

**Subcommittee on Energy Policy, Natural Resources
and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
September 9, 2003**

Testimony of E. Donald Elliott¹ on EPA Cabinet Elevation

(H.R. 37 and 2138)

Mr. Chairman and Distinguished Members of the Committee:

It is a pleasure to testify before this distinguished Subcommittee on the important topic of EPA Cabinet elevation. As an academic working in the fields of environmental law, administrative law and law and science, as well as a former EPA General Counsel and a practicing environmental lawyer, I strongly support the bi-partisan proposals to elevate EPA to cabinet status. Creating a Cabinet-level environmental ministry will send a clear signal at home, as well as 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. Cabinet status is also a good idea because it will more clearly make the White House responsible for EPA's actions or inactions, rather than reinforcing the mistaken impression that EPA is somehow "independent" of presidential direction and control.

While I would support Mr. Boehlert's bill (H.R. 37), I do prefer Mr. Ose's bill (H.R. 2138) because of its provisions to upgrade the role of

¹ Professor (adj) of Law, Yale Law School. Partner and Head of Environmental Department worldwide, Willkie Farr & Gallagher LLP, Washington, DC. Formerly, Julien and Virginia Cornell Professor of Environmental Law and Litigation, Yale Law School and Assistant Administrator and General Counsel, U.S. Environmental Protection Agency 1989-1991. Email: e.donald.elliott@aya.yale.edu.

science within EPA and its other organizational provisions. I do not agree with those who say that it is either inappropriate or infeasible politically for the Congress to deal with organizational issues such as creating a high-level chief science officer when legislating a cabinet-level Department of the Environment. On the contrary, most legislation creating new departments has properly addressed similar organizational and structural issues.

To improve environmental policy over the long term, there are, in my view, two pressing needs for organization improvements at EPA: (1) to create a high level advocate for science, and (2) to make sure that EPA's enforcement office is brought under proper policy control and does not continue to be an independent policy-maker, as I believe that it has been in New Source Review program under the Clean Air Act and other areas in recent years.

In the years since I left EPA, I have worked as an academic primarily on how to improve environmental policy. I am convinced that one of the keys is to strengthen science's voice at the highest levels within EPA. After much study, I am convinced that creating a high-level advocate for science at the highest levels of the Agency is the single most important step that we could take in that direction, and I applaud the efforts of Mr. Ose, as well as Mr. Ehlers and others in the past, to make this good idea a reality. As I testified before the Senate in 2001, I believe that an Undersecretary for Science is the right way to accomplish this objective.

The arguments that we need a high level advocate for science at EPA are admirably made in a report by a distinguished committee of the National Academy of Sciences in 2000. Just as law has a high-level voice through the

General Counsel, science also needs a similar high-level voice, I therefore support the recommendation by the National Academy of Sciences for a high-level chief science officer who would advise the Administrator – hopefully, soon the Secretary --whether proposed policies are consistent with science, just as the General Counsel advises the Administrator whether proposals are consistent with law, just as the advice of the agency’s legal counsel is relied upon by the Administrator to determine whether a proposal is ‘legal,’ an appropriately qualified and adequately empowered science official is needed to attest to the Administrator and the nation that the proposed action is ‘scientific’—that it is consistent, or at least not inconsistent, with available scientific knowledge”² I have published two articles recently explaining at length why I endorse this recommendation based on my own experiences at EPA as well as over 20 years studying the Agency as an academic.³ Rather than repeat those arguments at length in my prepared testimony, I request that these articles be made part of the record. To sum up my argument, as I reflect on my own experience at the highest levels of EPA, I believe that scientific considerations were unfortunately conspicuous by their absence from the high-level dialogue, and I believe this situation has gotten worse rather than improved in subsequent Administrations.

² National Research Council, *Strengthening Science at the U.S. Environmental Protection Agency* (2000).

³ E. Donald Elliott, *Strengthening Science’s Voice at EPA*, 66 *Law & Contemp. Problems* (Autumn 2004, forthcoming). E. Donald Elliott, *The Science Debacle at EPA, in Science, Agencies, and the Courts: Is Three a Crowd?* 31 *ELR* 10125 (Jan 2001).

I respectfully disagree with my friends who believe that any substantive provisions of any sort will kill EPA Cabinet-status legislation. This is a demonstrably mistaken theory that we came up with when I was at EPA in 1990. Since both parties had endorsed Cabinet-status in principle, we thought that perhaps a simple EPA elevation bill with no other provisions could pass. This was naïve and misguided in 1990 and it is naïve and misguided today. A simple elevation bill didn't pass in 1990 and it didn't pass subsequently. The theory that the key to legislating cabinet status is a simple elevation bill is refuted by history. The reasons that EPA has not been elevated in the past have been largely political, having primarily to do with who gets credit with the American people for putting an environmental agency into the Cabinet. Each party has favored the idea when it is in power, and then quietly finds reasons to oppose it when the other party is power. Perhaps now that we have the unique circumstances of the White House, House and Senate all under the control of a single party, we can finally pass EPA cabinet status legislation. We should not miss this unique historical opportunity, however, to deal with some of the long-standing organization issues at the Agency, such as elevating the role of science.

We all understand that a “clean bill” is more likely to become law if stripped of controversial positions. Each of us would undoubtedly like to see his or her pet project written into Cabinet-status legislation. I, for example, am a long-time supporter of “Next Generation” or “Alternative Compliance” legislation.⁴ Such legislation would give environmental

⁴ E. Donald Elliott, *Toward Ecological Law and Policy*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 170 (continued...)

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 the principle that Cabinet-status legislation should be restricted to truly organizational issues, I do think there is still room for needed organizational reforms, such as creating an Undersecretary for Science. In other words, I think a bill like the Ose bill that limits itself to truly structural issues IS a “clean bill” that does not deal with extraneous measures. There is plenty of room within the concept of a “clean bill” to designate a high-level “Chief Science Officer” at a new Department of the Environment -- 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 permanently into the foundations of the new Department of the Environment. My mentor Bill Reilly was fond of quoting a remark Senator Moynihan made to him during his confirmation process: “Young man, do

(...continued)

(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).

not allow your programs to become based on middle-class enthusiasms.” The greatest danger for the new Environmental Department, as for EPA at some low points in the past, is that it will be taken over by some passing political “enthusiasm” – of either the right or the left -- that is not grounded in science. “[S]cience is the great antidote to the poison of enthusiasm and superstition.”⁵ wrote Adam Smith, the political philosopher and father of economics.

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,⁶ 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.”⁷

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

5. Adam Smith, *An Inquiry into the Nature And Causes of the Wealth of Nations* (1776). CHAPTER I, PART 3 ARTICLE III.

⁶ Compare Adam Babich, *Too Much Science In Environmental Law*, 28 *Columbia Journal of Environmental Law* 119 (2003).

⁷ Steven Goldberg, *The Reluctant Embrace: Law and Science in America*, 75 *GEORGETOWN L. J.* 1341, 1365 (1987).

rather that science is not often heard in the top councils of the Agency when decisions are made.

It is particularly important to create a chief science officer over and above the traditional AA-ships such as the Office of Research and Development (ORD). It is part of the culture that Assistant Administrator's (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.

In conclusion, let me thank the subcommittee 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 Department. I hope that in one way or another, the legislation reported out by this subcommittee will provide that missing voice.