is not that we will have too much science and too little politics in our environmental decisions, but rather the opposite. As Professor Steve Goldberg at Georgetown put it one time, "people accuse regulatory agencies of being captured by all sorts of interests, but nobody accused a regulatory agency, particularly not EPA, of being captured by scientists."

I applaud the efforts that have been made in recent years to upgrade the role of science at the agency. There is a world-class science advisory board. I think the STAR program and enhanced peer-review, enhanced role is for scientists on the work groups, and a number of things that Administrator Browner did were very good steps. The remaining problem, though, is that science is not often heard in the top councils of the agency when decisions are finally

made. Science needs a high-level voice at the department, just like the law has a high-level voice through the general counsel, and I support the recent recommendation by the National Academy of Sciences that, "Just as the advice of the agency's legal counsel is relied upon by the administrator to determine whether or not a proposal is legal, an appropriately qualified and empowered chief science official is needed to attest to the administrator and the Nation that proposed action is not inconsistent with available scientific information."

Members of the Committee, the reality of the matter is that a strong norm of turf has developed at EPA, and it is part of the culture that AAs in one program do not comment and criticize on what is going on in the bailiwick of another. For that reason, I believe that creating a chief science officer, not just at the AA level, but at a higher level, such as the under secretary level, would send a strong organizational message to the agency about the importance of science. In government, the best is often the enemy of the good, and I support elevation, but it is my judgment that structural and organizational issues, like creating a chief science officer, are not really loading the bill down with extraneous materials in the way that if we were trying to address substantive matters we might be.

Just one final point. At some times in the past, we have had assistant administrators for ORD, the Office of Research and Development, that have performed that role. In the same way that we need to create a permanent organizational status for EPA in the cabinet, we need to create a permanent organizational status for science in the structure of the Department of the Environment, so that it is not dependent upon the whim of a particular administrator or the personality of a particular assistant secretary.

Thank you.

Chairman LIEBERMAN. Thank you, Mr. Elliott. As you heard, we talked about this before, and I think you make a good point, which is that adding a deputy is different from, for instance, adding an amendment with your favorite position on climate change. But the reality is that it will be controversial. We have already had input on the bill that I erroneously referred to as the Voinovich bill. Now it is the Voinovich-Carper bill, and it is, in fact, the Voinovich-Carper bill, and so I think that is what should concern us. I know that Senator Boxer, in her work with Senator Collins, actually turned away from some initial ideas she had about, for instance, creating in this bill a new Office of Environmental Justice, which one could certainly make a case for. But out of concern that it would arouse opposition to the essential purpose here, I wonder whether the two previous administrators would like to comment on this proposal and its relevance to the elevation bill.

Mr. REILLY. For my part, Senator Lieberman, I tried to give a very high priority to science, and I think that the integrity of scientific research underlying regulations is central to their effectiveness, their acceptance publicly, their survival. The question of whether and why science should have more status and does not have the status at the agency that it might is a complicated one, but in my experience it was difficult to recruit an assistant administrator for science for ORD. It was difficult to staff the agency, to

interest graduating Ph.D.'s and researchers in working for EPA and hitching their wagon to that star. The reason was the episodic ups and downs of budget for science at the agency. OMB has not supported a strong scientific component, budgetarily, historically, at the agency, for a variety of reasons.

One reason was made clear to me once very explicitly. The more we give you money over there for research, the more rocks you will lift up and find things that we have got to regulate and pay for. That, I think, has been a somewhat persistent view through the history of the agency, and it has had a deleterious impact on the scientific establishment within the organization. With respect to the structure of the agency, what I am suggesting is the problem has not been structure. We have tried to give a high priority to science at the agency. It is one of the most important concerns, and the assisted administrator for ORD is supposed to speak to those concerns. I certainly would not create the impression that science, all of a sudden, is the responsibility of one individual or office holder in the agency and therefore the rest of them can forget about it. If that is the implication of the deputy, I would think that a big mistake, and finally I do think that it is starting down a road of encumbering the bill with arguably good ideas that will not seem good to somebody and we will be right back where we were in 1991.

Chairman LIEBERMAN. Thanks. Ms. Browner.

Ms. BROWNER. Well, in keeping with the bipartisan commitment to this piece of legislation, I will largely align myself with my predecessor, but let me add a few quick points. There is a Senate-confirmed position in EPA today responsible for science. That is the Office of Research and Development, and I think, as Mr. Reilly said, the person who serves in that job functions in many ways as a chief science officer for the agency.

One of the concerns I have with singling out one person to speak on behalf of all of the science of the agency is that the breadth of knowledge and the breadth of scientific research that the agency engages in is not going to be easily spoken to or represented by one individual. For example, when we were working on the air pollution standards for ozone and fine particles, which I spent many, many years working on, there were numerous scientists that I met with in the agency who had committed their life to the analysis and the scientific research, and they knew little pieces of each area.

So I think we need to be cognizant of the fact that when we talk about good science, we are not simply talking about qualified researchers, we are also talking about process, peer review, and I appreciate Mr. Elliott's kind words about everything we did to institutionalize a scientific process. I think if I had one thought as you look forward, it would be not to focus on necessarily the structure, per se, but to ensure that the agency has the resources to manage the scientific process. It is expensive to run peer-review panels. You pay all those people. You have to bring them in. They meet over extended periods of time, and we were very successful in getting a good, strong budget and maintaining it, but as the agency goes forward in the future, that will be even more critical.

Science is fundamental to everything EPA does. Good science is absolutely essential, but we need to be flexible to allow the sci-

entists to do to work that they are skilled at doing and then do the peer review that gives the administrator, the secretary, the ability to make the decision.

Mr. ELLIOTT. Mr. Chairman, could I just respond very briefly?

Chairman LIEBERMAN. Yes, and when you do, let me ask you to answer this question: Why would not a deputy or under secretary in EPA dealing with science be a duplication of the work that OIRA does, and we have just been through a battle over the nomination of John Graham. He has been confirmed, but in his hearings, in his confirmation hearings, he was actually quite explicit about the fact that he would like OIRA to get more involved up front and actually with the agencies as they develop their regulations, and I think part of it, from his point of view, would be to infuse cost benefit, economic, and scientific evaluations.

Mr. ELLIOTT. In my prepared testimony, which I would ask to be made part of the record, I specifically stay away from endorsing the specific question of a deputy, because I think having two deputies at EPA would be a problem. That would really create turf wars. With regard to OIRA, as you know, I was a strong supporter of John Graham, but I do not think OIRA or its staff has a great deal of scientific expertise or knowledge. That is part of their mandate, but I do not think that is really their strong point, as opposed to economics.

With regard to ORD, there are two issues. First of all, at some points in the past, the Office of Research and Development has played the role and it could play the role that we are talking about. It has not always done that, and as I point out in my prepared testimony, some of the language about non-delegation could be read as essentially prohibiting one assistant administrator or assistant secretary from, "supervising the work of another." So I think at a minimum it would be helpful to clarify in legislative history or statutory language that it is not the intent of that provision to prohibit ORD from playing that role.

What I have argued for in my testimony is the designation of a chief science officer as an adviser to the administrator at the political level on scientific questions. Now, I believe that you need the staff level of expertise, which we have beefed up, but I think you have put that together with a principal who is committed to being an advocate for the issue. Good staff work without member support does not get the job done. You need both a good staff—and I think enhanced peer review provides that—but you also need a principal who is going to go in to the administrator every once in awhile and say, "Boss, this just does not wash from a scientific perspective." I do not view that as something that is going to happen every day. The general counsel does that maybe two or three times a year.

But it is very important to empower the scientists on the working group, that they have a principal who can back them up and has the ear of the administrator. Sometimes that happens, but today it is dependent on the personality and forcefulness of the people that we get in that job, and by raising its status, particularly to the under secretary level, I think that the Congress would send a strong message and we would recruit better people. It is not a substitute for budget. It is not a panacea, but it would help.

Chairman LIEBERMAN. Thanks. My time is up. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman. Mr. Chairman, I think there is a legitimate distinction between structural changes, such as adding another assistant secretary or deputy or chief science officer, versus changes that would alter EPA's authority or powers. So I can see why the issue of creating some sort of chief science position is coming up in this debate, because I think those are structural changes and ones that the Committee might well look at as we consider this legislation. I would note that Congressman Boehlert, who is the strongest proponent of elevating EPA on the House side, is also a co-sponsor of a separate bill in the House that would create a deputy secretary of science for EPA. Mr. Elliott has mentioned that there are structural issues on what exactly that position should be. I guess, however, my concern remains as to whether raising this issue would impede the progress of this bill on which there is strong bipartisan consensus, and I do not know the answer to that question. I am unclear why creating this position would be controversial, in that it sounds quite logical to me. So I guess my first question for Mr. Reilly is to enlighten me as to why it would be deemed controversial to create this position.

Mr. REILLY. Well, I think, Senator Collins, that the idea of elevating science, like the idea of ensuring good cost/benefit or good economic analysis, doing a number of other things, has an appeal and would certainly have supporters. But I think one of the first questions that would be raised is if we are going to look at the agency structurally and in detail to that degree, to elevate a concern we think has had inadequate attention in the past, why confine it to science? There are many other things that the agency is responsible for, as I mentioned. One could say public health ought to be something that over-arches many of the things that the agency has done.

In my own time, I thought that ecology had been under-represented. One could have someone who is responsible for making sure that the non-health concerns of the agency, which get less attention from the press and from the public than the health concerns, be elevated. You cannot win those arguments. They are very compelling arguments. But as you start down that road, pretty soon I think you have a bill that will not command the support that simple elevation will command.

By elevating the agency, one certainly does not rule out the possibility of revisiting the question of is there an effective way to ensure that science is better represented in the decisionmaking at the agency? Honestly, if you do that, I think you will find that there are problems with many of the statutes that do not accord the kind of respect for science, were not debated even here with a good scientific formulation or background, and that perhaps they ought to be revisited, as well. What I am suggesting is that is a long and important, but I think difficult road, and I would not try to go down it at the same time as I tried to do the elevation of EPA.

Senator COLLINS. Thank you. That is helpful, and that leads me to suggest to the Chairman most respectfully that maybe the answer is to move both bills separately, because the Voinovich-Carper bill clearly has a lot of interest and a lot of support. Maybe that is an important debate, but it should be a separate debate. Mr. Reilly, I want to ask you one other question. You talked about the

difficulties in recruiting well-qualified scientists to take positions at EPA. Do you think that raising the EPA status to cabinet level might well help with some of the recruitment by increasing the status or the prestige of working at EPA?

Mr. REILLY. I think that the consequence of having a Department of the Environment or having a group or entity that is broader than purely regulatory, both in its own eyes or in the eyes of the country, will have the effect of causing scientists to understand they can come to the agency and look forward to making a career doing some basic science, doing some innovative science that will have long-term support because it is part of what the agency is supposed to do. In other words, that the only reason to investigate a particular scientific question is no longer simply because we have got a reg to get out next year and we need some science to back it up; that you need a broader perspective on the scientific status of the environment, for example, nationwide, and that is a legitimate responsibility of the agency and I think the answer to your question then is yes.

Senator COLLINS. Ms. Browner, would you like to comment?

Ms. BROWNER. I just want to add that we recognized early on in our tenure that this was a real challenge for the agency, attracting young scientists into the agency. If you think about it, 30 years ago, if you wanted to do environmental science. you went to the EPA. There were not the State agencies. There were not all of the industry opportunities and environmental organization opportunities that exist today. We had some tremendous success by thinking creatively. For example, I think Don Elliott mentioned our STAR program, Science to Achieve Results. Essentially what we did there is we said, "You know what? There are a lot of great graduate students out there whose work would be valuable to the agency. They do not need to come work for the agency. We can provide some financial resources. They can stay in their university. They can do their work. they learn about EPA, and they do work that is a benefit to EPA."

So I think part of attracting scientists, it is like industry today. They have a hard time attracting high-level scientists. Thinking creatively—much as I would like to think it would be simply fixed by calling it a department, I think it is going to require a lot more creative thinking and monitoring of how the dynamics in the employment of scientists is going broadly. Our STAR program, the first time we advertised it, we thought we might get a handful of applicants. We got hundreds and hundreds. We were completely overwhelmed by the number of young scientists who wanted to do work for the agency, but did not necessarily want to come into the agency. Subsequently, many of them did. It became a nice way to build a relationship. So I think that kind of creative thinking is going to continue to be very important.

Senator COLLINS. Thank you. My time has expired. I do not want you to feel neglected, and I appreciated your testimony. Thank you.

Mr. ELLIOTT. I will try and squeeze it in someplace else. [Laughter.]

Chairman LIEBERMAN. Senator Carper.

Senator CARPER. Mr. Chairman, I want to thank you for holding this hearing on the Voinovich-Carper bill.

Chairman LIEBERMAN. Incidentally, I have to tell you my staff has informed me that the bill is actually before the Environment and Public Works Committee, so I was engaged in an act of manifest destiny in thinking that it was here.

Senator CARPER. Mr. Reilly, I have never had a chance, I do not think, to work with you. I want to thank you for your stewardship of our country, for our country, and welcome you today. To Carol Browner, with whom I served—your terms as director and my term as Governor of Delaware overlapping—we very much appreciated the great relationship we had, not just from my State, but through the Nation's Governors, and it is great to see you. I will always remember the time you came to Sussex County, Delaware and brought your son about 4 or 5 years ago on a very rainy day, and after, I went to Rehobeth Beach and it poured down the rain. But we appreciated your coming and trying to get a two-fer in that day, and I know we were pleased you would participate in our event. I am sorry that it rained for your son.

