THE LOGJAM: ARE OUR ENVIRONMENTAL LAWS FAILING US OR ARE WE FAILING THEM?

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Thank you for inviting me to speak with you today. Thanks to Dick Stewart, David Schoenbrod, and Katrina Wyman for inviting me to join this excellent conference. I am honored to be here. Indeed, after reading all the terrific and thought-provoking papers, I hope I have something worthwhile to add.

For those of us who have built a career in environmental law, the sense of urgency has never been greater than it is now. Never before have we faced a challenge of the magnitude global warming forces on us. Most of you here are familiar with the science, and with the IPCC's [Intergovernmental Panel on Climate Change's] findings, supported by the National Academy of Sciences and many other countries. The reality of the geophysical feedback loops—melting sea ice reflecting less of the sun's heat back into space, the melting tundra releasing methane and CO_2 [carbon dioxide], and the warming soils and oceans absorbing less CO_2—magnifies the urgency to reduce fossil fuel emissions and deforestation. Our government has known about this crisis for decades, and yet it has stood by and done little to solve it.

A little perspective here. In *1965*, the President's Science Advisory Panel said:

> "Carbon dioxide is being added to the Earth's atmosphere by the burning of coal, oil and natural gas. . . . This will modify the heat balance of the atmosphere to such an extent that marked changes in climate, not controllable through local or even national efforts, could occur."[1]

That was 1965. Yet today—almost 45 years later—we've yet to take the necessary action to combat climate change. While it

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[1] ENVTL. POLLUTION PANEL, PRESIDENT'S SCI. ADVISORY PANEL, RESTORING THE QUALITY OF OUR ENVIRONMENT 9 (1965).

might be tempting to find the "one big problem," failure on global warming is only the most salient example of what you are calling the logjam. By definition, the logjam is composed not of one problem, but of many. Similarly, there is no one solution—no one silver bullet. We need new policy tools and technologies. We need new legal approaches, but we also need increased effectiveness of existing ones. Breaking the environmental law logjams will require many of the solutions we come up with today, and then some.

To begin, let's look more closely at where we are now.

The Clean Air Act [CAA], when enacted in 1970, established National Ambient Air Quality Standards that were to be met within a decade. The country was still far from compliant as the deadline approached, so Congress extended deadlines in the 1977 amendments. Congress again extended deadlines in 1990. Today, many areas of the country are still out of compliance and will remain so for years to come. At the same time, pollution continues to rise, not fall. In 2007, for example, pollution from power plants actually rose more than it has in over a decade.

In the 1972 Clean Water Act [CWA], Congress established a goal of zero discharge by 1985. The discharge permitting program was meant as an interim program for most sources. Congress also aimed for our waters to be fishable and swimmable by 1983. Yet today, the zero discharge goal has long been forgotten. Fewer than one-half of our waters have even been assessed. Of those, only about half meet their designated uses. And for most of those the designated use is something less than fishable and swimable.

In the Toxic Substances Control Act, Congress intended to prevent the introduction of unreasonably dangerous chemicals into the marketplace. Today, 32 years later, there are an estimated 87,000 chemicals in use. Only 1,300 have been tested as carcinogens, to say little of their other environmental health impacts.

The situation is the same with other statutes. The cleanups intended by Superfund were delayed by decades and are still far from complete. The informed, careful, environmentally aware decision-making by all federal agencies intended by NEPA [the National Environmental Policy Act] is at very best only a partial reality. Despite more than 30 years of the Endangered Species Act, almost 1,000 species remain endangered with more threatened and extinct. Only sixteen endangered species have recovered to the extent that they have been taken off the list.

This is not, of course, to say all is bad. Indeed, we've made good progress, especially considering the growth of the American economy. Sulfur dioxide emissions are down; most sewage is treated; cars emit a tiny fraction of what they used to; billions of pounds of toxic water pollutants are removed from industrial waste water; most companies since CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act] was passed are very careful not to dump toxics whenever convenient; PCBs [polychlorinated biphenyls] have been banned; and lead is out of gasoline. Many wild species have *not* been lost and are recovering. Things are much better than they would have been without these statutes.

But still, how can a country of such wealth, armed with sound science and strong laws, have failed to reach the goals we set for ourselves? And to have failed by such a large margin? After all, we're not speaking of ending poverty or hatred or violence; simply fulfilling the mandates of existing laws should be easy. We have plenty of available technology and, frankly, more than enough money.

The question of why environmental laws have not worked as intended is indeed worthy of our attention. And while it may be tempting to say that our environmental laws have failed us, maybe the truth is that *we* have failed *them*. Perhaps, the laws themselves *could* work, if we actually followed them. Let me offer a few observations.

First, we're not now really enforcing the laws. To break the logjam, we should begin by dramatically stepping up enforcement of the laws we already have on the books. Enforcement truly does work, and it has a ripple effect. Yet federal, state, and local enforcement budgets are often among the first to be cut. Other scholars can give you all the statistics on enforcement—the number of inspectors, violations, court cases, and the like—but the best evidence of this under-enforcement is that we have not yet accomplished the clear goals of the law.

The law is clear, for example, about raw sewer discharges: they should not occur. But thousands of municipalities across the country have sewer systems that, at least at times, discharge raw sewage. There is little enforcement in part because the fix is expensive. Yet if there were real enforcement, the cities and states would demand more assistance, while the public would know more about the problem and would be more likely to support funding the

fix. In the process, above-board costs would replace the hidden costs of sickness, lost recreation, or quality of life. This would not happen overnight, but it would happen.

The benefits of enforcement of the Clean Air Act New Source Review program [NSR] are perhaps even clearer. I think we can all agree it would be good to reduce the number of these premature deaths by 10,000–20,000, and to reduce health care costs for thousands of hospital visits ever year. NSR would accomplish this goal. Yet our society lets those power plants knowingly continue a course of harmful pollution.

And when the states and the federal government finally started enforcing the NSR program more seriously, industry responded by claiming it was an unfair, mid-stream course change. Non-enforcement had become so much the norm that polluters appeared to consider it a vested right. They even persuaded the media and the new President to take seriously the notion that aggressive law enforcement is unfair. This is a sad state of affairs. Every lawyer, whomever they represent, should support compliance with the laws we have.

Second, when there finally is enforcement, the penalties should be much higher. Right now, there is no economic incentive to comply because, if a polluter is caught, the penalties are almost always less than the money the polluter saved by delaying the cleanup. The playing field therefore is far from level. The good companies that comply—the vast majority in most areas, fortunately—must compete against those who violate the law and have lower costs as a result. That's not fair to those who follow the law.

Take the example of a case NRDC [the Natural Resource Defense Council] recently settled. After a battle that lasted nearly a decade, NRDC, in conjunction with the EPA [U.S. Environmental Protection Agency] and other states and environmental organizations, reached a deal over American Electric Power's [AEP] violations of the Clean Air Act's NSR Requirements. In the settlement, AEP agreed to install almost $4.5 billion of pollution controls that should have been installed a decade ago, to pay $15 million dollars in civil penalties, and to pay $60 million dollars in environmental mitigation projects. $75 million sounds like a lot. However, in the same year, AEP's revenues exceeded $13 billion. That's nearly 200 times the penalties and projects. More important however, AEP's violations allowed it to delay the installation of

$4.5 billion of controls for a decade. That delay was worth hundreds of millions of dollars to AEP. Indeed, the penalty of $15 million is less than the time-value of that $4.5 billion for *four weeks*.

Given this, the current situation makes it almost economically irrational to comply with the law. Say a company is polluting—and polluting a lot. It's getting free, or below cost, waste disposal by dumping it for free in our lungs, streams, or soil. Chances are, it won't get caught and if it does, the penalty is unlikely to be as much as it has saved despite penalty policies that demand recouping the benefit. Recall that the Clean Air Act requires EPA to get penalties that at least exceed the economic benefit of delay. This would eliminate the incentive for polluters to delay compliance—a delay they have gotten good at. Between intimidating would-be enforcers and drawing out the process as long as possible, polluters are able to save more than the penalties ever recoup. Never mind the fact that, in the meantime, people get sick and die from breathing dirty air. As we know from other areas of law and life, *deterrence works*.

Let me be clear, by the way, that in saying this I'm not criticizing EPA or those who settled the AEP case. I worked on that case and others like it. Enforcers make these deals because they have so many other cases to handle and they know that judges, despite the law, are not comfortable imposing penalties of the necessary magnitude. This problem can't be fixed in one case.

Perhaps we need to conduct a study that demonstrates that penalties, discounted by the risk of actually getting caught, do not come close to recovering the benefit of non-compliance. With that study should come a strong call for much higher penalties. That would start to create financial incentive for, not against, compliance. It would shift the advantage to those who *do* comply. And it would create a real "market-based" approach to environmental law—one of this conference's principles and one I fully support.

Third, we need to recognize the reality of what it takes to write a permit. There really is no question that environmental law needs many site-specific permits in order to translate societal goals—such as clean air and water standards—into facility-specific limits. Facilities need to know what they need to do. Sure, in some areas, one can set regional limits and allow trading within that region, but that doesn't work that well for toxics and in other

circumstances. So we need permits.

Unfortunately, permit writers are now overwhelmed. Whereas in the 1970s, water permits were issued relatively quickly, now permit hearings can drag on for months or more. Polluters are able to demand a level of precision that governments either cannot provide or, if they do provide it, takes huge expenditures of time and money. Rather than allowing permits to be set at protective levels when the data are uncertain, regulated entities are able to insist on extensive risk analysis that over-taxes available resources. This has caused a widespread and profound chilling effect on permit writers. Challenges to pollution limits have been so time-consuming and expensive for governments that they have learned to err in favor of the polluter in the hopes of avoiding fights. Permit administrators have said to me that when there is doubt as to the amount of stress a system can take—pollution in a stream, grazing or timbering on land, or the like—the default must be to allow as much pollution as doubt allows. That gets the permits out faster. Thus, if it is uncertain whether a stream can assimilate 2 or 5 ppm [parts per million] of a pollutant, the government must allow more pollution. And, to avoid litigation, that's just what permit and standard writers do—they give in early. This is bad policy, but not a necessary policy. To solve it, we need openly to discuss and change the administrative paradigm. We need to change the burden of proof when it comes to pollution and environmental harm.

Similarly, polluters have so intimidated those who set effluent or emission standards, that now there is effectively a right to pollute. This is backwards. There is no doubt a certain right to conduct one's affairs as desired, but no right to pollute. There may be a long-standing American concern about government action, but historically that does not apply with respect to pollution or environmental harm. With the colonists fleeing arbitrary royal action came strict regulation of the commons to prevent over-grazing. The history of the common law indicates no presumption of a right to harm others. Thus, the default in cases of uncertainty should be towards less, not more, pollution.

I suggest that changing our implementation paradigm to one that defaults to or prefers public health over private pollution is not only good policy, but is exactly what Congress intended. In most statutes, