THE FEDERALIST SOCIETY

STUDENT DIVISION

ENVIRONMENTAL LAW IN THE 21ST CENTURY

ENFORCEMENT AND COMPLIANCE

FEDERALIST SOCIETY: ENVIRONMENTAL LAW IN THE 21ST CENTURY

(ENFORCEMENT AND COMPLIANCE)

Becky Norton Dunlop

Senior Vice President, Environmental Law and Environmental Policy, the Heritage Foundation; Former Secretary of Natural Resources to Governor George Allen

Jim Byrnes

Former Chief Judge of the Interior Board of Land Appeals, Department of Interior, Bush and Clinton Administrations

Professor Craig Johnson

Professor, Lewis and Clark Law School

Lynn Scarlett

Assistant Secretary for Policy, Management and Budget at the United States Department of the Interior

MODERATOR: Gregory Page

Senior Trial Attorney, U.S. Department of Justice, Environment and Natural Resources Division; Professorial Lecturer in Law, George Washington University Law School

THE FEDERALIST SOCIETY

STUDENT DIVISION

ENVIRONMENTAL LAW IN THE 21ST CENTURY

ENFORCEMENT AND COMPLIANCE

MODERATOR: We hope the presentations today will tantalize you about both the full sweep of environmental laws in this country and new opportunities to make these laws more effective.

Two experts on the panel will discuss the unique mission of the U.S. Environmental Protection Agency, the preeminent federal agency for protecting clean air and clean water by enforcing a national permitting system.

We also have an expert on the different problem of policing those Americans who have a right, derived from the homesteading laws, to prosper by mining and harvesting on federal lands. That's an entirely different field of environmental law, referred to as natural resources policy, that is often overlooked.

We also have one of the Bush Administration's preeminent environmental policymakers and administrators here to give her thoughts on the future of environmental law, particularly the areas in which it will be shaped anew by the Bush Administration.

Before describing each speaker's background, I'll briefly sketch a model for improving our environmental laws that our speakers are superbly qualified to evaluate.

Most of the major federal environmental laws at issue were enacted in the '60s and '70s. As a prospective college student visiting Philadelphia, I remember listening to actual college students jokingly referring to Philadelphia's preeminent river as the "Sure Kill River," remarking to me that it would sometimes ignite. Well, the Schuylkill River wasn't the only river that occasionally ignited in the '60s and '70s. There were others.

Congress certainly responded to the problem, and economists and scholars have elegantly described the problem to which Congress responded as individuals and businesses imposing social and environmental costs of environmental pollution on society without paying for these costs themselves. To make them pay, Congress enacted a series of new environmental laws. Some think that this new program was too harsh. Others think it wasn't harsh enough.

Congress dramatically banned all discharges into our waters and emissions into our air unless those

discharges and emissions were permitted under a national permitting system, and it also enforced this national permitting system with a new regime of civil and criminal sanctions. Further, Congress imposed some of the strictest forms of strict liability on individuals and industries.

I'm sure Professor Johnson's students are familiar with CERCLA, the so-called superfund statute. Under CERCLA, the federal government often makes businesses pay retroactively for social and environmental costs about which neither they nor their governments knew when they owned, operated, or transported materials on the property at issue, regardless of whether these businesses were complying with every environmental law that was known at the time.

As it has enforced these laws, EPA has often measured environmental success not by counting the acres of ecosystems that federal environmental law protects, improves, or restores, but by tallying the number of people indicted, the number of environmental cases resolved, or the settlements reached by federal prosecutors.

Conceivably, this bean-counting benchmark for measuring environmental success is EPA’s rational

response to the reality that its budgets over time have remained relatively constant, as Congress requires EPA to enforce more and more complex environmental laws.

In a simple-minded way, it certainly is logical if, while struggling to administer more and more laws with roughly the same budget each year, an agency simply decides to count enforcement marbles instead of measuring degrees of demonstrable environmental protection: merely counting the papers an agency files or counting the people it indicts is relatively easy and comparatively cheap. The alternative benchmark of actually determining the extent to which the federal enforcement paradigm protects nature and natural ecosystems—by, for example, measuring the ecosystems that federal enforcement protects and the importance of the acreage protected—is something that may be more expensive.

In assessing this environmental status quo, including its beneficial and harsher aspects, the Federalist Society wouldn’t be one of the co-organizers of this forum if it didn't ask this question: could James Madison be summoned back from the grave to improve environmental law and its enforcement outcomes today---even some of its harsher outcomes?

In one respect, Madison structured constitutional government by injecting new types of competition within and without government itself. He promoted a spirited, dynamic competition between the federal and state governments, and elsewhere in and outside of constitutional government, in two basic areas. First, Madison tried to foster and secure a highly competitive multiplicity of property interests, each protected by law, that would underpin and bolster both individual freedom and commercial prosperity.

Consider, for example, the social and commercial benefits of free competition and of different types of businesses watching and competing with others. Also consider how a multiplicity of Madisonian property interests protects free speech -- the idea that if law protects private property in all of its different types, it will prevent any one type of property or governmental interest from becoming strong enough to overpower, overwhelm, and silence the rest.

The second type of Madisonian competition is a major theme for the panel today: Madison advocated a dynamic intergovernmental competition between the federal and state governments, in which they competed from entirely different spheres of power. Our primary

question to the panel today: would more Madisonian competition in the administration of environmental laws improve environmental protection by providing more freedom to protect the environment among the different actors in our federal and state system?

This type of free Madisonian competition works very well in the realm of business. It's called the free market. Similarly, free Madisonian competition works well in the realm of free speech: our jurisprudence protects the free exchange of ideas not only for their intrinsic value, but for their value in competition. When you inject successful Madisonian competition from the realms of free markets and free speech into the political science of competing federal and state sovereigns, we call it Federalism, perhaps the most dynamic part of our constitutional government.

For environmental law, the crux of federalism underlies this question: if freedom and free competition work well in the free market, in free speech, and in the dynamic associations between the federal and state governments, could free competition be harnessed anew today to make environmental enforcement more effective and successful?

We've asked each panelist to analyze and

critique this federalist theme for environmental enforcement by addressing two questions. First, is the relationship between the federal and state governments in environmental enforcement today sufficiently competitive to yield the benefits of true Madisonian competition: more effective environmental laws more efficient than before?

Second, if there is not optimal competition, are we suffering today in environmental law from some of the same problems that Madison predicted society as a whole would suffer from competition that was less than desirable? Societal harm from diminished competition includes harm from an unrestrained government that acts more like a monopolist than a public servant. It also includes less innovation and less efficiency, occasioned by diminished competition.

Similarly, if the Madisonian model does explain environmental enforcement today, then the consequence of diminished competition will be ineffective public policies, and therefore diminished environmental protection, as government uses too much concentrated power to accomplish merely partisan or other monopolistic objectives instead of more effective, continually improving environmental protection.

The order of the speakers today will be as follows:

Becky Norton Dunlop will speak first. She probably knows more about Madisonian competition between the federal and state governments than anybody -- that I know of, at least. She actually competed effectively and successfully with EPA as an administrator and survived the process, surviving sufficiently to write an excellent book about it, too. She was then-Governor and now Senator George Allen's Secretary of Natural Resources from 1994 to 1998.

For those familiar with Ted Williams' famous batting average of .406, the last batter to hit .400, Becky's batting average against EPA in the Fourth Circuit, while urging more effective environmental enforcement, was about 200 points higher than the Splendid Splinter's batting average.

After leaving her position as Secretary of Natural Resources in Virginia, she became a senior vice president of the Heritage Foundation in Washington, DC, where she specialties in environmental law and environmental policy, among other things.

Becky's written a book about her experiences administering a state clean water and clean air program

in Virginia. It's entitled *Clearing the Air: How the People of Virginia Improved the State's Air and Water, Despite the EPA*. Copies are available to students and faculty of Lewis and Clark.

Our second speaker will talk more about the separate process of policing those individuals who harvest and mine on federal land. He is Jim Byrnes, who knows much about both constructive and destructive competition between the federal and state governments. He started his legal career on the staff of Pennsylvania Senator Richard Schweiker. He later served in the Reagan Administration as a Deputy Assistant Attorney General for the Department of Justice's Environment and Natural Resources Division. He also served, during much of the Clinton Administration, as Chief judge of the Interior Board of Land Appeals, the highest administrative tribunal in the Department of Interior.

We also have Professor Craig Johnson, who will speak third. He influences the next generation of environmental advocates, judges and policymakers, and he takes his responsibility very seriously. For the last ten years, he served as a Professor of Law at Lewis and Clark Law School. In 1998, he won the Leo Levinson Award, awarded to the person chosen as the best professor

by the graduating class. He's also written a popular textbook on the law of hazardous waste. Previously, he served as Assistant Regional Counsel of the Environmental Protection Agency, Region 1, in Boston, Massachusetts.

Our final speaker will be Assistant Secretary of the Interior Lynn Scarlett, who had the unique advantage of studying environmental law as a scholar before contributing to it as a new member of the Bush Administration.

Previously, she served as president of the Reason Foundation in Los Angeles, a prominent think-tank. She's written copiously on environmental law. Most recently, she authored a chapter in the book *Earth Report 2000*, and she's also co-authored a report called *Race to the Top -- State Environmental Innovations*. In July 2001, President Bush appointed her Assistant Secretary for Policy, Management and Budget at the U.S. Department of the Interior.

So, I would like to then give you Ms. Becky Norton Dunlop.

MS. DUNLOP: Good morning. Thank you for being here this morning, and thanks very much to the Dean of the School and the Federalist Society for sponsoring this event. It always is a pleasure for me to come out

and talk about Virginia.

I am not an attorney. I always like to make that clear. Don't take detailed notes from me and expect them to follow the textbooks that you're learning in terms of the complexities of law.

I'm here to talk to you about a practical interpretation and practical application from a citizen's standpoint, a citizen who's served in government and who was committed, along with my governor, George Allen, to basically do two things in this area. One was to have environmental improvements in the Commonwealth of Virginia; the other was to do so without inhibiting necessary economic growth and prosperity for the Commonwealth's citizens.

As some of you may know from reading materials or watching things play out when other people are in charge, one of the environmentalists' prized arguments is that when you have robust economic development, you destroy the environment. And we felt in Virginia that this was not the case at all.

So, it is indeed a pleasure for me to come and talk to you. I do hope, if you're interested in the details of some of the things I'm going to share with you, you'll pick up a copy of my book. I've brought some

out for you, and while there's no such thing as a free lunch, the caveat is, if you take a book, you need to read it. Otherwise, I'd be happy merely to discuss it with you.

Let me, if I can, talk to you for a few minutes and share some notions from our experiences in Virginia that implicate James Madison's view of things. The Heritage Foundation has just recently published a book called *The Founder's Almanac*. One of the people that we talk about in this book is James Madison. It's a delightful book to read, particularly for those of us who believe that the Framers' vision for our country was and still is correct. The book highlights Madison's belief that "the accumulation of all powers of government in the same hands is the very definition of tyranny." This is the issue that I think we're dealing with when we talk about environmental law today, vis-à-vis the Federal EPA.

We saw in Virginia during 1994 to 1998 abundant evidence that Madison was correct in predicting dire consequences if there was not true competition between, among, and within governments. In our dealings with the Environmental Protection Agency, we saw the wisdom of three Madisonian propositions.

One, too much concentrated government power is

used oftentimes to accomplish partisan political goals **instead** of actual environmental benefits. Two, there is less innovation and more inefficiency from diminished competition between federal and state governments. And three, impaired competition between governments occasions less benefit to the environment than true competition could achieve.

Plainly, James Madison and even basic economics texts teach that monopolistic state or private power can and in fact will be used destructively and punitively. The most vivid example of this fortunately lies outside the boundaries of our country, and that is the old Soviet Union. That was a country where the national government was in charge of everything. It was in charge of every government entity on the subcontinent; it was in charge of industry; it was in charge of all property, and it was in charge of people's lives, who did what, when, where, why, and how.

In this laboratory for a monopolistic, unchecked government lie the most polluted spots on earth. It's really very difficult for any of us to imagine the environmental tragedies that occurred in the old Soviet Union. I'll just share one aspect of the empirica: in 1998, one city in Ukraine had more toxic

emissions than the entire U.S. Now, that is devastating when it comes to caring about environmental quality. And it is solid, irrefutable evidence that Madison was correct in predicting that society would be harmed by a national government that did not truly compete with both other governments and private property.

Fortunately, we have a different tradition in the United States. You might be saying, well, we have enforceable property rights here and we do restrain the government. But that doesn't answer the salient question raised by my example of the old Soviet Union: if no meaningful competition with government resulted in environmental ruin, would more true competition between governments in our own country improve environmental protection? This implicates the second aspect of Madisonian competition-- coequal and, therefore, perpetual competition and coordination between states and the federal government.

In my experience, we absolutely need more dynamic competition among governments to enhance environmental protection in this new century. To be effective and truly dynamic, however, this new enforcement paradigm should not compel states to merely compete as to who can impose the most fines on businesses

and people. That would not only be an easy competition to measure but it would be, to some people, intrinsically fun, like an extended frolic. But rather, the competition, as we viewed it in Virginia, was over the best methods of improving the quality and condition of the environment for our citizens.

The evidence strongly suggests that we need more intergovernmental competition over these environmental means and methods. EPA's own inspector general admits that the rate at which federal government managers violate the Clean Water Act is approximately 25 percent higher than that of private companies, who by and large are under the responsibility of state governments. This is another issue that I think is important to consider when we think about bringing more Madisonian competition to environmental enforcement today.

In a nutshell, one of EPA’s major problems is that it frequently operates without the benefit of having the several states looking over their shoulder from a competitive standpoint. In setting environmental standards and benchmarks, for example, the Environmental Protection Agency, in and of itself, is largely a monopolist.

To follow on this idea of a government monopoly

in environmental protection, Madison also predicted that monopolistic government power would be used to punish and penalize opponents and competitors.

We certainly saw this in the Commonwealth of Virginia. In my book -- and I'll just mention three examples today -- we talk about the different occasions where EPA punished Virginia and its citizens for proposing innovative methods of achieving better environmental protection at a lower cost.

First, our Commonwealth addressed the issue of service station testing of air emissions. As we began putting in place enhanced emissions inspections in our service stations, EPA began demanding that we do this in a centralized garage.

Now, I must say I don't know how you do it in Portland, but in Northern Virginia, we tested emissions in service stations. There were about 280 service stations to handle 1-1/2 million cars on a bi-annual basis. We didn't have long lines. It was an efficient way to operate.

However, EPA mandated that we move to a centralized testing program, where the state government would be required to build 10 to 12 garages for all of Northern Virginia vehicles, to test 1.6 million cars

biannually.

We demonstrated to EPA that this was neither sensible nor environmentally effective. First of all, it was not good for the environment to have people get their cars tested in one location and, if they fail that test, drive a polluting car to another location that would then try to fix it, and then bring it back to have it tested and perhaps rejected once again. EPA's centralized testing regimen would indisputably generate poorer air quality, and it was bad for the practical lives and liberties of our citizens as they complied with the rule of law.

We also demonstrated that the system of using local service stations, which would be beneficial to the consumer, could be enhanced by using both more sophisticated testing equipment and more rigorous checks and balances to ensure that the garages were testing correctly.

We said to the Environmental Protection Agency, can you show us the scientific evidence for the plan that you're mandating on us? They said, no, it's an econometric model, and it's in Michigan, and we can't tell you anything about it.

We had our own scientists, our own technicians,

our own people in the Commonwealth of Virginia, who had run models demonstrating that our plan was better for the people and for air quality, and we understandably sought to compare our own information with EPA's model, allegedly supporting its Draconian rule to which EPA claimed their was no realistic alternative. But EPA categorically refused to share its supposedly superior scientific and technical information with us.

As we all know, knowledge is power. So, if EPA refuses to share with a state government information on which EPA is relying to impose environmental policies to which the state objects, then EPA cannot be enforcing measures that are anything but punitive. To use Madisonian concepts, because EPA refused to share its supporting data with a cooperating state, it also refused to engage in dynamic, competitive discourse about the best methods of environmental enforcement. And if Virginia declined to comply with an EPA plan that EPA refused to justify with science and numbers, EPA would punish Virginia by taking away federal highway dollars.

A second example was EPA's plan for imposing the California car on the Northeast part of the United States. Craig, were you in the Northeast when this discussion began?

PROFESSOR JOHNSON: No.

MS. DUNLOP: Lucky you.

This was a situation where, because of air quality problems in the Northeast and Northern Virginia, EPA, through a number of administrations, actually decided to impose on the Northeast the California car. Again using technical and scientific information that EPA did not seriously dispute, we demonstrated that this plan was not good for the environment, the people, or the economy of Virginia. Eventually, this became one of the times when, as Gregory Page mentioned, Virginia decided to go to court, making the case that EPA should not have the power to impose environmentally dubious and economically disastrous policies on Virginia. Virginia won.

My third example concerns a water quality issue. As detailed in my book, Virginia's government, across different Administrations, had serious problems with a Virginia company that had a long record of polluting. After many years of effort, the administration prior to the Allen Administration had executed a consent order with this company to bring it into compliance with the Clean Water Act. EPA, with a wink and a nod (but nothing in writing) to the

administrators in Virginia's approved state program, said, fine, you may proceed with this consent decree. Subsequently, our Administration was elected, and we continued implementing the consent order.

However, the administration at EPA changed, and, suddenly, EPA decided to disagree with our consent order. Because Virginia had nothing from EPA in writing stating that EPA agreed with the consent order, EPA decided to take action against the same company and sue it under the Clean Water Act for the same discharges previously governed by the Virginia consent decree.

This wasteful, inefficient, and redundant experience simply epitomized and magnified the atmosphere of distrust between the federal government and not only Virginia, but also other states who had developed consent orders through the years, who now were justifiably concerned that EPA would override and undermine their consent orders.

In closing, let me reiterate my experience that federal environmental laws generally, and EPA in particular, often prevent states from adopting innovative enforcement regimes that would provide the same or significantly more environmental protection at a lower social and economic cost.

My experience with most Virginia citizens and businesses is that, contrary to the radical environmentalist view that every corporation is a furtive polluter and law-breaker, the great majority of businesses would be willing to modify their activities for a cleaner environment. However, these businesses honestly believe that, if they were given more freedom to innovate in conjunction with close consultation with state and local officials, they could equal or surpass the environmental protection mandated by federal commands and controls at a significantly lower cost.

In Virginia, when we encouraged scientists, our citizens, local governments, and businesses to develop environmental innovations that were superior to the status quo, we found that our citizens willingly came to the table and did exactly that. Rather then contend with costly and inflexible "one size fits all" regulations, companies were willing to tackle air quality issues in their regions by adopting innovative, voluntary measures. Because many of these voluntary measures were not listed in EPA's suggested model for solving air quality problems, EPA often refused to extend the necessary credits in response to these measures that it required to approve our State Implementation Plan, even

where these innovative measures demonstrably improved air quality.

We found that, contrary to EPA's official position, states that proposed compliance measures superior to the suggested federal measures were treated as second-class sovereigns. In other words, once the state acts as a true Madisonian partner and competitor by proposing alternative compliance measures of equivalent or superior effectiveness, it is often subjected, as a practical matter, to a different legal and regulatory code that classifies competing state enforcement programs as separate, suspect, and certainly not equal.

EPA, for example, will not approve a State Implementation Plan unless it complies with EPA's mandated credit system. To obtain the easiest and most certain credits from EPA, states need only think mechanically, without independent reasoning, and be rewarded for it: EPA encourages states merely to select the suggested compliance measures on the official EPA list. However, EPA is not generally required to demonstrate that the particular compliance or remedial measures it often imposes as a practical matter on states would actually improve air quality. Frequently, I and my staff had absolutely no way to measure or confirm that

there was any environmental benefit to EPA's recommended measures, but we could confirm that there was a great cost.

Frequently, we found that, to really improve air quality for Virginia citizens with measurable, verifiable results, we had to embark on a second regime of things that we demonstrated would improve air quality but, nevertheless, were not recognized by the EPA credit system. During the four years of the Allen Administration, we reduced Virginia's air quality non-attainment areas went from five to one. Much of this environmental innovation consisted of voluntary measures for which EPA did not extend credit, contrary to the Madisonian model.

Superfund is another environmental issue that could use more Madisonian competition. In Virginia, we had about 30 superfund sites when I came to office in 1994. When I left, only two of those sites had been remediated. Although EPA somehow claimed great Superfund success at that time, when we looked behind their press releases we found that it had taken EPA so long to act on these two sites that they had naturally remediated, by acts of God if you will. So, God should get the credit, not EPA.

In Virginia, we decided that, to truly protect the environment, we had to substantially accelerate EPA's rate for cleaning up Superfund sites. Instead of putting more Virginia sites into the Superfund program, we worked with our General Assembly in a bipartisan way to establish a voluntary remediation program, where we actually could clean up contaminated sites quickly. We were able to get that program underway, and by the time I left office, we had cleaned up and put back into safe, productive use about 40 sites.

The only sites that we put into the federal superfund program on my watch were federal government facilities and sites, which seem to be the most logical place for a federal Superfund program. Across the country, voluntary remediation programs for contaminated sites like those in Virginia and Massachusetts have restored substantially more sites than the federal Superfund program, at a fraction of its cost, with no diminution in the environmental safety commensurate with the particular land use voluntarily chosen.

This highly competitive, highly innovative Madisonian model lends itself not just to EPA, but to virtually all of the environmental agencies in the federal government. Because natural resource problems

are inherently site and situation specific, natural resource management and regulation cannot rest on the best environmental science unless they are site and situation specific as well.

It is virtually impossible for centralized federal regulations to even quantify every relevant site and situation, let alone choose the most efficient compliance measure for each particularistic site. Therefore, states and localities are natural "green laboratories of democracy" and, as such, are ideally suited to challenge, compete with, and sometimes lead the federal government in securing the best environmental protection for America.

So, while there is a proper and properly limited role for the federal government in setting national standards and mandating national targets or goals for truly national environmental problems, the Madisonian model of checks, balances, and dynamic competition between states and the federal government would both increase and inject new popular support for the entire concept of environmental protection in our country today.

Thanks very much.

MODERATOR: Jim Byrnes.

JUDGE BYRNES: Thank you. As Greg mentioned, I've spent the last 15 years of my legal career in the natural resource law area. Generally, when I begin a training session or commence public remarks, I like to lead with a lawyer joke. I find it tends to break the ice with the non-lawyer employees of BLM, and it doesn't make me look like an aloof bureaucrat from Washington, DC.

However, I've recently decided to follow the advice given by Chief Justice Rehnquist on lawyer jokes. He said that, previously, his practice was also to begin his presentations with an appropriate lawyer joke, but Judge Rehnquist eventually decided to stop doing so. The reasons, he said, were that the lawyers in the audience generally didn't think the jokes were funny and the non-lawyers in the audience generally didn't think they were jokes.

You've heard from Becky about her experience in dealing with traditional command and control type systems in the Commonwealth of Virginia, principally with the EPA. My experience at the Department of Interior generally deals with more arcane statutes, and these statutes generally have a history much longer than EPA's legacy during the last 31 years or so.

In fact, the Department of the Interior's Office of Hearings and Appeals deals with a hybrid command and control system that's been developed over 150 years of the Department's history. The Office of Hearings and Appeals is the delegated representative of the Secretary of the Interior for deciding appeals from decisions of subordinate officials.

My purpose here today is to briefly analyze two naturally contentious natural resource issues and suggest that, with some creative thinking, recourse to the rich legal history of this area, and a little compromise, we can continue to have both necessary development of resources and improved, sustainable environmental protection, the ideal outcome of the type of Madisonian competition that Greg has described.

The areas of both hardrock mining and livestock grazing on public lands have been controversial and the subject of endless litigation. I'm going to suggest several options to hopefully break the deadlock in both of these areas.

Let's start by talking about public lands. Public lands are those lands owned by the federal government, including land not necessarily meant for permanent retention or conservation. Lands that are

meant for permanent retention and conservation are, for example, national parks, fish and wildlife refuges and national monuments. Apart from these designated lands, other public lands under the Federal Land Policy and Management Act of 1976 are available for multiple uses. These multiple uses span the spectrum of human activity, from hiking and camping to timber harvesting, mining and grazing. The vast majority of lands managed by the Bureau of Land Management, for example, are multiple use lands.

While the Departments of Interior, Agriculture and other agencies do their best to manage and maintain the public lands, they cannot possibly provide sustainable environmental protection for all of them. For example, Congress has just appropriated over half a billion dollars to clear up a backlog of maintenance in public lands. A large part of the backlog is meant for lands identified for conservation, such as parks, recreation areas, and fish or wildlife refuges.

I would therefore like to look at two areas and suggest how an enhancement of the same private property rights that improved government operations on public lands in the past would, with some creative thinking and appropriate compromises, allow government

operations in these areas to become models for sustained environmental protection and dynamic competition.

I should start by mentioning that my views are mine alone and do not necessarily reflect those of the Office of Hearings and Appeals, the Department of Interior or Secretary Gale Norton. However, I can say with a little confidence, I think they're probably a little closer to her views than they were former Secretary Bruce Babbitt.

First, I'd like to say, why is private ownership of mineral interests by patenting required by the Mining Law of 1872? I'd like to start by quoting a keen observer of the Mining Law, who said, "The present system of managing the mineral lands of the United States is believed to be radically defective. The system of granting leases has proved not only unprofitable to the government but unsatisfactory to the citizens who have gone upon the lands, and must, if continued, lay the foundation of much future difficulty between the government and the lessees.

"I recommend a repeal of the present system, and that these lands be brought into the market and sold upon such terms as Congress, in their wisdom, may prescribe, reserving to the government an equitable

percentage of the gross proceeds of the mineral product."

Now, that keen observer of the mining law at the time was none other than President James Polk in his message to Congress of December 2, 1845. His recommendation led to a series of enactments changing the way the United States dealt with mining claims on public lands of the United States. Ultimately, this led to the enactment of the Mining Law of 1872, which is essentially the same mining law that is in effect today.

The most innovative feature of the Mining Law was that it declared that all mineral deposits and lands belonging to the United States were open to exploration and purchase. But its really innovative feature was that, under its mandates, individuals who staked mining claims and maintained and diligently developed them could bring into their own private ownership not only the mineral resources themselves, but also the surface of the land itself. This process is known as the patenting process.

In large part, this process, originally envisioned by President Polk, was designed to achieve compliance with federal regulations and produce revenue. But we can, I believe, achieve better compliance with

environmental goals today with a continuation of the patenting process first urged by President Polk.

(End side 1; continuing on side 2)

JUDGE BYRNES: Consider the extent to which private ownership of property provides an exceptionally strong incentive to individuals to act more responsibly as steward of that property than those who do not happen to own it. Ask yourself the question: do you generally treat your rental car as good as your own automobile? I must confess that I usually buy regular gas for rental cars but I buy premium for my Supra.

Another reason why private owners are often more responsible environmental stewards than public managers is cost. The government can't afford to provide or even enforce through command and control systems the kind of sustainable environmental protection we all say we want in society. By 1996, for example, the average Superfund site took over a decade to clean up, as costs and concomitant government delays escalated. Only 200 of the 1,200 sites were ever removed from EPA's national priority list. And remember, also, the over half a billion dollars I mentioned before that Congress earmarked to clear up a backlog of maintenance on the public lands today.

The third reason that private owners are often more effective environmental stewards than their public counterparts is that the incentives in the private sector are frequently superior to those motivating federal natural resource managers. No matter how well intentioned the public official is, the incentives he or she faces often run contrary to good resource management. If a land manager improves management or saves money, he or she risks a smaller appropriation from Congress. I've seen this in my own office, where we reduce the backlog of appeals by two-thirds, and rather than applaud and keep a reduced time for case disposition, a recommendation was made to downsize our office.

In fact, salutary incentives for private property owners are often diametrically contrary to those relevant to the federal government. Private owners, whether individuals, corporations or non-profit land trusts, bear the cost of poor management decisions and have a strong incentive to maintain their property. As opposed to the government, they lose money rather than gain it for poor management decisions and must bear the costs themselves.

In fact, while federal facilities are

generally supposed to meet the same environmental requirements, EPA's own inspector general, as Becky mentioned, said that one in four federal facilities were out of compliance with water quality standards in 1996. This is higher rate of non-compliance than for equivalent facilities in the private sector. Yellowstone Park, for example, is one of the crown jewels of national park system, yet in 1998 and 1999, tens of thousands of gallons of raw sewage flowed out of the park into local waterways.

However, before we can make progress in this area, there are a number of improvements that need to be considered, since most patenting applications in recent years have been blocked. For a history of both the mining law and the recent controversy surrounding the patenting process, I'd commend to you the case of *Swanson v. Babbitt* at 3 F.3d 1348 (9th Cir. 1993) and *Independence Mining Co. v. Babbitt*, 885 Fed. Supp. 1356 (D. Nev. 1995).

While patenting federal land is still the law, it has been the subject of a congressionally mandated patenting moratorium. This is generally because certain aspects of the law have not been updated since 1872. For example, it's possible to patent a mining claim by

paying the federal government $5 an acre, and then turn around and sell the land for thousands of dollars per acre. That is, of course, assuming the land is outside of Las Vegas. Morever, bonding requirements have generally not been sufficient to ensure that the federal government will not be stuck with a tab for millions of dollars in environmental clean-up costs.

There have been several proposals for reform of the system. The mining industry has already offered to pay royalties, a la President Polk's proposal, and to contribute to various bonding systems to make sure that mines are cleaned up. Some have even offered to pay fair market value for the surface rights to public lands. In contrast, environmentalists generally prefer a command and control system where mining is strictly regulated, if it is allowed at all, and where federal land stays in federal hands.

As has been the case in recent years, neither party is likely to prevail on most of their positions, and the resulting deadlock is likely to continue. However, I think it's clear that the legislative stalemate on patenting is both inefficient and environmentally irresponsible. We should consider ending the patenting stalemate by linking more freedom

to obtain property rights with heightened environmental protection. This would give both industry and environmental groups something to be happy with each other, to the extent that this is possible at all.

I can tell you today that maintaining a mining claim on public lands is so complex that it takes a Philadelphia lawyer to assure that all the current legal requirements are met. I know because I'm a Philadelphia lawyer, or once was, and it's extremely complex to attempt to adjudicate these patenting appeals.

We could have the option, though, of allowing people to choose between two competing systems. It would include the option of the current system, which includes: staking the mining claim according to state law; filing the claim with the Bureau of Land Management; maintaining the claim and paying maintenance fees while waiting between three and six years for both the preparation of an environmental impact statement and the approval of a mining plan of operations; and partially or fully paying for these expensive environmental documents before being allowed to mine without a patent.

Or, we could consider giving mining operators the superior ownership rights of a private patent,

provided they adopt the mitigation and environmental protection that government managers could not accomplish, such as necessary conservation and habitat restoration.

In this choice between bureaucratic command and control and private property, I believe the United States should again choose private property rights, just as President James Polk recommended.

The second area I'd like to discuss today is also one with a rich and controversial history-- grazing of livestock on public lands. Today, livestock grazing takes place on approximately 260 million acres of federal forest and rangelands. Moreover, with the federal government's active encouragement, many ranchers and their families have grazed the same federal lands for a century or more, building expectations of continued federal access to their private ranching investments and other calculations.

With the enactment of the Forest Reserve Act of 1891, existing allocations of federal land grazing were given a more secure status in the national forest system. Grazing on other public lands was brought under government control by the Taylor Grazing Act of 1934. Under the Act, ranchers were eligible to graze on

federal lands if they met two conditions -- ownership of nearby private, so-called base ranch property that was complementary to livestock grazing on federal lands, and a demonstration of recent history of grazing on federal rangelands. The system of grazing on federal lands is essentially the same today as it was enacted in 1934.

Today, the most contentious issues of grazing revolve around the grazing fee, the ownership rights of improvements on federal lands and, as always, conflicts between competing users of public lands. Various reform attempts have met with various forms of conflict in both legislation and litigation. The most recent attempt at reform of grazing regulations resulted in litigation that went to the United States Supreme Court.

For an excellent history of grazing history, I recommend to you the decision in the *Public Land Council v. Babbitt*, 929 Fed. Supp. 1436 (D. Wy. 1996), and 154 F.3d 1160 (10th Cir. 1998), affirmed in part, reversed in part; a rehearing of that 10th Circuit decision at 167 F.3d 1287, which superseded the prior 10th Circuit decision; and finally, a decision by the Supreme Court at 120 S.Ct. 1815 (2000). I believe this citation alone points out the conflicts inherent in the current system.

My hypothesis for improvement in the system of

grazing on public lands is similar to my ideas for the reform of mining on public lands: increase the property rights of users of the system to both reduce conflict and improve environmental protection. There are already substantial property rights involved in the operation of the Taylor Grazing Act.

Although not specifically required by law, BLM and the Forest Service almost always renew the existing ranchers' permits, which can be granted for a term of up to ten years. When the base ranch property is sold, the Bureau of Land Management almost always transfers the permit to the new owner, although the agency is not legally required to do so. As a result, the assurance of future access to federal lands connected to a particular private ranch property has taken on the character of a property right. This right has a permit value, often representing a significant portion of the ranch's total value.

Many ranchers also put significant investments into rangeland, such as fencing to keep cattle in or out of particular areas, and irrigation improvements, which benefit both livestock and wildlife. These improvements are the property of ranchers, and can be transferred with the ownership of the base property. Again, the

federal government does not normally have the resources available to make these rangeland improvements itself.

As the Supreme Court recognized in the *Public Land Council* case, the federal government has the authority to regulate and, in some circumstances, even preclude grazing on public lands through its permit system. However, it is also clear that any significant changes would adversely affect the lives and legitimate expectations of many ranchers.

The Bureau of Land Management has about 17,000 livestock operators on public lands, and the Forest Service about 9,000. The size of the allotments ranges from less than 40 acres to over 1 million acres. While federal forage accounts for only 7 percent of the total forage consumed in the United States, it does play a significant role in the western ranching industry. In Idaho, for example, 88 percent of cattle spend at least part of the year grazing on federal rangelands. In Wyoming, the figure is 64 percent, and in Arizona, 63 percent.

With the result of the Supreme Court's decision in *Public Land Council*, it might just be the right time to propose a system that could provide both more rights and security to ranchers and more

environmental protection. This system could involve straight-out purchase of federal land or the exchange of previously federal forage lands for lands deemed environmentally sensitive or important by the federal government, or it could provide for an auction system, where forage rights are bought and sold on a long-term basis. Unlike the federal government, many western states actually put their grazing lands up for auction. This new system could also involve the sale or long-term rental, in the line of 50 to 100 years, of the surface estate or forage portion of federal lands.

While I don't have time to describe each of these systems today, they have been discussed in numerous forums. Given Secretary Norton's expressed desire to increase the dialogue from all affected constituencies, including local western communities, I'm sure these ideas are worthy of consideration and debate. It's interesting that several environmental organizations, recognizing the cost and often futility of litigation involving grazing issues, have been cautiously receptive to some of these new ideas.

The Nature Conservancy, for example, has pioneered the innovative use by an environmental organization of private property rights. In 1996, in

announcing its purchase of an option to buy the Dug-Out Ranch at one of the entrances to Canyon Lands National Park, the group said that it planned to continue in the livestock business. The organization stated that it sought to "move beyond the rangeland conflict and into collaborative efforts with livestock operators." For one thing, they noted that "cows are better than condos, and increasingly in the west, this is the only choice we face."

Similarly, I believe we can use the free market to more efficiently manage the public lands as an alternative to our current command and control structure, creating the type of Madisonian competition and competing property rights that would improve the environment, provide more secure property rights to the American people, and contribute to a stronger national and local economy. Thank you.

MODERATOR: Professor Craig Johnson.

PROFESSOR JOHNSON: Several years ago, I was the chair of a water quality advisory committee here in Oregon, and we developed some new temperature standards, which for the first time would result in the imposition of non-point sources of pollution. Particularly in the Oregon context, the big problems are temperature and

related shade loss. So we developed new rules that were going to require grazers and timber companies to leave some shade in riparian zones around the streams so that the streams wouldn't warm so much, especially when they flowed into Portland.

In the context of doing that, I had a public meeting out in Burns, Oregon, where I got to meet with all the grazers, out in cattle country. Needless to say, this was a brave new world that they weren't entirely thrilled to be entering. And I have to say, that's probably the last time I've felt this out of place.

I am, to some extent, an infidel in your midst because I believe very much in the federal pollution control or regulatory regime. In fact, I think it's the best such regime in the world. And I should add one caveat as well, and that is that I'm sure I do not speak on behalf of my dean in anything that I will say in the next 10 or 15 minutes.

The topic for my discussion and for our panel is enforcement, so I'm going to assume the validity of the federal regulatory standards and talk about how to best implement them, including whether we should implement them either in the current state-federal

partnership or with more deference to the states or to the federal government.

What we have right now is a compromise system, where the states are the primary day-to-day enforcers, subject to some oversight. Frankly, I think that's an imperfect system. I think if we really care about compliance with these environmental laws, for the most part we would move in the direction of more federal control, not less. I'll try to explain why in the next few minutes.

Compliance with environmental laws is difficult. The environmental regime is by definition complex. I worked in a big firm -- Greg didn't mention this when he was going over my background -- for three years, representing industrial clients. And my clients paid me a lot of money on a per-hour basis to explain the environmental regulations to them and find out exactly what they required in complicated factual scenarios. It requires great diligence on the part of the regulated community to both stay up to date with all the regulations and understand how they play out in particular factual scenarios.

One question that we have to ask ourselves is, well, why would a company pay a lawyer an hourly rate of

$200 to $300 or more, or a consultant probably $150 an hour or more, to figure out exactly what is required, absent the threat of serious enforcement if compliance is not achieved. In my experience, frankly, both inside and out of industry, the answer is, for the most part, the less enforcement there is, the less compliance there is. That's just the reality. None of my client wanted to hire me just because it was the right thing to do. For the most part, they hired me because they were concerned about what could happen to them if they didn't comply.

If you talk to any environmental lawyer in big law firm right now, you will find that business is bad. The environmental practice groups are getting smaller, not larger. And frankly, I think the major cause of that is the current de-emphasis on enforcement and the current emphasis on cooperative approaches to achieving compliance with environmental law. What cooperative approaches generally mean in practice is less serious oversight, and in the field, a reduced perception of the need to comply.

One of the suggested issues in the panel outline today is environmental audits and the question of whether we should immunize companies from enforcement

actions if they find their own violations and fix them on some kind of a timely basis. Should they be immune from any enforcement implications in that scenario? That's a very interesting topic; it's the topic that EPA and the states have been dealing with for ten years now. And perhaps surprisingly, the states were a little bit ahead of the curve on this one.

Oregon was actually the very first state to adopt what is called an environmental audit privilege law. The basic idea was that, if companies perform their own self-inspections on a voluntary basis, and if they find their own violations, they should not be hoisted on their own petards. That is, the government should not be able to use that information against that company in any enforcement action. The Oregon privilege went beyond that, at least on its face, and said not only can the government not use the information, but the government can't even have access to it. So, the government can't see any of the facts that companies learned or the conclusions that they came to when they were reviewing the results of the audit process.

Oregon was the innovator, but it didn't take long for other states to follow suit. In Colorado, there was a particular case where Coors violated the

Clean Air Act. Ultimately, the state proposed a fine of $1 million -- I think they negotiated it down to something like $300,000 -- based on the fact that Coors had reported these violations themselves. Coors thought that wasn't good enough and they went running to the Colorado legislature.

The Colorado legislature enacted an environmental audit privilege and immunity law. So now, we're saying that not only do companies get to keep this information absolutely secret, but even if the regulators or companies report the information, under no circumstances can these companies be required to pay any fines for any violations that are identified in those reports. And several states followed suit, passing either privilege or immunity laws, or both. In fact, Virginia passed a statute that had both a privilege and an immunity provision in it.

Finally, in the mid '90s, EPA began to say, what's happening here? And it asked itself, what should the federal response to this circumstance be? And frankly, I think that in the end EPA took a much more measured approach than the states had taken. The real question here is, to what extent should the regulators go in trying to encourage companies to do something that

they are not required to do as a matter of law.

It's very difficult -- perhaps unwise -- to set up a regulatory regime that would require companies to inspect themselves. The levels of detail that the regime would have to get into based on whatever types of industries various regulated entities may fall within would be probably too daunting to set up regulatory requirements in that area. So, neither Congress nor any state that I'm aware of has ever really required any kind of aggressive self-policing efforts on the part of regulated entities.

The idea is do we want to encourage companies to go out and find their own violations without any kind of regulatory requirements and hopefully fix them promptly? The answer to that question, of course, is yes we do.

Everyone agrees, even EPA, that self-policing is a good thing, largely because neither EPA nor the states, when you combine all of their enforcement resources, have the types of resources that would be necessary to go out and inspect every facility three, four, five, six times a year or any other kind of systematic basis. Would that it were so, but it's not; and politically speaking, it’s not likely to happen any

time in the near future.

Yes, of course we want to encourage companies to engage in effective self-policing. But the real question is how far should we go? What kinds of concessions should we make? Again, what Virginia and Colorado and Texas and a few other states did was to say, first of all, any information that you glean through this self-inspection is absolutely private. Secondly, again, even if the regulators find out about those violations, if you address them as the result of one of these compliance audits, under no circumstances can you be required to pay any fines.

Virginia law actually had one exception that was unclear. It applied where the company acted in bad faith. What does that mean? Who knows?

When EPA finally looked at it, again, in my view they came out with a much more measured policy. What EPA said was, in general, we will be willing to forgo any deterrence-based fines, any slap on the wrist beyond compensating for demonstrable environmental harm and recouping savings derived from law-breaking, in situations where companies find their own violations and promptly address them, with two exceptions.

First, where there is significant

environmental harm -- if a company has caused significant environmental harm through its violations of the environmental laws-- we don't think there should be any sort of mea culpa that can result in absolute immunity from fines. Second, EPA said, if it's clear that the corporation was either knowingly violating the law or was willfully blind in its corporate decision-making -- in other words, if there was real culpable, criminal-type behavior -- in those circumstances, there shouldn't be any immunity from civil sanctions or criminal sanctions.

But more importantly, EPA said, really, all the companies should avoid is the slap on the wrist. EPA has said throughout its enforcement history that the highest priority in any civil enforcement case is to recapture the economic benefit that any company has enjoyed through its non-compliance. Compliance costs money, both in terms of immediate outlays for the necessary equipment and in terms of operation and maintenance and the diligence required to ensure that the system is working properly on a day-to-day basis.

EPA has said that, again, under no circumstances should companies be willing to absolve themselves of the obligation to forgo the savings that

they actually enjoyed through their non-compliance for two reasons. First, we need to be able to level the playing field. Someone out there, presumably within that entity's industry, complied with the laws and spent the money that was necessary to comply during all relevant time periods. If the auditor is able to save money through its non-compliance, it will have a competitive advantage, vis-à-vis the entity that does what we want that entity to do.

Secondly, EPA said, even more fundamentally, there's the idea of ill-gotten gains. Irrespective of any concerns about competitive advantages, we just don't think that companies should be able to profit through their non-compliance with the environmental laws.

Very interestingly, in 1999, the states themselves, the National Conference of State Legislatures, prepared a study on environmental auditing. What that study concluded was that the state audit privilege and audit immunity laws had resulted in no increase in the amount of self-policing that corporations were engaging in. They had no positive benefit whatsoever. If you looked at a state that had audit laws and a state that didn't have audit laws, the same amount of self-policing was going on in both

circumstances.

So, contrary to the working assumptions of the states, their privilege and immunity approaches did not result in any further self-policing activities. In fact, the number one reason why all companies said that they did environmental audits was because of the threat of enforcement. In other words, if you really want to, if the states were really interested in promoting self-policing, and in fact if EPA were interested in promoting self-policing, the correct response would be to fine violators more and to bring more enforcement actions where violations are detected. That is what motivates companies in today's world. It's a sad statement, but it's true.

Just one other point that I'll make about the environmental laws, and that is, on their face, the states' environmental audit responses were flatly inconsistent with federal authorization requirements. EPA's authorization requirements under the Clean Water Act and other statutes clearly require that, to be authorized under the federal programs, states have to have access to any information bearing on compliance. And they clearly require that states have to have the ability to impose fines of up to $5,000 per day for any

and all violations of environmental law.

To me, one of the interesting things about the state legislatures that were passing these laws is that they were, knowingly or not -- I don't know what kind of legal advice they were getting -- absolutely thumbing their noses at the federal regulatory regime under which they worked. They were passing laws that were directly in violation of, again, the requirements, if they wanted to retain authorization status.

The interesting thing is that once EPA then reiterated its policies by stating that certain audit privileges are very problematic and could be a cause for a withdrawal of authorization if states retain them, the states then ran to EPA and said, why aren't you being more cooperative? We were supposed to be partners. Why aren't you working together with us on our innovative approaches here?

The answer is, or could have been, well, because there are federal baselines. That's part of the deal when you sign up to implement these programs. There are certain minimum federal requirements that you have to be able to meet. Is there room for competition between EPA and the states in the area of enforcement? Absolutely, there is.

There is no preemption under any of the major federal regulatory statutes with respect to the ability of states to take more aggressive enforcement actions, if they want to, and even to try alternative approaches to achieving compliance within certain constraints. But completely waiving all penalties and completely denying yourself access to any enforcement action is out of bounds and has been out of bounds since the mid '70s. But the state legislatures thought nothing about ignoring that when it was convenient for them to ignore it because they thought it would produce more compliance. And again, the states' own study several years later showed that it was an utter and abysmal failure.

Both Becky and Jim mentioned the low compliance rates for the federal government. And in fact, the federal government is among the worst violators of environmental laws under all programs, not just the Clean Water Act, followed only by municipalities. But the problem there is not that EPA is the primary regulatory overseer with respect to the federal government. In fact, it's not.

In delegated states, in authorized states, states have just as much inspection authority with

respect to federal facilities as they do with respect to any other type of facility. They have to have it in order to become authorized. The federal statutes all waive sovereign immunity with respect to inspections and the like, and sovereign immunity with respect to state inspections also.

The problem under the Clean Water Act, and the reason why the federal government is the biggest violator is because the federal government can't be compelled to pay penalties. So, if EPA wants to work with its sister federal agencies, it has to do so through cooperation, and it doesn't have any hammer in its arsenal to say, look, at a certain point in time, we're going to get serious.

The Supreme Court ruled in the *Ohio* case in the mid '90s that the Clean Water Act waived sovereign immunity for several purposes, but it does not waive sovereign immunity with respect to penalties for past violations. So, unfortunately neither EPA nor the states can impose fines against the Department of Defense or any other federal agency that blatantly violates the environmental laws, at least under the Clean Water Act. Under RCRA, sovereign immunity clearly has been waived now, in response to that Supreme Court

case. But the problem is sovereign immunity. The problem is not EPA--as opposed to the states--being the primary regulatory overseer.

Finally, I wanted to touch on one other point. That is the question of over-filing. Becky mentioned the sinister prospect of EPA upsetting state consent orders and breeding distrust between not only EPA and the states but between, presumably, the regulated community and both governmental entities. I'm not familiar with the particular Virginia case that Becky alluded to because I haven't read her book. But if you look at any of the case law, there is a clear need for the federal government to retain enforcement authority, even in authorized states and even in situations where the state has taken some kind of prior enforcement action.

Unfortunately, all too often the state enforcement action looks like the Massachusetts enforcement action, in a case called *Scituate*, from the 1st Circuit. In that particular case, we had a municipality that was operating an unpermitted sewage treatment plant for decades in Massachusetts.

When the state found out about this violation, what did it do? It required the city to begin studying

how it was going to implement the requirements of the Clean Water Act. It entered into the consent order. The consent order was extended several times. The consent order had no ultimate compliance date -- basically, just study forever (at least, that's all we can tell from the case) by the time the citizens finally filed their case.

It required a citizen suit for somebody to say, look, consent orders are fine where they are not sweetheart deals. In fact, Congress has expressly empowered citizens to file actions despite prior state or even prior federal enforcement actions, if those actions do not constitute diligent enforcement. So you have two types of enforcement actions -- diligent enforcement actions that will preclude citizen suits and in practice will preclude subsequent EPA enforcement, as well, or sweetheart deals. And unfortunately, in many scenarios, there are sweetheart deals.

Another relatively famous case is from the 9th Circuit here, involving Unocal down in California. The State of California negotiated a deal and basically waived all permit requirements indefinitely. They said, okay, well, we hope you'll meet these alternative

limits. Not the ones that are required by federal law but rather some lesser limits that we think you can meet. Should states have the power to waive federal law through writing of consent orders? That's not cooperation in my view; that's a state undermining the federal requirements.

Certainly, we can talk, and in later panels today, they will talk about whether the current federal regulatory requirements make sense or are the best way to go. But if we're only talking about enforcement, the point here is simple. That is, again, that enforcement costs money, and by the way the EPA Inspector General has found that the states nationwide invariably do an abysmal job at recapturing economic benefit -- a dramatic contrast between EPA enforcement actions and state enforcement actions. If the state is in the lead and is taking the enforcement actions, the unspoken message to industry is, go ahead, fail to comply, because in the end you are likely to be financially better off than if you comply.

Thank you very much.

MODERATOR: Assistant Secretary Scarlett.

ASST. SECRETARY SCARLETT: I'm going to do something different. We're a small group, and standing

up there at the lectern seems to me to be a little bit unfriendly. Also, I threw away my notes and decided I'm just going to chitchat here.

I'm going to call this talk "Next Year

MODERATOR: Assistant Secretary Scarlett.

ASST. SECRETARY SCARLETT: I'm going to do something different. We're a small group, and standing up there at the lectern seems to me to be a little bit unfriendly. Also, I threw away my notes and decided I'm just going to chitchat here.

I'm going to call this talk "Next Year Country". It's after a rancher that I met last week in Montana who lives in Next Year Country -- that is, always hoping that it's going to rain next year, that there won't be a freeze in June, and so on. And so, I'm a Next Year Country person, an optimist. Some people might call me a Pollyanna, wearing rose-colored glasses.

When I think about environmentalism and environmental futures, a passage from *Alice in Wonderland* always comes to mind. Alice is walking in Wonderland, she comes to a fork in the road, looks up, and sees the Cheshire Cat. She asks the Cheshire Cat, which way ought I to go from here? The Cheshire Cat

grins, looks down, and says, it depends a good deal on where you want to get to.

The moral of that tale is relevant to what I call a new environmentalism. That is, as we think about our institutions, there's no reason to think that we got them all perfectly right 100 years ago, 60 years ago, 50 years, 40, 30, 10 years ago, and even to the present. So we are engaged in a constant discovery process seeking to achieve results. I would suggest that an approach emphasizing results should have three components. One is environmental results. As we engage in this discovery process, we should ask ourselves, "how can we do better?" Not better in terms of numbers of permits and compliance enforcement actions, but better in the actual goals of environmental law. Are our habitats being restored? Is the water cleaner? Is the air cleaner? Are we creating environments in which species can flourish?

The second results component is a community results component. By that I mean, "how can we achieve peaceful resolution of conflicts?" Peaceful resolution of conflicts is something on our minds these days; we recognize the importance of tolerance, temperate discourse, and an ability to peacefully resolve

problems, because ultimately it's that peaceful resolution of problems that will be sustainable.

The third results component is good governance or better governance. By that I mean achieving an expeditious resolution of problems and the effective utilization of resources.

Now, consider the old environmentalism -- the environmentalism of the last hundred years. I'll go back a little further than Becky. I think our environmental law foundations started before 30 years ago. We heard Jim talk about laws that are 60, 70, 80, 100 years old. That old environmentalism has what I characterize as four features, at least from the vantage point of a 60,000-foot aerial view. I call these the four "Ps".

First, the old environmentalism is prescriptive-- that is, decisions are top-down and based on the old notion that the best experts are in Washington; they know best about managing forests.

Second, the old environmentalism is very process and permit focused --there is a "get a permit, pass go" orientation which steers us away from thinking about results and, instead, concentrates our minds on permits and processes.

The third “P” is what I characterize as partitioned decisionmaking. By that, I mean, looking separately at air and water and waste, and looking at grazing activities separately from forestry or riparian management. Our decision-making institutions drive us to look at all these things in segmented silos, instead of holistically. In fact, at one time, I wanted to call the new environmentalism holistic environmentalism. I was advised that, being a Californian, that smacked too much of backpacks and Birkenstocks. So, I use the less descriptive word "new" instead of "holistic". The third “P” is partitioned decisionmaking, which lends itself to problem shifting -- sometimes an air problem, even if solved, translates into a water problem; decisions on water don't necessarily integrate with the decisions on air, and so on. The result is many unintended consequences.

The fourth “P” is an emphasis on punishment, the idea that the primary motivation for human behavior is one driven by “the stick”--that the threat of punishment generally induces the best behavior. Of course, there is always a necessity to address ill-deed doers because they’re out there, and I have seen some environmental cases in which there truly are ill-deed

doers.

But there's a lot of folks out there -- many ranchers, for example -- trying like heck to do the right thing. They may sometimes lack information, but they are willing to accept a little bit of help, some incentives, some technical knowledge, to help them figure out what might be better. These aren't folks going out and trying to nefariously rape and pillage the landscape. The same is frequently true in factories and other large or small businesses: there is tremendous desire to try and do better.

One piece of information that Professor Johnson overlooked in the Coors case -- he said that Coors had an air emission problem and then went to the state legislature to avoid its responsibility. What he forgot to say was that this was actually a volatile organic compound emission, hydrocarbon emission, from their brewing process. Neither Coors nor the regulators even knew about these emissions until Coors did their voluntary audit. And, contrary to Professor Johnson's model, Coors conducted its voluntary audit because they wanted to figure out where their environmental problems were. It was self-motivated. They wanted to be good citizens.

So Coors actually found out it had a hydrocarbon emission problem from their brewing process of which neither the state health agency nor the federal agency was aware. As I mentioned, Coors did not previously know about this emission problem either. So Coors stepped forward to the state and reported this problem. The state said, thank you very much. That'll be a fine of over one million bucks. Coors was trying to be a good citizen. They were trying to do better in that instance and were punished for it, although they eventually reached agreement on a more modest fine.

So, the fourth "P" is punishment, the idea that we drive action primarily by punishment rather than through a little bit of aspiration and inspiration, recognizing the honesty of most folks. Even in criminal cases, innocence is the presumption, a constitutional one at that.

Now, I would suggest that, as we move toward a new environmentalism focused on ecological results and outcomes, community results, and better governance, we face four fundamental challenges in the institutional discovery process.

In keeping with my alphabetical theme, having started with the four "P's", I'll add the four "I's."

The first of the four "I's" is incentives. What institutions will help us create incentives or will align the incentives that people have in their daily decisions with good environmental outcomes? If I have a ranch, for example, the Endangered Species Act should give me an incentive not to hide the endangered species I might have, but in fact to protect, nurture and replenish the environment and all threatened species. So, what institutional arrangements will help us get there?

The second "I" is innovation. What institutional arrangements will harness our citizenry's incredible entrepreneurial spirit to innovate? Consider the El Dorado refinery in Kansas. They had a biologist onboard. They were faced with a prescriptive permit from EPA to improve their water treatment facility by investing in a new, substantially more expensive water treatment plan that would have improved water quality, but only moderately.

This biologist said, in effect, we can and must do better by harnessing "nature's capital." Indisputably, wetlands are a superior natural water purification system. Therefore, the biologist recommended that, instead of building a wastewater

treatment facility costing millions of dollars, the refinery should build a network of wetlands. Demonstrably, those wetlands would not only yield purer water, but create a new habitat for ducks, frogs, and birds. This is exactly what happened. The new wetlands cost the company less money than the water treatment plan urged by EPA and achieved superior environmental results.

Thus, the second "I" is "how do we create institutions fostering this kind of innovation?" It took this company, by the way, quite a long time to overcome EPA's initial prescription that "thou must build a wastewater treatment plan to the exclusion of all other creative thoughts, even those achieving superior environmental protection."

The third "I" follows: how do we create a more integrated decisionmaking that facilitates looking at the "big picture," encouraging us to consider whole landscapes and helping us consider air and water and waste simultaneously. How do we integrate our decisions to include environmental performance, economic dynanism, and community well-being?

And, finally, consider the fourth "I" -- how do we better tap local information? Plainly, this does

not mean that information from scientists and other data from Washington are not important. Of course, such information is important. But we also know, as Becky said, that many environmental problems are site-specific, lending themselves uniquely to experiential knowledge, the knowledge of time, place and circumstance --the knowledge, for example, that a rancher has of his own county, home, and land.

Consider, for example, a rancher I met recently in New Mexico, a rancher who had a problem in the late winter with coyotes attacking his calves. Now, he didn't want to get rid of the coyotes because he liked the coyotes and wanted them to be part of their natural landscape, as do I.

But, because of his local knowledge, he realized that if he simply shifted his calving season two months, moving it into March or April, the coyotes by that time would be preying on other sources of food, thereby saving his calves. That's the kind of textured local knowledge of relevant detail that only a local person often has.

Those are my four "I's." Is this simply a Next Year Country vision? Is this environmental vision far on the horizon, only suggesting that we might

someday have a new environmentalism focused on better environmental results and better answers resting on these four "I's?" I would suggest that, as we speak, we're undergoing an enormous institutional discovery process, including an influx of competition and experimentation. Let me explain.

I was at an event in Red Lodge, Montana last week. There were some miners there, representing the Stillwater mine. They had a huge conflict with local environmental groups and citizens who opposed that mine's expansion. Other groups opposed the mine for different reasons, including concerns that it would bring more people into the area, and thereby create unacceptable pressure on local infrastructure and existing development.

After liberal doses of the old environmentalism, including its focus on perpetual litigation and perpetual conflict, a number of environmentalists from the valley, conservationists, miners, local decisionmakers, and state decisionmakers decided to pull together and negotiate a good neighbor compact, specifying and guaranteeing the environmental benefits that an expanded mine would or could achieve.

Many of the environmental benefits secured by

this compact went beyond existing permit requirements and, therefore, were aspirational. The miners, to put it bluntly, traded their textured knowledge about how to obtain superior environmental protection for agreed amounts of additional economic activity.

As part of this compact, the mining operators created a fund, enabling environmental and community leaders to monitor the environmental benefits described in the compact and review newly disclosed information about mining plans and processes that exceeded the information required by law. The Stillwater "good neighbor compact" is an example of the kind of contractual relationship that yields aspirational results and cooperative decision contexts superior to those required by existing environmental laws.

Similarly, New Jersey has implemented its Gold and Silver Track program for manufacturing facilities, which actually creates performance contracts with participating companies. If those companies meet certain performance levels beyond current regulatory requirements, they obtain a series of operational benefits, not the least of which is being excused from having to obtain a permit for every extra bolt and nut that they use to change their production processes.

Also notable is Colorado's Ranching for Wildlife program, in which a third of all the state's hunting permits are allocated to ranchers, who may sell those permits. What's that have to do with environmentalism? These ranchers now have a strong incentive both to enhance their habitat for the numerous plant and animal species necessary to sustain viable hunting and to prevent poaching.

That's my New Country vision of an environmentalism focused on results -- environmental results, community results and better governance. Now, is this is an easy slam-dunk for the body politic? No. There are three problems, again delineated alphabetically, as the three "M's."

First is metrics. When you begin focusing on results, measuring them becomes central. It's really interesting to me that 100 years into federal environmental laws generally, and 30 years into our modern EPA-type regulations, we still have relatively poor metrics.

We have pretty good metrics for air, but relatively poor metrics for water. We've so fixated on the permit requirement that we often fail to focus on measuring what environmental permitting is supposed to

achieve, with information that is both scientifically accurate and accessible to the public. Accurate, accessible information will allow our citizens to assess the environmental policies of their governments by reviewing a kind of environmental report card, if you will. So metrics is a necessary challenge in which we need to invest.

The second "M" is mediation skills. Much of today's environmental status quo consists of habits of conflict and litigation. For example, many on this panel are lawyers skilled in the tools of litigation. But, if we're on the cusp of a new, more cooperative environmentalism, this new environmentalism will require a new skill set: enhanced mediation, arbitration, and even newly developed habits of conversation rather than the ingrained, adversarial, and rhetorical habits of winning or losing by attempting to orchestrate the defeat of another. All the players in environmentalism today need to learn how to think "we", not "I" and "you".

The third "M" is that we need to overcome some of the mismatch between the old environmentalism and the new environmentalism. Some of the old permit structures stand in the way, for example, of desirable

environmental protection and innovation. Granted, some desirable environmental innovation has occurred over the past several decades.

However, state environmental regulators, companies, ranchers, and environmentalists engaged in cooperative environmentalism have told me repeatedly that often they can only improve the environment so far before the existing system becomes a roadblock. Unfortunately, the inherent uncertainty underlying all innovation creates either unacceptably high legal risks or an outright conflict with existing laws. So we need to overcome that mismatch. I have some ideas on that.

The National Environmental Performance Partnership System, styled "NEPPS," was an EPA administrative innovation, in which EPA worked with states to develop environmental performance strategies. If the state developed that strategy, EPA then delegated to it certain permitting and other authorities. However, there's still too much uncertainty about whether states can replace old permits for particular emission sources with new, facility-wide permits securing higher levels of environmental protection, like the New Jersey Gold and Silver Track

program, without violating the existing permit structure.

I would argue that we may need more tools like NEPPS. If a state or local government in conjunction with the federal government discloses measurable information on its environmental performance and shows it is meeting or surpassing all applicable environmental benchmarks, then the environmental performance structure created by the state or locality should be affirmed. That's more than a possibility. In the Endangered Species Act, "safe harbor agreements" have emerged, giving landowners more incentives to protect species.

But we need perhaps some transitional legal space or some greater certainty in securing endangered species protection through experimental population programs -- safe harbor, habitat conservation plans, and so on. Of course, there are many different and desirable institutional alternatives; those that I sketched today obviously are not exclusive. They are just ideas.

I'll end with my favorite philosopher, Yogi Berra. Yogi once said, "the future ain't what it used to be." It seems to me that, indeed, we are moving into both a new environmentalism and a different future.

It's a future that evokes a NPR radio commentary in which the pundit observed that there are two kinds of people in the world -- those who dwell on its imperfections and those who celebrate the world's working parts.

The new environmentalism is about expanding environmental protection today by maximizing the power of these working parts. It's an aspirational environmentalism recognizing that 85 percent of Americans describe themselves as environmentalists. We want blue skies. I love the pristine creek running through my yard in Santa Barbara. I like the proliferation of frogs singing at night and want them to stay. We are all, or virtually all, environmentalists now.

But what we need today to inspire our common efforts and improve both environmental law and the environment are new institutional arrangements that tap our shared innovative spirits and align the incentives that affect how we act with environmental protection. We need environmental performance goals that tap the unique local or regional information often necessary to truly solve environmental problems. We need environmental goals and performance measures that both

average citizens and their governments may use to assess environmental protection.

Thanks.

MODERATOR: We're going to open up the podium for questions. And one pleasure as a moderator is that you can both ask the first question and set the stage for more questions. I'll hazard a theory that there's some common ground here between Becky Norton Dunlop's remarks and Professor Craig Johnson's remarks.

When I heard Becky speak, for example, I didn't hear her say, that the states should be the primary or the only entities for the enforcement of environmental laws. What I did hear her say is that she believes she shouldn't have had to go to court so many times against EPA to accomplish measures that were almost self-evident in their protection of the environment.

For example, she had to go to court to compel EPA to let Virginia citizens test emissions in local, accessible service stations. We sit here today and consider the self-evident truth that you burn less fuel driving a block than driving 20 or 30 miles to one of four central planning facilities in Northern Virginia, and that a state possessing the technology and technical

evidence necessary to show that it is successfully policing service stations and meeting all applicable air quality standards and benchmarks should be either left alone or encouraged, not harassed. But, instead, Virginia had to sue EPA in court. I think what I hear Ms. Dunlop saying is that she would like states to have a more autonomy to protect the environment as much or more than the federal government.

But I also hear from Professor Johnson's perspective that he sees a real need for vigorous federal enforcement. And indeed, that is demonstrably true because we wouldn't have had that well-documented period in the '60s and '70s when federal standards made a difference, where the previously existing network of federal and state laws had not.

So, the question I'd like to pose to the panel is: are there situations in which states might be the better entity for imposing environmental standards? I'd like to pose the question first to Becky and then to Professor Johnson, through the rubric of the following example.

Consider Madisonian competition once again. One reason why his federalist system requires the federal and state governments to compete is that the

Framers wanted to protect our society from the numerous occasions in both ancient and modern history when a national constituency and national government successfully eviscerated the liberties of a national minority that, for example, was more numerous and effectively represented in a state or region. So Madison and the other Framers created parallel intergovernmental systems, in which the different sovereigns checked and competed with each other, because the probable outcome would be better, more humane public policies. Multiple sovereigns and multiple property interests, for example, provide society with both more free speech—more protected viewpoints— and more power to ensure that these different viewpoints are heard.

In environmental law, the corollary to this Madisonian model is that there are times when a national constituency is so strong that it can impose so-called environmental standards that actually harm the environment or merely punish competitors. And whereas this national constituency might have primacy in a national government, it may not have primacy in other states, in discrete states or regions.

Consider, for example, the situation with

ethanol and oxygen-enhancing additives. Many of us have read about why and how the ethanol lobby is an extremely powerful national lobby. Because it's a powerful national lobby, it's been able to subsidize itself by requiring ethanol additives, so-called oxygen-enhancing additives, in gasoline. They have been able to do this even though EPA admits in the public documents analyzing its final oxygenate rule requiring MTBE additives that "the use of ethanol might possibly make air quality worse."

Subsequently, in audits of the amount of MTBE in state water systems and aquifers, MTBE contamination is viewed as one of the most significant problems in water systems faced by many states today.

I'd like to ask the panel to consider whether it's possible that, if states were newly empowered to propose alternative environmental standards that accomplish as much or more environmental protection than the federal standards, we might be able to accomplish more and better environmental protection than was the case in my MTBE example. The genius of the Madisonian system is that there are also non-grain producing states in our country, aren't there? And they might not be as willing to subsidize ethanol or compel gasoline

manufacturers to inject oxygenate-enhancing additives in fuel that actually pollute the environment.

Ms. Dunlop.

MS. DUNLOP: Gosh, Professor Johnson, you've opened a ripe area for discussion.

Let me just say, very briefly, I think that there is room for the partnership in transition to the new environmentalism. One of the problems we have with the current situation, which admittedly has slightly changed since Mrs. Browner retired from the scene, is that we're not dealing with a real partnership now. We certainly use that terminology. But, in my four years in Virginia, EPA openly and explicitly threatened the state for developing better, more environmentally beneficial compliance measures than EPA. EPA's position was, we really don't care whether your standards are demonstrably better or not. If we don't like your standards, we're coming after you. Only when the press, raw politics, or lawsuits blocked EPA did it treat Virginia like a true partner.

In the instance of the environmental audit law, part of the reason I think the report to which the professor referred indicated that there wasn't much positive change is that EPA wrote a letter to us in

Virginia, and I assume to other states, when this issue was being debated in our General Assembly, and said, "We don't really care whether you pass an environmental audit law. If companies do things that we don't like, we're going to prosecute them vigorously for an infraction, even if the companies uncover it themselves under an audit program approved by Virginia." What possible company is going to then comply with a law encouraging them to prepare more audits and disclose more information to the government to correct environmental problems if EPA nevertheless will look over their shoulder and sue them anyway?

For the previous four years, EPA was a textbook example of an almost Orwellian Big Brother in action, repeatedly hurting under the pretext of helping. And I could go on and on with other examples. A true partnership says, yes, if there's a consent order that does not incorporate an explicit outcome and results-oriented solution with a verifiable timetable, and the end result is that the pollution problem has not ended, then perhaps there is room for the federal EPA to take legal action. But that wasn't the case in the Virginia examples I discussed, and I suspect it's not the case in most other states.

I think the true partnership that Madison envisioned not particularly with EPA, but generally for our country, is one where the federal government and the state governments work collaboratively and competitively to both enhance human liberty and the right of our citizens to pursue happiness on their own property, without infringing on the rights of others.

PROFESSOR JOHNSON: I don't have much to say except that I'm certainly not arguing that the federal system is perfect, and I would be a fool to do so. But the question is, could the states ever come up with better schemes and certain particulars that would reach better results more cheaply? The answer, absolutely, is yes, they can.

But the question really is, well, what areas, should you carve out to allow this type of experimentation? And frankly, I don't know a limiting principle. Personally, I don't like the federal government just because it's the federal government, folks. And I don’t support federal regulation just because of my views on Federalism. I'm a pragmatist. I support what works. I want what will be the best scheme for the environment and for the people of the United States.

On balance, I think that the federal government has more expertise and is less susceptible to local political control or political influence by industry. And, in general, they will do a better job of establishing technology-based and health-based standards that actually will protect the citizenry of the United States. That's all there is to it.

Again, are they perfect? Far from it. I could chronicle a list of a hundred areas where I could tell you that a creative state could do a better job. But again, there aren't just a hundred areas or situations out there. There are tens of thousands. Am I ready to turn control over to the state in all of those areas? Again, in a perfect world, I am not.

ASST. SECRETARY SCARLETT: I think we're answering the question in the wrong way. The question is not, in what areas might states or localities do well. It's how do we best achieve results, and what decisionmaking structures might help us do that through a blending of the different governing and private decisionmakers in our country.

The reason that I mentioned NEPPS, the National Environmental Performance Partnership System, is that it might give us a glimpse of what that

structure could look like. It's a structure in which many states believe they have the personnel, the knowledge, the will, and the capabilities to advance environmental goals well beyond what the federal structures, in terms of both efficiency and effectiveness, can achieve. NEPPS provides a means of going to EPA and saying, this is our strategy. These are the performance standards that we'd like to adopt pursuant to a kind of contractual relationship with EPA. By doing that, state and local decision-makers are then given the kind of autonomy to engage in different institutional arrangements through an ongoing discovery process.

States that don't have those capabilities can simply function under the old federal permitting rules. So, it provides an option to simultaneously have the kind of experimentation and competition we're talking about, while also safeguarding the environment from those not possessing the necessary will or capabilities.

The problem with NEPPS now is that it's an administrative action taken unilaterally by EPA. There are a lot of questions about the legal status of the agreements that the states engage in and, therefore, the legal status of any of the permits and arrangements that

they enforce in the private sector. So, one of the related questions that has been posed recently in Washington is, "what kind of transitional legal space might we create to provide greater legal clarity to this kind of legal structure?"

Now, NEPPS is not the only solution here. But I do suggest that it's the wrong question to ask what should be the exclusive domain for a given sovereign in environmental law today. The better question is what structures will allow government to achieve better environmental results under a measurable, performance-based focus.

For six years, I was chairman of California's Inspection and Maintenance Review Committee. I don't think there's anyone in this room that knows as much detail about auto emissions in this process as me, based on this arduous experience.

It happens that California has far greater air emission knowledge and expertise than the Federal Air Office. California's knowledge, scientific and technical, is premiere in the world. And it's not a surprise, since we have the most cars and traffic per capita.

California, like Virginia, contested the

prescriptive inspection and centralized maintenance requirement because we had no evidence that there was any empirical basis for EPA's assertion that centralized testing performed better than decentralized or other arrangements.

In fact, when we pressed this issue and sent three researchers to the mobile air emissions lab in Ann Arbor, we ultimately were able to get the EPA data supposedly establishing the superiority of centralized testing, and we had our scientists pore through it. We discovered that EPA did not rely on any scientific comparison between centralized and decentralized testing; rather, EPA used audit information from attempts to see whether there was fraud going on in decentralized testing programs.

According to this information, one state had a covert audit of its program, in which they sent ten automobiles through the decentralized program. These were known to the regulating authorities to be cars that had particular problems. What they did covertly was to see whether the decentralized testers in fact accurately passed or failed those vehicles. In other words, the state had modified these vehicles, taking out the catalytic converter in approximately ten cars and, in

half of them, replacing the converter with a rusty pipe. In the other half, they replaced it with something that looked like a catalytic converter.

When those cars went through the covert audit during their visual inspections, 50 percent of the cars were failed, i.e. the ones with the rusty pipe, and 50 percent passed. EPA said, okay, that's a 50-percent failed identification rate in the decentralized program.

Then EPA considered a covert audit of vehicles for a centralized testing facility in Maryland as well. In those vehicles, all catalytic converters were removed and replaced with rusty pipes. During the visual inspection phase of the covert audit for the Maryland centralized facility, the centralized inspectors accurately failed all of the vehicles with the rusty pipes.

So, EPA concluded that the centralized facility had a 100-percent accurate testing rate and the decentralized facility had a 50-percent accurate testing rate, even though it used dissimilar tests and different audits for these different facilities.

It is that kind of experience that leads us to declare with confidence that we can and we must do

better. If we're going to clean up the air from our automobiles, we need better data than that. That's going to come from a variety of sources -- sometimes from the federal government, sometimes from states like California who have been pioneers in air quality, sometimes from the private sector, as suggested by my rancher and coyote example.

And our challenge is how can we promote that mix of players, while concentrating always on measurable and accessible environmental results, and on disclosing those results to the American people and to every government enforcing environmental law in our federal system.

MODERATOR: We have time for a couple of audience questions.

AUDIENCE PARTICIPANT: I'd like to pose this question to the moderator, actually. You mention Madisonian competition between the federal and state governments. But didn't we develop new federal laws in the '60s and '70's because state and local autonomy had failed?

MODERATOR: Yes, that's certainly been the case at times. But remember, the example I was posing is what happens when the national constituency is so

strong, as in my ethanol example, that the national standard actually facilitates even more pollution? A national or regional constituency, for example, might be strong enough to manipulate national standards because it exists across several important states. But if states had true, co-equal power, they could stand up and challenge the flawed federal environmental standard by adopting their own standard if, for example, they could show an adjudicator that their environmental standard is equivalent or superior.

My view as a Madisonian is that each sovereign should have the power to dynamically check and restrain the other.

ASST. SECRETARY SCARLETT: Greg, a real quick clarification of fact. Right now, the leaders nationally, in asking for a greater state role and flexibility, if you will, are Pennsylvania, New Hampshire, Florida and California, increasingly. It is not the case that those states less engaged in centralized environmental protection over the years are leading the charge. Instead, it is increasingly some of our highest environmental performers -- Illinois, under the leadership of former Secretary of the Environment there, Mary Gady - that request enhanced autonomy and

flexibility.

AUDIENCE PARTICIPANT: If states are sometimes the best laboratories of democracy, who restrains the states? What happens to the environment, for example, when polluters are in the majority?

MS. DUNLOP: I myself think that the accurate reflection of political influence and environmental success is called "elections" in our country. Everyone engages in the political gamesmanship, obviously, and many try to persuade the voters that there is only one way, their way, to protect the environment. In Virginia, we had an election for the Senate last year. The Sierra Club, the Nature Conservancy, League of Conservation Voters -- I mean, they were in the state spending hundreds of thousands of dollars making their case that Governor Allen was nothing but a polluter and that he didn't deserve to be elected to anything.

Corporate America obviously has lots of fish to fry, so to speak, in these election campaigns. But by and large, they went about 60-40 in their support for Governor Allen over Chuck Robb, who was the incumbent senator. Granted, the citizens of Virginia voted for George Allen on the basis of the whole package, but this package included his environmental record. Our voters

were more than smart enough to know George Allen's environmental record was being attacked and to evaluate the veracity of those attacks. Governor Allen and his chosen successor as governor both won their elections, in part, because individuals and communities around the state were in the best position to know first-hand that environmental protection improved significantly during the Allen Administration.

Of course, as a matter of pure politics, I don't think environmental issues are frequently the deciding issue in victories in the political arena, although they can be the losing issue. But the beauty of both elections and enhanced local and state autonomy for the environment is that elections are an arena in which voters can actually rate an officeholder's action or inaction on environmental issues. The more our leaders are held accountable for measurable environmental results, the more the environment wins, and the more our country wins.

(Whereupon, the panel was concluded.)