Ms. BROWNER. It was a wonderful day. Thank you.

Senator CARPER. Mr. Elliott, you mentioned your neighbor. I think I heard Senator Lieberman call you neighbor. How does that work? Do you live in his neighborhood?

Mr. ELLIOTT. Yes, I teach half-time at Yale Law School. I have been teaching there for 20 years. So I still think of myself primarily as a professor and an environmental law professor. So I have a house there and a house here, and I go back and forth every week. So I have been teaching at Yale since 1981. In fact, that is how we met, in some academic conference on tort reform and other issues.

Senator CARPER. You mentioned in your comments and your testimony—you talked about other areas of expertise that are addressed in the legislation outside of science. I think you may have mentioned the role of the general counsel and several others, that we do take the time to address in this bill. Could you just mention a few of those again?

Mr. ELLIOTT. The bills talk about a chief legal officer, a chief information officer, and a chief financial officer. If we had codified the practices and structure of EPA at a somewhat earlier time, we would be codifying in statute the role of the assistant administrator for ORD in reviewing the underlying science. We had for many years at EPA something called the Red Border Review Process, which resulted in proposed rules being circulated for comment by all the other assistant secretaries, and that did provide a mechanism by which the science underlying a particular regulation would be taken a look at by the assistant secretary for ORD. That was abolished in the last administration as part of a streamlining program.

It is important to codify the practices at EPA, but there is a question legitimately as to which particular practice do you codify? I think it is literally the case that the scientists have been taken out of the reviewing loop at EPA in recent years. They still have a very important role in terms of peer review and in terms of the working groups, and that is all to the good, but I think it needs to be balanced. I would have the peer-reviewed documents come back to a chief science officer, as well as the program offices, so

that somebody can take a look at the very excellent comments and questions that are raised about proposed rules by these outside peer reviewers.

Senator CARPER. Administrator Browner was shaking her head just a moment earlier, before I gave her a chance to do more than that. Let me just say to my colleagues, the concern has been raised that we should not just have one person at EPA who is thinking about science, and I would agree with that, but at the same time I do not think we want to have just one person at EPA who is thinking about legal aspects, would not have one person who is thinking about information aspects, one person who just happened to be thinking about the finances. Obviously, those have to be concerns that go beyond any one person, and the same applies here to science.

What I really want to do here is engage in a dialogue with you that goes beyond today, certainly with George Voinovich and the leadership of this Committee, and Senators Boxer and Collins. I want us to find a way to come up with an effective compromise that helps ensure that we do focus more of science within EPA, that we do elevate it to the position of a full department with the Secretary in charge. I am convinced with people as smart as you are, and people as amenable as the rest of us are up here, we can work this out. We have to be able to work this out.

Ms. Browner.

Ms. BROWNER. I have never in my 8 years of testifying at EPA had to discuss Red Border Review. It is a technical issue of moving files around at EPA, and to suggest—and I do not think Mr. Elliott was suggesting this—but somehow or other discontinuing that in the last days of making a regulatory decision did damage to the scientists' ability to participate, is not probably exactly right. The most important thing for EPA is to have science on the front end. A scientist coming along 10 years after a group of scientists have been doing complicated research, subjected to external peer review, and then saying, "Oops, wrong," is not going to be helpful to the integrity of EPA's decisionmaking. So as we think about this, I think we need to be very well-informed on what is an appropriate scientific process for the agency, and to strengthen that and not add a gotcha at the end.

Senator CARPER. Thank you. Mr. Reilly.

Mr. REILLY. May I just add something, Senator Carper, that goes a little bit beyond science, and it perhaps is a provocative point, but as you open up the question of how to get better scientific integrity underlying EPA decisionmaking, I think it is an excellent question to ask, but you will find that many of the problems lie with the statutes themselves and within the diverse interests of the various committees that authored them. You will have different characterizations of risk, different concern about threats, different balancing of health versus ecological concerns, different, maybe, exposure assumptions if the statute is that detailed. And it is profoundly in the interest of the Nation's environmental laws, in my view, to try to integrate those things. It is not easy and it would involve many committees of the Congress.

This bill, I believe, opens the door to do that. It provides enabling authority for the first time in an organic statute to put things to-

gether that have never been effectively put together, that came, as was mentioned earlier, from five different departments. That is one of the great merits of cabinet status. I think it will begin that debate about integrating our perspective, and people will see that there should be fewer disparities among these different statutes and the concerns that trigger a regulation as a result.

Senator CARPER. Mr. Chairman, my time has expired. I again very much appreciate your testimony here, and, Mr. Elliott, especially your comments in support of the initiative. I did not realize Sherwood Boehlert over in the House, and Senator Voinovich and myself, and you all have forgotten more about this stuff than I will ever know. I say that freely. I would really appreciate your willingness to work with us as Senator Voinovich and I, and Congressman Boehlert, try to find the right balance here. We do not want to derail the bill. We want to see this legislation passed, but at the same time, we want to make sure that when we do that, that the concerns that we have expressed that have frankly been expressed by a lot of people around the country with respect to the role of science are addressed.

No one will ever accuse EPA of being blinded by science, but we want to make sure that, in the end, that its role is enhanced, as well. Thank you.

Chairman LIEBERMAN. Thanks, Senator Carper.

Senator Thompson.

Senator THOMPSON. Thank you, Mr. Chairman. A couple of observations: First of all, I'd like to thank all three of you. This has been extremely helpful to me—the things you say would be beneficial to the EPA by elevating it, and also to the science position, by elevating it. Both involve having a seat at the table. You can have some science influence there, but that is, to a great extent, the discretion of whoever happens to be administrator and what their goals are. Just as EPA becomes a cabinet-level position, there are certain things you cannot do to EPA anymore, and there are certain things that you cannot do to freeze out or not use scientific input as much as one should, so I think we need to keep that in mind. Also, Mr. Reilly, all of the things that you mentioned of concern, it seems to me like there was one common denominator for all of that, and that is they all should require sound science.

Mr. REILLY. Yes, sir.

Senator THOMPSON. Science is the common denominator for all those interests, because science is not just another interest group. Science should be an integral part of everything that we do. On the legal side of things, I think your point is well-made, different standards, different laws and so forth. In some cases you cannot even consider the cost of something, and in other cases, the cost/benefit analysis is required and best science is required. So I think that is a good point. On the other hand, we have seen some significant instances where—and you assume that a person in this position is not going to make things any worse, that he would apply the law as he went about his or her job. But we have seen instances where more science input would have been beneficial. I think maybe the PM ozone layer situation is a good example of that. The court held there that EPA was arbitrary and capricious

in refusing to or not considering the substitution risk of reducing ozone.

Is that not an example where the science part of the decision-making process should have been given greater weight, Ms. Browner?

Ms. BROWNER. I am happy to respond as the person who, obviously oversaw that. I know you are aware that the Supreme Court, Justice Scalia writing for all nine members of the court, did uphold those fine particle and the ozone standards. I think the issue you are raising——

Senator THOMPSON. I do not think EPA even contested this part.

Ms. BROWNER. The issue that came up into the lower court that I think you are raising is whether or not allowing excess pollution in the air reduces skin cancer, and as I understand it, EPA is going through the process of considering that. The fact that EPA did not speak to that in its regulation, however, does not mean that it was not part of a rigorous science review. I know you know this, but I think it is worth repeating. It is widely accepted that on PM and on ozone, EPA had more science process and more external scientific review and studies than any decision in the history of EPA.

The process started with hundreds of external peer-reviewed studies. That was narrowed by an external peer-review board to 87 studies, which were then peer-reviewed again. I can go through it, and I do not want to belabor it.

Senator THOMPSON. I am sure all those points were made to the court as they ruled against you.

Ms. BROWNER. No, they did not rule—sir, with all due respect, those standards are on the books now and the new administration has embraced them as the pollution standards. The issue goes to the regulatory, not the science side, which is in adopting the regulation, the pollution standard, did EPA speak to the issue of excess pollution and a reduction in skin cancer? It is a very small piece of a much, much larger public health decision.

Senator THOMPSON. My understanding was it did not go to what a substitution risk would show. For example, it went to the fact that, in the court's opinion, at the DC level, that the EPA did not consider the substitution risk at that point. So, to that point, and it is a procedural one, my concern is whether or not on something very important, very costly, we have a case in point. I have not read the Supreme Court opinion, but my understanding is the Supreme Court did not address this because EPA did not contest that part of it.

Mr. Elliott, do you have any input on that, from your vantage point?

Mr. ELLIOTT. There are lots of cases recently where reviewing courts have reversed EPA decisions because of concern about the science. I think the chloroform standard is perhaps a better example, and in an article that I have provided as part of my testimony, I have cited a number of cases. But I think there is a general consensus in academia that more EPA rules are being reversed in court on scientific grounds than in the past, and I, at least in print, have expressed the concern that the courts are stepping in, because some of EPA's scientific credibility has been undermined.

In terms of recruiting good scientists, if you look at other agencies that perhaps do a better job of recruiting scientists and have a high-level of credibility in terms of science—I think, for example of FDA—it is not so much the funding issues as that the scientists are part of the policy process. That is one of the mistakes that we have made at EPA. People come to Washington not for the money, but because they are committed to public service and the role that they have in making public policy. We cannot ask scientists to come to EPA and put them off in a research lab and not have them be fully part of the same policy process that motivates lawyers and others to come to the agency.

We have separated scientists a little bit too much from the policy process. There is a great line by Samuel Coleridge, that every generation has to deal with the consequences of the past generation's reforms. Some of the reforms and streamlining that was done in the last administration that get science at the front end, I think does really create a problem in terms of not having a high-level advocate for science. I do not think the high-level advocate for science, at the end of the line, is the answer. I think you need both. I think you need scientists on the work group and you need peer review, but you also need somebody who is in the upper counsels of the agency as the advocate for science, because there are advocates for politics, there are advocates for interest groups, there are advocates for economics. What is missing in the structure today is a high-level forceful advocate for science, and I would plead with the Committee to figure out some way to get that back into the process.

It has been there at some points in the past, but in my opinion, as somebody who spends his life studying this stuff, as well as a former participant, I do think that science is more excluded from the high-level policy process at EPA today than it has been in the past, and I think it is appropriate for this Committee to try to nudge things back in the right course.

Senator THOMPSON. Thank you very much, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Thompson.

Do my colleagues have any other questions? If not, I thank the witnesses very much. The fact that we had not only the current administrator, but her two predecessors here and a former general counsel, really lends tremendous weight to this recommendation. Maybe I should have said it was more like an all-star team than old-timers day.

Senator THOMPSON. Still trying to get out of that; aren't you?

Chairman LIEBERMAN. Yes, I am. I do think the hearing also—and the arguments that you and others before you have made for elevating EPA to cabinet status—makes those arguments very powerfully, and in the discussions we have had here, we have also shown the temptations or the challenges that we are going to have as we steer this bill through the legislative process, to stay between the lines and just focus on elevation to cabinet status, or we are going to get into difficulties, and I hope we can do it. Did you have something more you wanted to say?

Mr. REILLY. Well, I was struck listening to Senator Thompson. Once when I testified before the Environment Committee, Senator Moynihan was in attendance, and he made a memorable point. I

think, Senator Thompson, you are now picking up the standard of concern for science at EPA, and you no doubt know of Senator Moynihan's passion for science. I remember he concluded once by saying, "Sooner a diabolist in the convent than a member of the scientific community on the Environment and Public Works Committee."

Senator THOMPSON. That is an expression I am sure he got from me somewhere along the line. [Laughter.]

Chairman LIEBERMAN. That is an old Smoky Mountain expression; isn't it? [Laughter.]

Thanks to you all very much. The hearing is adjourned.

[Whereupon, at 12:03 p.m., the Committee was adjourned.]

APPENDIX

TESTIMONY

by

The Honorable Barbara Boxer
United States Senate

Thank you, Mr. Chairman, Senator Thompson, Senator Collins, and Members of the Committee. It is my pleasure to have the opportunity to testify before you today in support of S.159, the Boxer-Collins bill to make the Environmental Protection Agency a permanent part of the President's cabinet.

Before I get into my testimony, I want to let you know that the bill before you today is modeled after a bill introduced by Senator Glenn in 1993, in the 103rd Congress, to elevate the Environmental Protection Agency to cabinet status. That bill passed the Senate, but unfortunately was weighed down by numerous provisions that kept it from becoming law. I have pared back my bill significantly from the Glenn bill, even as introduced, in order to stream-line the bill, while retaining its essential elements.

Mr. Chairman, on the first working day of the new Congress, I introduced a bill to address the energy crisis in California. On the second day, I introduced the Department of Environmental Protection Affairs Act. I believe that shows the importance I place in putting the EPA on equal footing with the rest of the Cabinet. I particularly want to thank Senator Collins, the lead co-sponsor of this bill, for her support in this bi-partisan effort.

As most of you know, the EPA was created over 30 years ago by President Nixon in response, in part, to waters too polluted to drink, and air too dirty to breathe. It had become clear that air, waste and water pollution did not respect state boundaries, and that public health and environmental protections varied widely from state to state.

In the more than 30 years since its founding, the EPA has played a critical role in ensuring that all Americans enjoy the same basic level of public health and environmental protection. At the same time, the world has changed a great deal since the EPA was founded in 1970. EPA's responsibilities have greatly expanded from its original mandate.

Mr. Chairman, it is now time for the EPA to be a permanent part of the cabinet. Protection of public health and the environment must have a seat at the President's table, along side those cabinet members who are fighting for education, commerce, transportation, agriculture, energy, and defense. The EPA must no longer be an agency on the outside looking in. It must be on the inside with a permanent seat at the table.

This bill is more than just a symbolic gesture. Let me take a few minutes to summarize the reasons for elevating the EPA to a cabinet-level Department.

First, by elevating the EPA to the cabinet, the Boxer-Collins bill would ensure that the President is directly involved and responsible for setting environmental policies. While some past Presidents as well as the current President have invited the EPA Administrator to cabinet level discussions, this bill assures that environmental protection has a place among the national issues occupying the attention of the President and his cabinet.

Second, the Boxer-Collins bill would ensure that the head of the EPA is on an equal footing with her colleagues in the rest of the Administration.

Third, the Boxer-Collins bill recognizes the growing role of global

environmental issues.

Most nations in the world already afford top status to their environmental officials. In fact, according to the Congressional Research Service, of 198 countries surveyed, only 10 do not afford cabinet or ministerial status to their highest environmental official. The United States is joined by nations such Libya, Yemen, Qatar, and Uzbekistan in failing to grant permanent cabinet status to its environmental agency.

We now have a chance to fix this. And we are presented with a unique opportunity at this moment in our history -- with a bipartisan bill in the Senate and the support of a Republican Administration -- to get it done.

Past efforts have failed. This time, we must succeed.

As you know, serious legislative attempts to elevate the EPA to a cabinet-level Department were made in the late 1980s and the early 1990s. Each time, however, controversial policy issues were injected into the debate. Despite substantial bi-partisan agreement on the core issue -- that the EPA deserved a permanent seat at the cabinet table -- too much baggage killed the effort.

The Boxer-Collins bill provides a chance to do it right this time. Our bill sticks to the basics. It would codify the broad parameters of what would be the Department of Environmental Protection Affairs, but does so in a way that ensures that the new Department maintains the mission, tradition and history of the existing EPA: that of a leader in environmental protection.

EPA has an unusual history, it was created in 1970 by President Nixon,

through a reorganization plan. There has never been a stand alone statute that spells out the structure of EPA. The Boxer-Collins bill takes care of that by providing a broad outline of the Department of Environmental Protection Affairs.

Specifically, S. 159 provides for a Secretary, a Deputy Secretary, Assistant Secretaries, a General Counsel, and an Inspector General. It lists general areas of responsibility that must be addressed by the Assistant Secretaries, such as enforcement, clean air, clean water, toxic substances, and hazardous waste. It encourages EPA to participate with the Secretary of State in negotiating international agreements. It also includes a number of technical and conforming amendments.

Mr. Chairman, I am not here to tell you my bill is perfect. But, it is intended to be a clean bill. I have tried to stick to the basics while still providing enough detail so that we have a reasonable idea at the end of the day what the new Department of Environmental Protection Affairs will look like.

To achieve this result, Members of the Committee may have suggestions that make the bill better. I am open to those suggestions and look forward to working with you on the best bill possible. The most important thing to remember is the lesson of the past. Keep it clean.

It will be hard to stick to this approach -- from both sides. I, for example, would like to see the EPA's Office of Children's Health and the Office of Environmental Justice written into law. But when I wrote this bill in January, I resisted the attempt to use this bill as a vehicle.

Elevating the EPA to a cabinet-level Department is too important to become bogged down once again in bickering over pet issues and petty grievances. This could be the year --should be the year -- when the ribbon is finally cut on the new Department of Environmental Protection Affairs.

Once again, thank you, Mr. Chairman for holding this important hearing and for allowing me to testify on a subject of great importance to me. And, thank you again, to Senator Collins for joining me in this effort.

Testimony of Honorable Sherwood Boehlert
Hearing on EPA Cabinet Level Legislation
Senate Governmental Affairs Committee
342 Senate Dirksen Office Building
July 24, 2001

Thank you, Mr. Chairman, Senator Collins, and distinguished Members of the Committee. Thank you for holding this hearing and thank you for allowing me to testify. And to return the favor, I will state those four words that every Senator wishes to hear from a Member of the House: I will be brief.

That can be a challenge, given the importance of the subject and my long (and sometimes tortured) legislative experiences with the effort dating back to 1988. But you know the importance of elevating EPA -- not just to Senator Boxer and myself but to the Administration, the previous Administration, and the nation as a whole -- so I will get right to the point. And actually, there are three basic points:

1. Congress should elevate EPA to the Cabinet level status it deserves and needs.

Now is the time and this is the place to do what is long overdue. What does the United States have in common with Libya, Monaco, Peru, and six other countries? These are the "holdouts" that, for whatever reason, have chosen not to make their primary environmental agencies Cabinet level departments. Every other major country has done so. Today more than ever before, we need to make EPA an official member of the President's Cabinet.

This has nothing to do with the stature or capability of Governor Whitman, who I think is doing a tremendous job. Instead, it's a question of timing and national and global conditions. Environmental issues are becoming more complex, international, and global. Climate change, widespread toxic pollution, and invasive species are obvious examples. The House Science Committee, which I'm privileged to chair, is looking precisely at such issues. There are also growing complexities involving natural resource damages and environmental challenges among other Federal agencies, such as the Department of Energy and the Department of Defense.

Mr. Chairman, the stars may have finally aligned to make EPA elevation a reality. As Chairman of the Science Committee, which has jurisdiction over NASA, I'll do all in my power to ensure the stars stay properly aligned. As Chairman of this Committee, you are in a position to do all the hard work and to help get the bill to the President in an acceptable form.

2. Don't be tempted by side-issues or diversions.

Based on my previous experiences with cabinet level legislation, I cannot overemphasize the importance of staying focused. Let's not forget the lessons of 1993 and 1994, when elevation bills addressed wide-ranging and controversial issues and

became magnets for further controversy. The effort ultimately failed. Republicans, Democrats, Conservatives, and Liberals alike recognized then what all of us should recognize today: Only a straightforward, clean elevation bill can make it through the process. This has been the consistent message from the White House and I believe they're right.

3. S. 159 and H.R. 2438 are both on the right track.

Both are bipartisan, excellent bills, although the Boehlert - Borski bill is "a little more excellent than S. 159." In all seriousness, Mr. Chairman, there is not a large difference between the two bills and there is plenty of room for compromise. Both bills can be called "clean," although S. 159 includes far more detail in housekeeping, findings, and related provisions. The twenty-five page bill includes several provisions that some may question the need for or view as new grants of authority (e.g. non-delegation and international responsibilities) or argue should trigger multiple referrals to other Committees. The five page Boehlert – Borski bill is an attempt to cover the bare minimum of housekeeping and conforming changes to get the job done. I trust you'll find an appropriate middle-ground, keeping in mind that some provisions, no matter how legitimate in their own right, may provoke needless or mischievous debate.

Thank you again, Mr. Chairman, for the courtesy of allowing me to participate in this historic hearing. I hope a markup of a clean, bipartisan bill will follow very soon. We have worked together on many important environmental issues ranging from multi-pollutant controls under the Clean Air Act, to Superfund, to restoration of Long Island Sound. I'm confident that with your help, the support of the Administration, and the bipartisan teamwork of Boxer, Collins, Boehlert, and Borski, we can make this important effort a complete success.

Remarks for Governor Christine Todd Whitman,
Administrator of the U.S. Environmental Protection Agency,
before the
Committee on Governmental Affairs
U.S. Senate

July 24, 2001

Mr. Chairman and Members of the Committee:

Thank you for inviting me to appear before you on this topic of obvious importance to the environment. I am pleased to be here to support legislation that will establish a Department of Environmental Protection.

When the Environmental Protection Agency was created in 1970 by Richard Nixon, it was a combination of 10 different units from five departments and agencies. In a message to the Congress, President Nixon submitted his reasoning for the reorganization plan that would establish the EPA. He wrote, "As concern with the condition of our physical environment has intensified...it has become increasingly clear that only by reorganizing our Federal efforts can we...effectively ensure the protection, development, and enhancement of the total environment."

This statement rings true more than thirty years later. The environment continues to gain prominence in the American consciousness and is routinely ranked among the public's most important national concerns. Without an organic statute of it's own, there continues to be a need for an institutional framework to protect the environment that is equal in scope and significance to the pervasive nature of this issue.

Establishing EPA as a cabinet department is not a new idea. The first bill to elevate EPA to cabinet status was introduced in the Senate in June 1988; and since that time a dozen similar proposals have followed.

Former President Bush was the first president to support elevating the EPA to cabinet level, mentioning it in his State of the Union address more than a decade ago and inviting then-Administrator Reilly to attend cabinet meetings. President Clinton and President George W. Bush have followed suit with both presidential support for the legislation and a seat at cabinet meetings for the sitting EPA Administrator. Without legislation that codifies these practices, however, there is no guarantee that future Administrations will do the same.

The mission of the EPA is of vital importance to all of our lives. The actions of this agency protect our environment and public health by ensuring the most basic of life's necessities – clean air to breathe and safe water to drink.

In the short history of the Agency, our work has helped transform the way America views the environment – planting in the American consciousness a clear sense of environmental stewardship. The EPA has helped underscore the universal agreement that our natural resources are valuable, not just for economic prosperity but for sustained quality of life. No longer do we

debate whether we need to act to protect the environment. Rather we discuss how we can keep America green while keeping our economy growing.

The EPA is a natural fit among the other cabinet departments. Our mission – to protect human health and safeguard the environment – both complements and contributes to the overall service of the cabinet. Already I have found my participation at the cabinet level helpful in navigating the many important areas of overlap between the work of EPA and other departments including Energy, Agriculture, Interior, Housing, and Labor. Quite frankly, I cannot think of a cabinet department with whom EPA does not interact. I would consider it vital to the work of future Administrators – and vital to our country – to assure similar cooperation and participation in the future.

The time has come to establish EPA as a full member of the cabinet, and doing so would be consistent with observations of state governments as well as our international counterparts.

As Governor of New Jersey, I felt it important to have my Environmental Commissioner as part of my cabinet. I find it instructive that all but five of the states that have a formal cabinet include the head of the environmental agency at that level. As President Bush calls for increased cooperation between federal environmental regulators and state and local governments, it is appropriate to follow their leadership on this issue.

Further, the environment continues to play a central role in international relations. This legislation would bring the United States on par with the rest of the G-8 countries and more than sixty others by establishing a Secretary of the Environment.

I am pleased that Congress supports this important step. Both the Boxer/Collins bill, S. 159, and the Boehlert/Borski bill, H.R. 2438, would elevate EPA to cabinet status and both provide for the orderly transfer of responsibilities from the Agency to the Department. Moreover, both bills are "clean bills," in that they exclude extraneous policy issues that in the past have derailed the legislative process to establish a Department of the Environment.

While the Boxer/Collins bill is more prescriptive, I believe that the Boehlert/Borski bill provides the Agency with the flexibility it needs to ensure that the transition to Cabinet status goes as smoothly and efficiently as possible.

The justification for placing EPA in the cabinet is compelling. Creating a Department of the Environment will ensure that our country prioritizes this issue today and long into the future. As I have said repeatedly, my aim for this agency is to leave America's air cleaner, water purer, and land better protected than when I arrived. I enjoy the full support of the President in pursuit of this goal. Elevating the EPA to cabinet level will assure that future Administrators are able to set – and achieve – similar goals in the future.

Taking this step will be a reflection of the importance the Congress and the President place on the environment in America today. Thank you for allowing me to appear before you today, and I would be happy, now, to take any questions you might have.

TESTIMONY ON S.159, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AFFAIRS ACT OF 2001

CAROL M. BROWNER

Administrator, EPA, 1993-2001

July 24, 2001

Mr. Chairman, thank you for the opportunity to appear before this Committee on this matter. It is a great honor to be here today.

Thanks to President Clinton I was a member of the Cabinet and EPA's work was represented in Cabinet meetings from the first day I assumed my post at EPA January 23, 1993. Similarly, Administrator Whitman now occupies that Cabinet chair, as did Mr. Reilly. The time to make the cabinet membership a permanent right -- is long overdue and I applaud Senator Boxer and her cosponsors for once again bringing this important matter to the forefront. Making EPA a permanent member of the president's cabinet will guarantee EPA the stature and recognition it deserves and reaffirm its position of importance in the health and welfare of the American people and the world -- today and into the future.

It is also a fitting tribute to the work of the 18,000 public servants who make up the EPA. Some of the most wonderful and committed professionals and staff I have ever had the opportunity to work with.

During the Senate and House hearings on the establishment of the EPA, Russell Train who subsequently served as the second Administrator of EPA said, "the EPA will provide us with the unity and the leadership necessary to protect the environment."

And in the last 30 years, the EPA, working of behalf of the American people, and with the direction and support of the Congress, has provided that leadership and made incredible progress in cleaning and protecting our air, water, land -- the health of our families and communities. EPA has strengthened and improved air and water quality in communities across the country; it has set limits on dumping waste and cleaned up hundreds of the worst toxic waste sites; it has met new challenges creating cutting edge programs such as Brownfields; it has banned pesticides that are harmful to our children's health; it has honored the public's right to know about their environment, dramatically expanding access to information; and it has joined with countries around the world to secure global environmental agreements including the recently signed Convention on

Persistent Organic Chemicals and previously the Montreal Protocol which is reaping benefits as the hole in the upper ozone begins to heal..

Foreign Governments from the Bahamas, to the United Kingdom and France, to Kenya, to Australia, have given their national environmental agencies permanent membership in their cabinets. The United Nations has devoted an entire committee and multiple conferences to environmental challenges and efforts. The environment is one of the most important topics in international relations today and environmental policy is becoming an integral part of foreign policy. The United States is uniquely situated with the experience and expertise of the EPA to provide global leadership on these issues. Important to that leadership position is the recognition and international statute that comes with permanent, guaranteed cabinet membership

In the past bills to permanently elevate EPA have become something of a magnet for matters well beyond the creation of a Department of the Environment -- including limitations or changes in EPA's existing statutory authority or decision making processes embodied in the existing major public health and environmental laws -- I would certainly hope that that does not happen again. This recognition is too long over due to have it yet again delayed by issues properly considered elsewhere.

When the Environmental Protection Agency was in the process of being created, an alternative was proposed by some – the creation of a more comprehensive, cabinet-level Department of Environmental Quality. Today the EPA has become essentially that. It deals with matters spanning all types of environmental issues and government bodies, however, with every change of the Administration, it risks losing its voice in the Cabinet. Permanent inclusion of the EPA in the Cabinet: its work and responsibilities, its expertise and experiences and the environmental and public health challenges it is tasked to solve, guarantees a continued commitment by the United States to the protection of the air we breath, the water we drink, the land on which we live – the health of our communities and our families. I can think of no finer tribute to the successes of EPA over the last thirty years or better recognition that the challenge of protecting our health and the environment is a responsibility that will always be with us.

Thank you.

TESTIMONY

by

The Honorable William K. Reilly
President and Chief Executive Officer
Aqua International Partners
and
Former Administrator,
U.S. Environmental Protection Agency, 1989-1993

Before the
Committee on Governmental Affairs
of the
United States Senate

July 24, 2001

Mr. Chairman, Mr. Thompson, Members of the Committee, I greatly appreciate the opportunity to appear before you today on behalf of Senate Bill 159, which seeks to elevate the U.S. Environmental Protection Agency to cabinet status.

For the record, I am William K. Reilly and I had the privilege of serving as EPA Administrator for the first President George Bush – Bush 41, as a number of people are starting to refer to his Administration – from February 1989 until January 1993.

And for the record, too, I am a strong proponent of elevation.

Let me thank you, Mr. Chairman, for convening this hearing to consider Senator Boxer's bill, S. 159. And let me also salute Senator Boxer for putting this legislation forward. I am particularly pleased, now that I live in California, that it is my Senator who has taken the initiative. I understand my friend Congressman Boehlert, in that other body across the Capitol, has introduced comparable legislation. I hope we will see these endeavors succeed this time around.

Many members in the Senate and the House in both parties have been supporters of cabinet elevation for EPA. We have tried before, at least three times I

can recall, and each time we have fallen short. The first President Bush and President Clinton both supported elevation. But those efforts fell victim to the competing agendas of the different interests in our society that follow environmental policy and the work of EPA in particular. Some harbored anxieties about what EPA might or might not do. Others feared they could not trust OMB, or that the White House or Congress might meddle too much politically, or, I suppose, not enough. Too much was asked of the prior legislation and no consensus was forthcoming. In 1991, a whole series of amendments were offered – for example, limiting the number of political appointees; applying standards of the Resource Conservation and Recovery Act to federal agencies; adding property rights protection; and more. Whatever the merits of the individual amendments, it was clear in the debate that not everyone thought them good and useful steps in elevating EPA. The result was that no legislation passed the Congress.

In 1993, the attempt to impose cost-benefit analysis on the agency across the board doomed the cabinet bill. I believe in such analyses, done properly, done rigorously, and as long as the EPA chief retains authority to render his or her best judgment on the merits of the rule, including the economic analysis. But such a broad-ranging requirement, cutting across major statutes and affecting the criteria for environmental decision-making, proved a poison pill. It did not belong in cabinet legislation, and the result, here, too, was that no legislation emerged from Congress.

So I am reminded and underscore for you that the best chance to achieve the goal of creating a Department of the Environment is to keep the elevation simple. Keep it clean. And this is precisely what Senator Boxer has proposed. So I am pleased to endorse S. 159.

What adds a new impetus and a new possibility to this proposal is the recent expression of support by President George W. Bush. I applaud his leadership in

publicly embracing the elevation of EPA to cabinet status. It is not something, after all, that his political allies and supporters have made a priority. The President's support represents a welcome appreciation that cabinet status for EPA is good policy, good symbolism, and good politics.

One may reasonably ask, why elevate EPA? Will it make a tangible difference? Both Presidents Bush and President Clinton have treated their EPA Administrators as members of the Cabinet. So some might argue that elevation is more symbolic than anything else. The symbolic value of elevation has value, for communicating priority to environmental issues. Nothing now ensures that a future President will confer de facto cabinet stature upon the EPA Administrator. Moreover, we are one of the very few major nations that do not formally include its environmental agency in the cabinet. The irony, of course, is that for much of the past 30 years, the United States has set the pace worldwide in environmental policy innovation and in actual achievements in environmental protection and restoration.

Beyond the symbolic value, however, I believe there are three important reasons for making EPA a cabinet agency.

First, unless you follow environmental issues closely, most Americans probably don't appreciate that EPA has no basic enabling legislation or authority. The agency was cobbled together by President Nixon, in 1970, through an executive order that brought together four principal agencies, each with its own statutory responsibility and its own oversight committee of the Congress. We have seen landmark environmental legislation pass, to clean the air and water, preserve critical habitat and scenic wonders, to cut toxic waste, and more. But no statute has given EPA basic operating authority. It is way past due. The consequences of distinct agencies and diverse statutes being brought into one organization is an incongruous mix of basic assumptions involving statutory history, characterization of risk, exposure

assumptions, and cleanup standards. Legislating an organic statutory order elevating EPA will not correct this problem but it is a step that will likely begin a process of rationalizing statutory and regulatory inconsistencies.

It is especially important that EPA have authority in the international arena, and I am pleased to see that Senator Boxer's bill has explicit recognition of the role that the Secretary would play, and the agency more broadly, in international environmental affairs. It is proposed to be done, rightfully, by means of assisting the President and the Secretary of State in carrying out their responsibilities to conduct U.S. foreign policy.

This authority could not come at a more important juncture. Now it is true EPA has been active internationally. But often the funding is doled out through U.S. AID or the State Department. Or the authority comes in legislation that addresses a particular issue government-wide, such as climate change research. The fact is that increasingly EPA will need to turn its attention to matters outside our borders if we are to maintain the significant momentum at home behind efforts to clean our air and our waters. I understand, for instance, that EPA's air office has estimated that as much as 30 percent of the mercury loadings in this country derive from sources outside the country, brought here by long-range air transport. That is true as well for DDT in the Great Lakes. Pollutants cross the U.S.-Mexico border. And so on. In devising strategies to address environmental problems here in the United States, EPA will be called on more and more, and clearly in consultation with the State Department, the National Security Council, and others, to develop strategies that seek to address sources of the problem outside our borders. The agency needs to be able to discuss these matters forthrightly and to seek appropriations as part of agency budgets if that's what's required. We no longer can afford to treat international activities at EPA as

something that best belongs under the radar screen, as extracurricular work funded by stealth through the water or air programs.

The second reason is one of parity with other Cabinet agencies that have important and wide-ranging influence on domestic policy and our economy. Indeed, EPA often finds itself dealing with the actions of other federal agencies as it reviews environmental impact statements for federally sponsored projects, as it seeks to foster cleanup of old sites where nuclear and other wastes have been deposited, as the agency pursues clean air and water goals, or pesticide regulation, or wetlands protection. Now it falls to the President to make clear that he supports his EPA Administrator in these interagency battles, or the EPA Administrator cannot do the job effectively. By providing parity, cabinet elevation changes the equation and makes clear the environment is not to be subsumed under other national interests but must be accommodated and integrated as federal agencies carry out their own responsibilities.

Third, and perhaps most importantly, elevation has the real potential to change the way the agency's 18,000 or so employees think of themselves and their mission. I have found the agency's staff to be as dedicated and talented a group of public servants as I have seen anywhere and I was proud to lead them during a very productive time. But I also came to realize that our environmental agency must be more than a regulatory and enforcement arm of the federal government, as important as these functions have been in achieving the substantial progress our country has made on the environment. There must be equal attention to education and information that can inform citizens. There must be monitoring and reporting to chart our progress. There must be solid, rigorous scientific research to get at unanswered questions and needs. There must be commercial deployment of technological innovations that can benefit the environment. These are all pillars of a sound national

environmental policy, along with the partnerships EPA has formed with the states and communities, with businesses and nonprofit groups, across the country. Yet the agency is widely perceived, and I think this holds within as well, as principally a regulator and an enforcer. A more contemporary understanding that EPA is uniquely the environmental overseer, watchdog, and point of reference regarding the status, needs and problems of ecology and environmental health in America, compels a broad view of the agency's role. Administering EPA is a distinctly integrative job, and it requires putting many interests together. Its turf is universal. We must broaden EPA's concept of its mission.

There is a moment early in the life of every new EPA Administrator when he or she enters the Cabinet Room to encounter a congenial group of department heads and begins to make the rounds and shake the hands before the arrival of the President. It occurs to the Administrator that there's a dispute with Agriculture about chemicals, with HUD about housing sited in wetlands, with Interior about water contracts and projects, with Defense about base cleanup, with Transportation about auto pollution standards and maybe fuel efficiency, with Energy about hazardous or nuclear waste. The other department heads, too, are aware of the disputes, joke about them, sometimes with an edge of annoyance or resentment. The undercurrent sometimes seems to be, "Who is this guy, the only one here who's at war with everybody." For that is the nature of environmental protection. The Energy Secretary under President Bush 41, my good and admired friend Jim Watkins, once gave an exasperated speech to his colleagues complaining about my advocacy of an ambitious new Clean Air Act. "He's in my knickers," he said, pointing to me, "and he's in yours," he added, pointing to the Transportation Secretary. And I was. It was my job. President Bush backed me. A statutory status of equality with those whose environmental activities I was charged with helping police, would have simplified my

task. It would have communicated that I had parity, that my concerns mattered as much as anyone else's in the Cabinet Room. And although I never had the problem of getting my phone calls returned, thanks to President Bush's strong personal support, my predecessor Lee Thomas once informed me that he had had such a problem, and believed strongly that Cabinet rank would have helped correct it.

EPA's $7 billion budget is a bit like the proverbial tail wagging the dog. It triggers much greater expenditures by other levels of government, by the private sector, by consumers generally. The agency thus deploys enormous power and influence over the economy. Without the direct involvement of other agencies and non-governmental institutions in solving environmental problems, EPA doesn't have a chance to achieve the ambitious goals of our nation's laws on air, water, waste, and the like. Thus EPA must see its role and its choices in a broader context. Cabinet elevation will help achieve this.

At some later point it may make sense for the new Department in consultation with the Congress to consider its organization and structure, whether the functions are grouped in the most sensible or effective fashion, and whether a single scientific template should be used to characterize threats and goals. But I would leave that until later. We needn't encumber this legislation with proposals that are sure to unleash protracted debate and maybe draw fire from friend and foe alike.

Senator Boxer's bill has it exactly right. President Bush has it exactly right in supporting EPA elevation. Now is the time to make it happen.

I make but one request: please do look at the acronym that would result from whatever you name the new Department, and make sure it's a good one.

Thank you.

###

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

[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.

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

(...continued)

[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).

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

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

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.

---

[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.

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.

---

[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).

Copyright © 2000 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®—The Environmental Law Reporter®. All rights reserved.

1-2001 31 ELR 10125

ELR
NEWS & ANALYSIS

Science, Agencies, and the Courts: Is Three a Crowd?

by E. Donald Elliott, Alan Charles Raul, Richard J. Pierce Jr., Thomas O. McGarity, and Wendy E. Wagner (moderator)[1]

WENDY WAGNER: Welcome to the Panel on Science, Agencies, and the Courts. This panel is sponsored by the Environmental Natural Resources Regulation Committee of the Administrative Law and Regulatory Section of the [American Bar Association (ABA)], and also co-sponsored by the Standing Committee on the Environment of the ABA.

My name is Wendy Wagner. I'm going to moderate the panel, and as the title of the panel implies, we're going to talk about judicial review of agency science. This isn't a new topic in administrative law, but over the past few years there have been some different developments in the courts that may ultimately change the way the courts review agency science in the future.

We have convened four panelists whom I consider to be the nation's top experts on the issue of judicial review of agency science. I'm sure all of you are familiar with these panelists, each of whom is extraordinarily distinguished, not only in this narrow area, but also in administrative and environmental law more generally.

E. Donald Elliott is our first speaker. He is currently a partner at Paul, Hastings, Janofsky & Walker LLP, Washington, D.C. He was a tenured professor at Yale Law School until 1993, but he continues to serve in an adjunct role there. Mr. Elliott was general counsel of the [U.S.] Environmental Protection Agency [(EPA)] from 1989 through 1991. His practice currently specializes in environmental and toxic torts areas, but he seems to find time still to participate in a number of academic conferences and continues to be prolific, writing more than 60 articles on various issues of environmental and administrative law. So with that, I will turn the microphone over to Don Elliott.

DONALD ELLIOTT: Thank you, Wendy. I want to talk about what I call the "science debacle" at EPA.

I think the central conundrum of U.S. administrative law has been how to meld politics and expertise. As recently as the 1960s and the 1970s, thoughtful people were concerned that experts might overwhelm democratic decisionmaking in a technocratic society. My old mentor, Judge Bazelon, called this threat "the perils of wizardry,"[2] or the notion that expertise might dominate our public decisionmaking. Now, a decade or two later, no thoughtful person could possibly think that we've got too much science in environmental decisionmaking. 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."[3]

The so-called endocrine destructor issue is a good example of too much politics and not enough science in our environmental decisions. The theory that low doses of certain chemicals might mimic hormones and disrupt the functioning of our bodies is frightening, but is based on experimental results that many scientific laboratories have tried and failed to replicate.[4] Nonetheless, this poorly supported speculation is taken very seriously at EPA, and the Congress has even legislated about it.

Our public discourse in administrative law is increasingly dominated by politics and increasingly excludes science and expertise from playing an important role. I like the title of David Stockman's book, *The Triumph of Politics* (even though it was about another area of policy). What

1. E. Donald Elliott is a partner in the Washington, D.C., office of Paul, Hastings, Janofsky & Walker LLP and is an adjunct professor at Yale Law School. Alan Charles Raul is a partner in the Washington, D.C., office of Sidley & Austin. Richard J. Pierce Jr. is the Lyle T. Alverson Professor of Law at George Washington University. Thomas O. McGarity holds the W. James Kronzer Chair in Trial and Appellate Advocacy at the University of Texas School of Law. Wendy E. Wagner is a professor at the University of Texas School of Law. This is an edited transcript of a program held at the American Bar Association (ABA) Section of Administrative Law and Regulatory Practice 2000 Administrative Law Conference, held in Washington, D.C., Oct. 12-14, 2000. The panel was co-sponsored by the Environmental Natural Resources Regulation Committee of the Administrative Law and Regulatory Section of the ABA and by the Standing Committee on the Environment of the ABA.

Every October, the Administrative Law Section holds a three-day conference in Washington, D.C., with more than a dozen panels, workshops, and other events that focus on issues arising in administrative and regulatory law. To learn more about the section's activities and publications (including its "Annual Developments in Administrative and Regulatory Practice" series), contact the Administrative Law Section's office at (202) 662-1528 or visit the section's website at <http://www.abanet.org/adminlaw>.

This transcript is published with the permission of the ABA; the views expressed have not been approved by the ABA House of Delegates and do not constitute the position of the ABA.

2. *See, e.g.*, David L. Bazelon, *Coping With Technology Through the Legal Process*, 62 CORNELL L. REV. 817 (1977).

3. Stephen Goldberg, *The Reluctant Embrace: Law and Science in America*, 75 GEO. L.J. 1341, 1365 (1987).

4. *See, e.g.*, J. Ashby et al., *Lack of Effects for Low Dose Levels of Bisphenol A and Diethylstilbestrol on the Prostate Gland of CF1 Mice Exposed in Utero*, 30 REG. TOXICOLOGY & PHARMACOLOGY 156 (1999).

Copyright © 2000 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®—The Environmental Law Reporter®. All rights reserved.

we're experiencing in environmental law is really "the triumph of politics," or conversely, the "rout and retreat of science" in environmental decisionmaking.

The decline of science as an important determinant in environmental decisionmaking is in many ways the underlying subtext of Justice Stephen Breyer's book, *Breaking the Vicious Circle: Toward Effective Risk Regulation*.[5] In case after case, the book shows how decisionmaking, particularly in the environmental area, has become political and science has been precluded from playing its rightful role.

My belief is that what we're seeing in terms of the recent court decisions setting aside many agency decisions, particularly in the environmental area, is not the result of more stringent standards of judicial review or of judicial activism. Rather, I think it's a symptom of a more fundamental problem: science is being increasingly marginalized and is playing less of a role in the decisionmaking process, particularly at my old agency, EPA. In short, the courts are stepping in more because the agencies are ignoring science more.

Throughout my career I've been very skeptical of the role of courts in reviewing scientific and technical information. I have written a lot about that, and been active as an adviser to the Carnegie Commission and the Federal Courts Study Committee. I worked with Judge Bazelon on the lower court opinion in *Vermont Yankee*.[6] All of this has led to skepticism about the ability of judges to penetrate to the merits of scientific and technical controversies. But I do have to admit there is a role for the courts when agency abuses become too extreme. Judge Wald got me to admit that a few years ago when we were on another ABA panel together. After hearing my spiel about how judges can't really understand the scientific issues, [she] said: "Well, you will agree with me, won't you, Don, that we're better off with [courts] reviewing [agencies], to really get at the extreme abuses." I had to admit that she was right. What we're seeing now is that a string of court decisions that are setting aside EPA decisions because the Agency has really gone too far in disregarding science.

I want to talk a bit about what I think may underlie some of those developments, and potentially what we might be able to do to return science to its rightful role.

I am somewhat skeptical about claims that the stringency of judicial review is changing because of the empirical study that Peter Schuck and I did of judicial review that was published in 1990.[7] What our data showed was that the affirmance and reversal rates tended to be relatively durable over time, and that affirmance rates were actually higher during the so-called hard look era of supposedly stringent judicial review. We concluded that one can't judge the actual stringency of judicial review by looking at a few "leading cases" because they are really just the tip of the iceburg.

Nonetheless, I believe that some of the decline in the role of science in environmental decisionmaking experienced in recent years is a consequence of a highly deferential standard of judicial review on scientific and technical information. I trace this deferential standard back to the *Baltimore Gas*[8] case, which was a decision by the U.S. Supreme Court on the merits of the *Vermont Yankee* litigation.

After the *Vermont Yankee* case went back on remand, and the D.C. Circuit tried a second time to say that the Nuclear Regulatory Commission [(NRC)] had not given proper consideration to the long-term disposal of nuclear waste, this time on substantive grounds.[9] The Court reversed a second time, essentially throwing Judge Bazelon's words back at him and stating that the Court's deference is highest in areas in which cold war agencies are making decisions at the "frontiers of science."

The high level of deference that courts give to agencies in technical areas has produced distorted incentives. It is an open invitation to agencies to make decisions on political grounds but rationalize them on technical grounds. Wendy Wagner calls this the "Science Charade" in her very important piece in the *Columbia Law Review*.[10] Professor Wagner has correctly identified the incentives that the courts have created for agencies to distort the actual basis of their decisions by rationalizing them on technical grounds. This is simple to analyze as a matter of law and economics; if one creates a standard that is highly deferential in one area, i.e., there are lower costs for agencies if they ground a decision on scientific grounds, one would expect that the incentives created would warp their decisions.

In my experience at EPA—where I was in many meetings with the Administrator or Deputy Administrator when options were presented to them for decision—I cannot remember a single case in which there was a significant discussion of the underlying scientific emphasis.

Now, that doesn't mean science was irrelevant to Agency decisionmaking; that conclusion would be too extreme. Perhaps science sets the outer parameters of discourse, the range of options that are considered.

But there is no doubt in my mind that our public discourse is distorted by the "science charade" as a result of the greater deference that courts give agencies if they rationalize their decisions on technical rather than policy grounds. As a result of the more deferential standards for technical decisions, the written opinions that state the "basis and purpose" for Agency decisions often end up justifying a policy outcome based on a discussion of science.

Wendy's insight is that we've got a fundamental disconnect in American administrative law between the real reasons for Agency decisions—as reflected by the policy debate within the Agency and within the government about

5. STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

6. Natural Res. Def. Council v. NRC, 547 F.2d 633, 6 ELR 20615 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 8 ELR 20288 (1978).

7. Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J 984.

8. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 13 ELR 20544 (1983).

9. Natural Res. Def. Council v. NRC, 685 F.2d 459, 12 ELR 20465 (D.C. Cir. 1982), *rev'd sub nom. Baltimore Gas*, 462 U.S. at 87, 13 ELR at 20544.

10. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

Copyright © 2000 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®—The Environmental Law Reporter®. All rights reserved.

why we make a decision—and the quite different rationale that ends up in the written statement of reasons to justify the Agency's decision. And, of course, it is the Agency's contemporaneous statement of reasons that usually becomes the sole basis for judicial review.[11] What ends up in the statement of reasons to justify it, in turn becomes a subject of judicial review.

In general, at EPA, the decisions are written by people who weren't even in the room when the Administrator made his or her decision. I would usually go back and give the lawyer in the General Counsel's office who was going to write up the decision one or two sentences on what I took to be the essence of the Administrator's decision, in the hopes that it might kind it [sic] into the written statement of the Agency's reasons for purposes of judicial review. But there is a massive disconnect between what agencies think about internally and what they say in justifying their decisions. This disconnect should be very troubling for proponents of judicial review. In my view, judicial review has almost become a form of literary criticism, focusing on the skill of the Agency's lawyers in writing up opinions, rather than the rationality of the actual basis of Agency decisions, because the courts rarely see the actual basis for the Agency's decisions.

In a sense, the culprit is the *Morgan*[12] rule, the notion that you can't go behind the agency's statement of reasons, because that has created a distance between the actual grounds of the decision and the stated basis. Courts should not defer to agency decisions on the grounds of scientific expertise if all of the scientists within the agency dissented from the decision.

There are a lot of costs to the "science charade." Public dialogue and peer review of agency decisions are stifled if agencies misstate the true basis for their decisions. Many environmental scientists criticize EPA for misunderstanding the science. That's rarely the problem. In my experience, someone within EPA understands the science quite well. If the science gets mangled along the way, it is because the scientists aren't writing up the Agency's rationale; the lawyers are, and the lawyers perceive their role as that of advocates who must justify the Agency's decision on the grounds that are most likely to be sustained in court. Thus, the "science charade" creates pervasive confusion, and a warping or distortion of public dialogue about environmental issues.[13]

Nonetheless, despite the growing disconnect between real reasons and stated reasons in Agency decisionmaking, judicial review does, to some extent, constrain the Agency. Let me mention just one example, the recent chloroform decision.[14] EPA had for many years maintained that there were no thresholds for the activity of carcinogens, i.e., there are no "safe" levels of exposure. As science developed, the mechanisms of carcinogenesis became better and better described, and the mechanisms of repair at the cellular level also were better understood. Science reached the conclusion that, at least with certain chemicals, there were levels of exposure below which there would not be a significant effect, and this became a broad scientific consensus, at least for some substances.

Chloroform is one of the substances for which thresholds had been demonstrated scientifically and broadly accepted by scientists, including EPA's scientists. Despite widespread recognition of that consensus, EPA stuck with its policy of setting maximum contaminant levels (MCLs) at zero under the Safe Drinking Water Act (SDWA). That decision was, of course, then set aside by the D.C. Circuit as capricious and arbitrary and not supported by the record.

But this is to me an example of EPA systematically disregarding, if not defying, the science. I remember one incredible meeting at EPA that crystallizes my conclusion that science is not playing the role that it ought to within the Agency. There's a separate office at EPA called the Office of Research and Development (ORD), which is really the science office. The name is interesting—Office of Research and Development. In my opinion, it should really be called the "Science Office." Nonetheless, it's where pure science is housed at the Agency. During a "red border review," in which a program office circulated its proposal for comment by all the other offices, we were in a meeting with the Deputy Administrator. The specific subject of the meeting doesn't matter. Following the meeting, the representative of ORD, who had not said anything during the meeting, came up to me in the hall and said, "Don, how could you let that happen? You know that this decision is not supportable at all from a scientific basis." My thought in reply was "Why does the representative of the science office not dare to say anything in the meeting, and then beats on me, as the general counsel, afterwards to carry the ball for science." To me, this vignette illustrates how cowed science has become in the internal debates at the EPA.

When I left EPA one of my biggest priorities was to try to figure out how we could increase the role of science at EPA. I believe that this should be the highest priority for the incoming Administration, to restore science to its rightful role at EPA.

The challenge is to get more science and better science into EPA decisions. I tried to look around for some success stories. I believe that as a research academic strategy one should ferret out cases in which things work reasonably well, and then figure out how to replicate success. It struck me that we have an agency that's quite similar to EPA, but whose decisions are very credible scientifically—the Food and Drug Administration (FDA). There are a lot of criticisms of the FDA—that it's too slow, that it doesn't get drugs on the market soon enough—but it's very rare that FDA's decisions get attacked for disregarding the science,

11. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 332 U.S. 402, 1 ELR 20110 (1971).

12. United States v. Morgan (Morgan IV), 313 U.S. 409 (1941). *See also* Daniel J. Gifford, *The* Morgan *Cases: A Retrospective View*, 30 ADMIN. L. REV. 237 (1978).

13. For a parallel argument that legal fictions in toxic tort cases are distorting public perceptions of risk, see E. Donald Elliott, *The Future of Toxic Torts: Of Chemophobia, Risk as Compensable Injury and Hybrid Compensation Systems*, 25 HOUS. L. REV. 781 (1988).

14. Chlorine Chemistry Council v. EPA, 206 F.3d 1286, 30 ELR 20473 (D.C. Cir. 2000).

Copyright © 2000 Environmental Law Institute®, Washington, DC, reprinted with permission from ELR®—The Environmental Law Reporter®. All rights reserved.

or for not being science-based. EPA has a lot to learn from FDA about how to create an agency culture that is more science-based.

Now, admittedly, there are some important structural differences between FDA and EPA. For one thing, FDA doesn't have environmental groups, at least to the same extent, involved in making policy. But I don't actually blame the environmental groups for the low level of scientific discourse at EPA. I think that they, like industry, have simply adapted to the current nature of the discourse.

When my friend Fred Krupp became the executive director of the Environmental Defense Fund [(EDF)] a number of years ago, we were riding back on the plane from New Haven together. He said, "well, what do you think I should do?" I replied, "Hire some scientists and economists," and he did. I'm sure other people gave him that same advice, but EDF (now ED) has been very successful at using more scientists and economists as environmental advocates. So I disagree with those who would say that "good science" is inherently biased in favor of industry.

One of the reasons that environmental groups and companies do not invest more in scientific discourse at EPA is that it is not the coin of the realm. It is simply not the basis on which decisions are made. So they're in a sense adapting to the culture of the place.

There are three quick points that I would like to make about what we might learn from the FDA example, how we might improve the role of science at EPA. First, consider the personnel. We've never had a scientist as the Administrator of the EPA. That's quite remarkable. My boss, Bill Reilly, was a lawyer, but he also had an M.A. in city planning from Columbia, so that's about as close, I think, that we have gotten to a scientist. Meanwhile, David Kessler, who is both an M.D. and a lawyer, was the head of FDA and is now the dean at Yale Medical School. Carol Browner was formerly a congressional aide, and I didn't actually hear Carol make this point, but she is reputed to have said in a meeting that she regards science as just another pressure group. If science is regarded as just another interest group, that partially explains the problems that we have.

We have had a number of assistant administrators at EPA, such as Lynn Goldman, Bernie Goldstein, and Jack Moore, who have had a scientific background, and I think their background shows in the quality of their decisions. I don't agree necessarily with the decisions that they have made, but their decisions have been science-based and serious about the evidence, in a way that I don't see many other decisions at EPA as being.

But the personnel issue is obviously not just concerned with the political appointees at the top. When EPA was formed in the 1970s there were 360 public health officers at the Agency. There are only a handful, if any, today.

The second major thing I think that needs to happen is that the ORD needs to be reinvigorated. It ought to be reorganized, and renamed as the "Science Office," not just the Office of Research and Development, but the Science Office, and they ought to put somebody in charge of it who is a vigorous policy advocate as well as a scientist.

The Science Office at EPA ought to have a veto over the Agency's decisions on scientific grounds in a way that the economists had a veto over decisions in the past.[15] And until there is a group that is serious about science, that has the ability to stop decisions that are not respectful of science, I don't think things are going to change.

The third point is we need to find ways to build science into the decisions, rather than tacking them on at the end as a judicial review measure. The Clinton Administration took a very useful and courageous act in its Executive Order mandating peer review,[16] but one of the problems with peer review, like Office of Management and Budget (OMB) review or judicial review, is it comes at the end of the line, and tries to knock out bad decisions, rather than building in good decisionmaking from the beginning. Elsewhere[17] I've argued—building on the "total quality management" literature by Demming and others—that you can't inspect quality at the end of the line; you have to build it in from the beginning. While it would be helpful to have better peer review, and to have a reinvigorated Science Office, we also have to change the culture of EPA so that decisions are science-based from the beginning.

An irony here is that one of the significant differences between EPA and [the] FDA is that at EPA, science decisions are institutionally separated from political decisions. They're kind of tacked on at the end. This, I think, comes in part from Bill Ruckelshaus' famous distinction between risk assessment and risk management,[18] the notion that we need to separate science and values. I think that's an entirely valid point, as an analytical one, but it doesn't follow, in my view, that a separation between science and policy ought to be reflected in the internal organization of the Agency. By separating the scientists from the policy process, we've marginalized them. One example of that is when Bill Reilly asked the Science Advisory Board (SAB) to make recommendations for risk reduction. There was a big debate within the SAB as to whether or not the board would be willing to make a policy recommendation, be-

15. The National Academy of Sciences has recently made a similar proposal for a new EPA Deputy Administrator for Science and Technology: "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 . . . ." NATIONAL RESEARCH COUNCIL, STRENGTHENING SCIENCE AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2000).

16. Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993). ADMIN. MAT. 45070. *See also* PRESIDENTIAL/CONGRESSIONAL COMM'N ON RISK ASSESSMENT AND RISK MANAGEMENT, RISK ASSESSMENT AND RISK MANAGEMENT IN REGULATORY DECISIONMAKING 103 (1997).

17. E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167 (1994).

18. *See* William D. Ruckelshaus, *Stopping the Pendulum*, ENVTL. F., Nov./Dec. 1995, at 26.

Copyright © 2000 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®—The Environmental Law Reporter®. All rights reserved.

cause there was such a strong culture of separation of science and values.

Now, contrast that with the FDA where, rather than having a program office that's political, and then tacking on science by "peer review," science is an integral part of the process. Many of the agencies that use science successfully integrate it into the policy process by creating "advisory committees" of outside experts that recommend policy to the Agency, such as the Advisory Committee on Reactor Safeguards at the NRC. In contrast, it merits noting that one of the ways that peer review is conducted at EPA under the Executive Order is to hire a consulting firm.

Let me close by saying that I don't believe judicial review is the complete answer. We also need to change the internal culture and structure of the Agency. And I would respectfully disagree with my friend and colleague from the last Bush Administration[19] about *Daubert*[20] being the solution. I don't think courts can solve the problems of administrative agencies, but I do believe that the recent spate of court decisions setting aside EPA decisions on scientific and technical grounds is a symptom of a fundamental regulatory disease, which reflects the diminished role of science at EPA.

I very much hope the next president will correct the situation. Thank you.

WENDY WAGNER: Thank you very much.

Our next speaker is Alan Raul. He is a partner at Sidley & Austin, and has written a number of influential and provocative briefs, congressional testimony, and articles on the subject of the judicial review of agency science.

Before becoming a partner in Sidley & Austin, Mr. Raul had quite an impressive career inside government. He first served as an associate in the Office of White House Counsel under President Reagan. He then served as General Counsel at OMB from 1988 to 1989, and subsequently was General Counsel at the [U.S.] Department of Agriculture (USDA) for another four years, from 1989 to 1993.

Perhaps equally impressive is the fact that Mr. Raul is not only a formidable force in the environmental law area, he also specializes on issues of the Internet, and coordinates the E-commerce practice group at the Washington office of Sidley & Austin. So welcome, Alan.

ALAN RAUL: Thanks, Wendy.

I propose the use of what I will call "regulatory *Daubert*" as a principle for judicial review of agency decisionmaking in the scientific realm—not as a solution, but as a reform to enhance agency decisionmaking, to refine judicial review, and to promote accountability, which I think really is the most significant aspect of the issue.

I think in part there is a fallacy of the degree of effectiveness of presidential and congressional oversight with regard to agency rulemaking in general, and perhaps environmental decisionmaking in particular. The principle that has been articulated in the *Chevron*[21] decision of the Supreme Court and many other decisions, namely that policy decisions, including those of bureaucrats in the executive branch, should be left to the political branch and not displaced by the preferences and policy choices of judges, is quite correct, quite appropriate. But it is grounded in the notion that there is political accountability for the regulatory decisions made by agencies such as EPA, and that premise can be dissected and challenged and determined to be not entirely substantiated.

For some of the very most important regulatory decisions that an agency like EPA makes, you will get interest of the White House, although their ability to affect the outcome is limited; you will get some congressional oversight, through the Congressional Review Act,[22] which specifically empowered Congress to enact legislation to overturn rules.

Of course, Congress has the power under the Constitution to reject regulations, whether or not it utilizes a specific statute such as the Congressional Review Act. But while Congress has established procedures through the Act to review regulations, not a single rule has been taken to a vote in either House. There have been some measures introduced regarding final regulations, but not once has a measure come upon to a vote in either chamber.

So while the *Chevron* notion of deference assumes there is political accountability for policies that are adopted by regulatory agencies through the legislative and executive branches, the assumption does not withstand close scrutiny.

What, then, is the problem that a regulatory *Daubert* solution would solve? As Don indicated, EPA is subject to rather intensive judicial review, in the D.C. Circuit in particular, and in other courts of appeals and district courts as well. That review has resulted, perhaps recently to an even greater extent, in reversals of the Agency's decisions at a remarkably high rate.

Jonathan Adler has documented[23] an appellate reversal rate of EPA that is much higher than would be expected under the *Chevron* deference that is, at least in principle, accorded to the Agency. EPA is reversed frequently on scientific grounds, regardless of the courts' references to "extreme" deference, on scientific questions. The agency is reversed in the D.C. Circuit a lot, and is not treated with kid gloves.

By importing *Daubert*-type principles into judicial review under the Administrative Procedure Act (APA),[24]

19. *See* remarks of Alan Raul, hereinbelow.

20. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 23 ELR 20979 (1993).

21. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 14 ELR 20507 (1984).

22. Congressional Review of Agency Rulemaking Act, 5 U.S.C. §801(a)(1)(B).

23. Jonathan Adler, *Environmental Performance at the Bench: The EPA's Record in Federal Court*, Reason Pub. Pol'y Inst. (2000), *available at* <http://www.rppi.org>.

24. *See* 5 U.S.C. §706, *available in* ELR STAT. ADMIN. PROC.

Statement by Senator Robert Smith
on the creation of a Department of Environmental Protection
Senate Committee on Government Reform
July 24, 2001

I would like to first express my support for the creation of a Department of Environmental Protection and would like to commend Senator Boxer for introducing S. 159, a bill to designate the EPA as the nation's 15th Department. However, as Ranking Member of the Environment and Public Works Committee, I am concerned that some unnecessary provisions in the legislation will stall Congressional action.

Joining his two predecessors, President George W. Bush recently announced his support for elevating the Environmental Protection Agency to a cabinet position. Such an action would place Governor Whitman in the cabinet making decisions of great importance with Secretary of State Colin Powell and Secretary of Interior Gale Norton to name a few. In the interim, President Bush has asked the EPA to participate in all cabinet-level discussions. By doing so the President has ensured the input of the nation's chief environmental official during important policy debates. The EPA's participation in cabinet activities is crucial to the numerous Departmental issues. For instance the EPA's brownfield and Superfund programs can play an integral part in the economic development programs run by the Departments of Housing and Urban Development and Commerce. Many of the EPA's clean water programs have a direct impact on the agricultural and forestry industries. Today's international discussions often involve environmental problems requiring some coordination with the Department of State. Thus, making the EPA a member of the Cabinet is absolutely necessary.

Prior to the EPA's creation by President Richard Nixon in 1970, many of these same programs currently overseen by the EPA were once under the jurisdiction of other cabinets. For

example, the National Air Pollution Control Administration and the Bureau of Solid Waste Management were under the predecessors of today's Department of Health and Human Services. The Department of Interior once had oversight over the Federal Water Pollution Control Act. It is now time for these programs to once again fall under the jurisdiction of a federal department.

A cabinet position is not only important in managing the country's environment but also indicates a national priority. As a nation, we hold with great importance protecting ourselves from foreign attack, supporting a strong economy, maintaining national parks and a federal highway system. I assert that we as a nation also believe that our environment must be protected and our natural resources preserved for our health and enjoyment as well as those of our children and grandchildren.

During the 101st, 102nd and 103rd Congresses, either the Senate or House each passed legislation to create a Department of Environmental Protection. None of these bills were enacted because they each contained extra programs and regulations that were unrelated to the goal of elevating the EPA. Unfortunately, Senator Boxer's bill contains some of these provisions. For instance it maintains language regarding contracting and governmental functions that was drafted prior to the publishing of some administrative rules and the passage of the Federal Activities Inventory Reform Act of 1998. Further, it requires the designation of a Chief Information Resources Officer. However, the EPA, like all agencies, addressed the need for an information officer after passage of the Clinger Cohen Act in 1996. Thus I cannot support Senator Boxer's bill as it is currently drafted but look forward to working on a bill that can be signed by President Bush.

We all share the goal of streamlining the EPA so that it can better serve our constituents and our environment however imposing new unnecessary regulations on the agency will not

further this objective. While some guidance is certainly necessary, the prescriptive nature of Senator Boxer's bill would limit its ability to be passed and signed into law. I would encourage amending the bill to allow for the elevation of the EPA to cabinet status without the potentially controversial reorganization of the EPA. For those of us who firmly believe the environment is deserving of a stronger federal commitment indicative of cabinet status, I call on my colleagues to streamline this legislation and elevate the EPA to cabinet status.

II

107TH CONGRESS
1ST SESSION

S. 159

To elevate the Environmental Protection Agency to a cabinet level department, to redesignate the Environmental Protection Agency as the Department of Environmental Protection Affairs, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 23, 2001

Mrs. BOXER introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

---

A BILL

To elevate the Environmental Protection Agency to a cabinet level department, to redesignate the Environmental Protection Agency as the Department of Environmental Protection Affairs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Department of Environmental Protection Affairs Act of 2001".

SEC. 2. FINDINGS.

Congress finds that—

(1) 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) the Federal Government should ensure that all Americans enjoy the same basic level of public health and environmental protection regardless of where they live;

(3) protection of public health and the environment increasingly involves negotiations with foreign nations, including the most highly industrialized nations all of whose top environmental officials have ministerial status; and

(4) a cabinet-level Department of Environmental Protection Affairs should be established.

SEC. 3. ESTABLISHMENT OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AFFAIRS.

(a) REDESIGNATION.—The Environmental Protection Agency is redesignated as the Department of Environmental Protection Affairs (in this Act referred to as the "Department") and shall be an executive department in the executive branch of the Government.

(b) SECRETARY OF ENVIRONMENTAL PROTECTION AFFAIRS.—

(1) IN GENERAL.—There shall be at the head of the Department a Secretary of Environmental

1 Protection Affairs who shall be appointed by the
2 President, by and with the advice and consent of the
3 Senate. The Department shall be administered
4 under the supervision and direction of the Secretary.
5 (2) NONDELEGATION.—The Secretary may not
6 assign duties for or delegate authority for the super-
7 vision of the Assistant Secretaries, the General
8 Counsel, or the Inspector General of the Department
9 to any officer of the Department other than the
10 Deputy Secretary.
11 (3) DELEGATIONS.—Except as described under
12 paragraph (2) of this section and section 4(b)(2),
13 and notwithstanding any other provision of law, the
14 Secretary may delegate any functions including the
15 making of regulations to such officers and employees
16 of the Department as the Secretary may designate,
17 and may authorize such successive redelegations of
18 such functions within the Department as determined
19 to be necessary or appropriate.
20 (c) DEPUTY SECRETARY.—There shall be in the De-
21 partment a Deputy Secretary of the Environment, who
22 shall be appointed by the President, by and with the advice
23 and consent of the Senate. The Deputy Secretary shall
24 perform such responsibilities as the Secretary shall pre-
25 scribe and shall act as the Secretary during the absence

1 or disability of the Secretary or in the event of a vacancy
2 in the Office of Secretary.
3 (d) OFFICE OF THE SECRETARY.—The Office of the
4 Secretary shall consist of a Secretary and a Deputy Sec-
5 retary and may include an Executive Secretary and such
6 other executive officers as the Secretary may determine
7 necessary.
8 (e) REGIONAL OFFICES.—The regional offices of the
9 Environmental Protection Agency are redesignated as re-
10 gional offices of the Department of Environmental Protec-
11 tion Affairs.
12 (f) INTERNATIONAL RESPONSIBILITIES OF THE SEC-
13 RETARY.—
14 (1) IN GENERAL.—In addition to exercising
15 other international responsibilities under existing
16 provisions of law, the Secretary is—
17 (A) encouraged to assist the Secretary of
18 State to carry out his primary responsibilities
19 for coordinating, negotiating, implementing,
20 and participating in international agreements,
21 including participation in international organi-
22 zations, relevant to environmental protection;
23 and
24 (B) authorized and encouraged to—

1 (i) conduct research on and apply ex-
2 isting research capabilities to the nature
3 and impacts of international environmental
4 problems and develop responses to such
5 problems; and
6 (ii) provide technical and other assist-
7 ance to foreign countries and international
8 bodies to improve the quality of the envi-
9 ronment.
10 (2) CONSULTATION.—The Secretary of State
11 shall consult with the Secretary of Environmental
12 Protection Affairs and such other persons as he de-
13 termines appropriate on such negotiations, imple-
14 mentation, and participation described under para-
15 graph (1)(A).
16 (g) AUTHORITY OF THE SECRETARY WITHIN THE
17 DEPARTMENT.—Nothing in this Act—
18 (1) authorizes the Secretary of Environmental
19 Protection Affairs to require any action by any offi-
20 cer of any executive department or agency other
21 than officers of the Department of Environmental
22 Protection Affairs, except that this paragraph shall
23 not affect any authority provided for by any other
24 provision of law authorizing the Secretary of Envi-

1 ronmental Protection Affairs to require any such ac-
2 tions;
3 (2) modifies any Federal law that is adminis-
4 tered by any executive department or agency; or
5 (3) transfers to the Department of Environ-
6 mental Protection Affairs any authority exercised by
7 any other Federal executive department or agency
8 before the effective date of this Act, except the au-
9 thority exercised by the Environmental Protection
10 Agency.
11 (h) APPLICATION TO THE DEPARTMENT OF ENVI-
12 RONMENTAL PROTECTION AFFAIRS.—This Act applies
13 only to activities of the Department of Environmental Pro-
14 tection Affairs, except where expressly provided otherwise.
15 **SEC. 4. ASSISTANT SECRETARIES.**
16 (a) ESTABLISHMENT OF POSITIONS.—There shall be
17 in the Department such number of Assistant Secretaries,
18 not to exceed 10, as the Secretary shall determine, each
19 of whom shall be appointed by the President, by and with
20 the advice and consent of the Senate.
21 (b) RESPONSIBILITIES OF ASSISTANT SECRE-
22 TARIES.—
23 (1) IN GENERAL.—The Secretary shall assign
24 to Assistant Secretaries such responsibilities as the
25 Secretary considers appropriate, including—

1 (A) enforcement and compliance moni-
2 toring;
3 (B) research and development;
4 (C) air and radiation;
5 (D) water;
6 (E) pesticides and toxic substances;
7 (F) solid waste;
8 (G) hazardous waste;
9 (H) hazardous waste cleanup;
10 (I) emergency response;
11 (J) international affairs;
12 (K) policy, planning, and evaluation;
13 (L) pollution prevention;
14 (M) congressional, intergovernmental, and
15 public affairs; and
16 (N) administration and resources manage-
17 ment, including financial and budget manage-
18 ment, information resources management, pro-
19 curement and assistance management, and per-
20 sonnel and labor relations.
21 (2) ASSIGNMENT OF RESPONSIBILITIES.—The
22 Secretary may assign and modify any responsibilities
23 at his discretion under paragraph (1), except that
24 the Secretary may not modify the responsibilities of
25 any Assistant Secretary without substantial prior

1 written notification of such modification to the ap-
2 propriate committees of the Senate and the House
3 of Representatives.

4 (c) DESIGNATION OF RESPONSIBILITIES BEFORE
5 CONFIRMATION.—Whenever the President submits the
6 name of an individual to the Senate for confirmation as
7 Assistant Secretary under this section, the President shall
8 state the particular responsibilities of the Department
9 such individual shall exercise upon taking office.

10 (d) CONTINUING PERFORMANCE OF FUNCTIONS.—
11 On the effective date of this Act, the Administrator and
12 Deputy Administrator of the Environmental Protection
13 Agency shall be redesignated as the Secretary and Deputy
14 Secretary of the Department of Environmental Protection
15 Affairs, Assistant Administrators of the Agency shall be
16 redesignated as Assistant Secretaries of the Department,
17 and the General Counsel and the Inspector General of the
18 Agency shall be redesignated as the General Counsel and
19 the Inspector General of the Department, without renomi-
20 nation or reconfirmation.

21 (e) CHIEF INFORMATION RESOURCES OFFICER.—

22 (1) IN GENERAL.—The Secretary shall des-
23 ignate the Assistant Secretary whose responsibilities
24 include information resource management functions
25 as required by section 3506 of title 44, United

1 States Code, as the Chief Information Resources Of-
2 ficer of the Department.
3 (2) RESPONSIBILITIES.—The Chief Information
4 Resources Officer shall—
5 (A) advise the Secretary on information re-
6 source management activities of the Depart-
7 ment as required by section 3506 of title 44,
8 United States Code;
9 (B) develop and maintain an information
10 resources management system for the Depart-
11 ment which provides for—
12 (i) the conduct of and accountability
13 for any acquisitions made under a delega-
14 tion of authority under section 111 of the
15 Federal Property and Administrative Serv-
16 ices Act of 1949 (40 U.S.C. 759);
17 (ii) the implementation of all applica-
18 ble government-wide and Department in-
19 formation policies, principles, standards,
20 and guidelines with respect to information
21 collection, paperwork reduction, privacy
22 and security of records, sharing and dis-
23 semination of information, acquisition and
24 use of information technology, and other

information resource management functions;

(iii) the periodic evaluation of and, as needed, the planning and implementation of improvements in the accuracy, completeness, and reliability of data and records contained with Department information systems; and

(iv) the development and annual revision of a 5-year plan for meeting the Department's information technology needs; and

(C) report to the Secretary as required under section 3506 of title 44, United States Code.

SEC. 5. DEPUTY ASSISTANT SECRETARIES.

(a) ESTABLISHMENT OF POSITIONS.—There shall be in the Department such number of Deputy Assistant Secretaries as the Secretary may determine.

(b) APPOINTMENTS.—Each Deputy Assistant Secretary—

(1) shall be appointed by the Secretary; and

(2) shall perform such functions as the Secretary shall prescribe.

1 (c) FUNCTIONS.—Functions assigned to an Assistant
2 Secretary under section 4(b) may be performed by 1 or
3 more Deputy Assistant Secretaries appointed to assist
4 such Assistant Secretary.

5 **SEC. 6. OFFICE OF THE GENERAL COUNSEL.**

6 There shall be in the Department, the Office of the
7 General Counsel. There shall be at the head of such office
8 a General Counsel who shall be appointed by the Presi-
9 dent, by and with advice and consent of the Senate. The
10 General Counsel shall be the chief legal officer of the De-
11 partment and shall provide legal assistance to the Sec-
12 retary concerning the programs and policies of the Depart-
13 ment.

14 **SEC. 7. OFFICE OF THE INSPECTOR GENERAL.**

15 The Office of Inspector General of the Environmental
16 Protection Agency, established in accordance with the In-
17 spector General Act of 1978 (5 U.S.C. App.), is redesig-
18 nated as the Office of Inspector General of the Depart-
19 ment of Environmental Protection Affairs.

20 **SEC. 8. MISCELLANEOUS EMPLOYMENT RESTRICTIONS.**

21 Except as otherwise provided in this Act, political af-
22 filiation or political qualification may not be taken into
23 account in connection with the appointment of any person
24 to any position in the career civil service or in the assign-

1 ment or advancement of any career civil servant in the
2 Department.

3 **SEC. 9. ADMINISTRATIVE PROVISIONS.**

4 (a) ACCEPTANCE OF MONEY AND PROPERTY.—

5 (1) IN GENERAL.—The Secretary may accept
6 and retain money, uncompensated services, and
7 other real and personal property or rights (whether
8 by gift, bequest, devise, or otherwise) for the pur-
9 pose of carrying out the Department's programs and
10 activities, except that the Secretary shall not endorse
11 any company, product, organization, or service.
12 Gifts, bequests, and devises of money and proceeds
13 from sales of other property received as gifts, be-
14 quests, or devises shall be credited in a separate
15 fund in the Treasury of the United States and shall
16 be available for disbursement upon the order of the
17 Secretary.

18 (2) REGULATIONS.—The Secretary shall pre-
19 scribe regulations and guidelines setting forth the
20 criteria the Department shall use in determining
21 whether to accept a gift, bequest, or devise. Such
22 criteria shall take into consideration whether the ac-
23 ceptance of the property would reflect unfavorably
24 upon the Department's or any employee's ability to
25 carry out its responsibilities or official duties in a

1 fair and objective manner, or would compromise the
2 integrity of or the appearance of the integrity of a
3 Government program or any official involved in that
4 program.
5 (b) SEAL OF THE DEPARTMENT.—
6 (1) IN GENERAL.—On the effective date of this
7 Act, the seal of the Environmental Protection Agen-
8 cy with appropriate changes shall be the seal of the
9 Department of Environmental Protection Affairs,
10 until such time as the Secretary may cause a seal
11 of office to be made for the Department of Environ-
12 mental Protection Affairs of such design as the Sec-
13 retary shall approve.
14 (2) CRIMINAL PENALTY FOR UNAUTHORIZED
15 USE OF SEAL.—
16 (A) IN GENERAL.—Chapter 33 of title 18,
17 United States Code, is amended by adding at
18 the end the following:
19 **"§ 716. Department of Environmental Protection Af-**
20 **fairs Seal**
21 "(a) Whoever knowingly displays any printed or other
22 likeness of the official seal of the Department of Environ-
23 mental Protection Affairs, or any facsimile thereof, in, or
24 in connection with, any advertisement, poster, circular,
25 book, pamphlet, or other publication, public meeting, play,

1 motion picture, telecast, or other production, or on any
2 building, monument, or stationery, for the purpose of con-
3 veying, or in a manner reasonably calculated to convey,
4 a false impression of sponsorship or approval by the Gov-
5 ernment of the United States or by any department, agen-
6 cy, or instrumentality thereof, shall be fined not more than
7 $250 or imprisoned not more than 6 months, or both.
8 "(b) Whoever, except as authorized under regulations
9 promulgated by the Secretary of Environmental Protec-
10 tion Affairs and published in the Federal Register, know-
11 ingly manufactures, reproduces, sells, or purchases for re-
12 sale, either separately or appended to any article manufac-
13 tured or sold, any likeness of the official seal of the De-
14 partment of Environmental Protection Affairs, or any sub-
15 stantial part thereof, except for manufacture or sale of the
16 article for the official use of the Government of the United
17 States, shall be fined not more than $250 or imprisoned
18 not more than 6 months, or both.
19 "(c) A violation of subsection (a) or (b) may be en-
20 joined at the suit of the Attorney General of the United
21 States upon complaint by any authorized representative
22 of the Secretary of the Department of Environmental Pro-
23 tection Affairs.".
24 (B) TECHNICAL AND CONFORMING AMEND-
25 MENT.—The table of sections for chapter 33 of

1 title 18, United States Code, is amended by
2 adding at the end:

"716. Department of Environmental Protection Affairs Seal.".

3 (c) ACQUISITION OF COPYRIGHTS AND PATENTS.—
4 The Secretary is authorized to acquire any of the following
5 described rights if the related property acquired is for use
6 by or for, or useful to, the Department:
7 (1) Copyrights, patents, and applications for
8 patents, designs, processes, and manufacturing data.
9 (2) Licenses under copyrights, patents, and ap-
10 plications for patents.
11 (3) Releases, before suit is brought, for past in-
12 fringement of patents or copyrights.
13 (d) ADVISORY COMMITTEE STANDARDS OF CONDUCT
14 AND COMPENSATION.—The Secretary may promulgate
15 regulations, no less stringent than any other applicable
16 provision of law, regarding standards of conduct for mem-
17 bers of advisory committees (and consultants to advisory
18 committees), including requirements regarding conflicts of
19 interest or disclosure of past and present financial and em-
20 ployment interests. The Secretary may pay members of
21 advisory committees and others who perform services as
22 authorized under section 3109 of title 5, United States
23 Code, at rates for individuals not to exceed the per diem
24 rate equivalent to the rate for level V of the Executive

1 Schedule under section 5316 of title 5, United States
2 Code.

3 **SEC. 10. INHERENTLY GOVERNMENTAL FUNCTIONS.**

4 (a) GOVERNMENT OFFICERS AND EMPLOYEES.—

5 (1) IN GENERAL.—Any inherently governmental
6 function of the Department shall be performed only
7 by officers and employees of the United States.

8 (2) DEFINITION.—In this section, the term "in-
9 herently governmental function"—

10 (A) means any activity which is so inti-
11 mately related to the public interest as to man-
12 date performance by Government officers and
13 employees; and

14 (B) includes—

15 (i) activities which require either the
16 exercise of discretion in applying Govern-
17 ment authority or the use of value of judg-
18 ment in making decisions for the Govern-
19 ment; and

20 (ii) work of a policy, decisionmaking,
21 or managerial nature which is the direct
22 responsibility of Department officials.

23 (b) CONFLICTS OF INTEREST.—

24 (1) IN GENERAL.—The Secretary shall by regu-
25 lation require any person proposing to enter into a

1 contract, agreement, or other arrangement, whether
2 by competitive bid or negotiation, for the conduct of
3 research, development, evaluation activities, or for
4 advisory and assistance services, to provide the Sec-
5 retary, before entering into any such contract, agree-
6 ment, or arrangement, with all relevant information,
7 as determined by the Secretary, bearing on whether
8 that person has a possible conflict of interest with
9 respect to—
10 (A) being able to render impartial, tech-
11 nically sound, or objective assistance or advice
12 in light of other activities or relationships with
13 other persons; or
14 (B) being given an unfair competitive ad-
15 vantage.
16 (2) SUBCONTRACTORS.—Such person shall en-
17 sure, in accordance with regulations prescribed by
18 the Secretary, compliance with this section by sub-
19 contractors of such person who are engaged to per-
20 form similar services.
21 (c) REQUIRE AFFIRMATIVE FINDING; CONFLICTS OF
22 INTEREST WHICH CANNOT BE AVOIDED; MITIGATION OF
23 CONFLICTS.—
24 (1) IN GENERAL.—Subject to paragraph (2),
25 the Secretary may not enter into any such contract,

1 agreement, or arrangement, unless he affirmatively
2 finds, after evaluating all such information and any
3 other relevant information otherwise available to
4 him, either that—
5 (A) there is little or no likelihood that a
6 conflict of interest would exist; or
7 (B) that such conflict has been avoided
8 after appropriate conditions have been included
9 in such contract, agreement, or arrangement.
10 (2) MITIGATION OF CONFLICTS.—If the Sec-
11 retary determines that such conflict of interest exists
12 and that such conflict of interest cannot be avoided
13 by including appropriate conditions therein, the Sec-
14 retary may enter into such contract, agreement, or
15 arrangement, if he—
16 (A) determines that it is in the best inter-
17 ests of the United States to do so; and
18 (B) includes appropriate conditions in such
19 contract, agreement, or arrangement to miti-
20 gate such conflict.
21 (d) PUBLIC NOTICE REGARDING CONFLICTS OF IN-
22 TEREST.—The Secretary shall promulgate regulations
23 which require public notice to be given whenever the Sec-
24 retary determines that the award of a contract, agreement,
25 or arrangement may result in a conflict of interest which

1 cannot be avoided by including appropriate conditions
2 therein.
3 (e) DISCLAIMER.—Nothing in this section shall pre-
4 clude the Department from promulgating regulations to
5 monitor potential conflicts after the contract award.
6 (f) RULES.—Not later than 60 days after the effec-
7 tive date of this Act, the Secretary shall publish rules for
8 the implementation of this section.
9 (g) CENTRAL FILE.—The Department shall maintain
10 a central file regarding all cases when a public notice is
11 issued. Other information required under this section shall
12 also be compiled. Access to this information shall be con-
13 trolled to safeguard any proprietary information.
14 (h) DEFINITIONS.—In this section, the term "advi-
15 sory and assistance services" includes—
16 (1) management and professional support serv-
17 ices;
18 (2) the conduct of studies, analyses, and evalua-
19 tions; and
20 (3) engineering and technical services, excluding
21 routine technical services.
22 **SEC. 11. REFERENCES.**
23 Reference in any other Federal law, Executive order,
24 rule, regulation, or delegation of authority, or any docu-
25 ment of or pertaining to—

1 (1) the Administrator of the Environmental
2 Protection Agency shall be deemed to refer to the
3 Secretary of Environmental Protection Affairs;
4 (2) the Environmental Protection Agency shall
5 be deemed to refer to the Department of Environ-
6 mental Protection Affairs;
7 (3) the Deputy Administrator of the Environ-
8 mental Protection Agency shall be deemed to refer
9 to the Deputy Secretary of Environmental Protec-
10 tion Affairs; or
11 (4) any Assistant Administrator of the Environ-
12 mental Protection Agency shall be deemed to refer
13 to an Assistant Secretary of the Department of En-
14 vironmental Protection Affairs.
15 **SEC. 12. SAVINGS PROVISIONS.**
16 (a) CONTINUING EFFECT OF LEGAL DOCUMENTS.—
17 All orders, determinations, rules, regulations, permits,
18 agreements, grants, contracts, certificates, licenses, reg-
19 istrations, privileges, and other administrative actions—
20 (1) which have been issued, made, granted, or
21 allowed to become effective by the President, by the
22 Administrator of the Environmental Protection
23 Agency, or by a court of competent jurisdiction, in
24 the performance of functions of the Administrator or
25 the Environmental Protection Agency, and

1 (2) which are in effect at the time this Act
2 takes effect, or were final before the effective date
3 of this Act and are to become effective on or after
4 the effective date of this Act;
5 shall continue in effect according to their terms until
6 modified, terminated, superseded, set aside, or revoked in
7 accordance with law by the President, the Secretary of En-
8 vironmental Protection Affairs, or other authorized offi-
9 cial, a court of competent jurisdiction, or by operation of
10 law.
11 (b) PROCEEDINGS NOT AFFECTED.—This Act shall
12 not affect any proceedings or any application for any li-
13 cense, permit, certificate, or financial assistance pending
14 before the Environmental Protection Agency at the time
15 this Act takes effect, but such proceedings and applica-
16 tions shall be continued. Orders shall be issued in such
17 proceedings, appeals shall be taken therefrom, and pay-
18 ments shall be made pursuant to such orders, as if this
19 Act had not been enacted, and orders issued in any such
20 proceedings shall continue in effect until modified, termi-
21 nated, superseded, or revoked by a duly authorized official,
22 by a court of competent jurisdiction, or by operation of
23 law. Nothing in this subsection shall be deemed to prohibit
24 the discontinuance or modification of any such proceeding
25 under the same terms and conditions and to the same ex-

1 tent that such proceeding could have been discontinued
2 or modified if this Act had not been enacted.

3 (c) SUITS NOT AFFECTED.—This Act shall not affect
4 suits commenced before the date this Act takes effect, and
5 in all such suits, proceedings shall be had, appeals taken,
6 and judgments rendered in the same manner and with the
7 same effect as if this Act had not been enacted.

8 (d) NONABATEMENT OF ACTIONS.—No suit, action,
9 or other proceeding commenced by or against the Environ-
10 mental Protection Agency, or by or against any individual
11 in the official capacity of such individual as an officer of
12 the Environmental Protection Agency, shall abate by rea-
13 son of the enactment of this Act.

14 (e) ADMINISTRATIVE ACTIONS RELATING TO PRO-
15 MULGATION OF REGULATIONS.—Any administrative ac-
16 tion relating to the preparation or promulgation of a regu-
17 lation by the Environmental Protection Agency may be
18 continued by the Department with the same effect as if
19 this Act had not been enacted.

20 (f) PROPERTY AND RESOURCES.—The contracts, li-
21 abilities, records, property, and other assets and interests
22 of the Environmental Protection Agency shall, after the
23 effective date of this Act, be considered to be the con-
24 tracts, liabilities, records, property, and other assets and
25 interests of the Department.

1 (g) SAVINGS.—The Department of Environmental
2 Protection Affairs and its officers, employees, and agents
3 shall have all the powers and authorities of the Environ-
4 mental Protection Agency.

5 **SEC. 13. CONFORMING AMENDMENTS.**

6 (a) PRESIDENTIAL SUCCESSION.—Section 19(d)(1)
7 of title 3, United States Code, is amended by inserting
8 before the period at the end the following: ", Secretary
9 of Environmental Protection Affairs".

10 (b) DEFINITION OF DEPARTMENT, CIVIL SERVICE
11 LAWS.—Section 101 of title 5, United States Code, is
12 amended by adding at the end the following: "The Depart-
13 ment of Environmental Protection Affairs".

14 (c) COMPENSATION, LEVEL I.—Section 5312 of title
15 5, United States Code, is amended by adding at the end
16 the following: "Secretary of Environmental Protection Af-
17 fairs".

18 (d) COMPENSATION, LEVEL II.—Section 5313 of title
19 5, United States Code, is amended by striking "Adminis-
20 trator of Environmental Protection Agency" and inserting
21 "Deputy Secretary of Environmental Protection Affairs".

22 (e) COMPENSATION, LEVEL IV.—Section 5315 of
23 title 5, United States Code, is amended—

24 (1) by striking "Inspector General, Environ-
25 mental Protection Agency" and inserting "Inspector

1 General, Department of Environmental Protection
2 Affairs"; and
3 (2) by striking each reference to an Assistant
4 Administrator of the Environmental Protection
5 Agency and by adding at the end the following:
6 "Assistant Secretaries, Department of Environ-
7 mental Protection Affairs (10).
8 "General Counsel, Department of Environ-
9 mental Protection Affairs.".
10 (f) INSPECTOR GENERAL ACT.—The Inspector Gen-
11 eral Act of 1978 (5 U.S.C. App.) is amended—
12 (1) in section 2(1)—
13 (A) by inserting "the Department of Envi-
14 ronmental Protection Affairs," after "Veterans
15 Affairs,"; and
16 (B) by striking "The Environmental Pro-
17 tection Agency,";
18 (2) in section 11(1) by striking "or Veterans
19 Affairs" and inserting "Veterans Affairs, or Envi-
20 ronmental Protection Affairs,"; and
21 (3) in section 11(2) by striking "or Veterans
22 Affairs" and inserting "Veterans Affairs, or Envi-
23 ronmental Protection Affairs,".

1 **SEC. 14. ADDITIONAL CONFORMING AMENDMENTS.**

2 After consultation with the Committee on Govern-
3 mental Affairs and the Committee on Environment and
4 Public Works and other appropriate committees of the
5 United States Senate and the appropriate committees of
6 the House of Representatives, the Secretary of the Envi-
7 ronment shall prepare and submit to Congress proposed
8 legislation containing technical and conforming amend-
9 ments to the United States Code, and to other provisions
10 of law, to reflect the changes made by this Act. Such legis-
11 lation shall be submitted not later than 6 months after
12 the effective date of this Act.

13 **SEC. 15. EFFECTIVE DATE.**

14 This Act and the amendments made by this Act shall
15 take effect on such date during the 6-month period begin-
16 ning on the date of enactment, as the President may direct
17 in an Executive order. If the President fails to issue an
18 Executive order for the purpose of this section, this Act
19 and such amendments shall take effect 6 months after the
20 date of enactment of this Act.

○

○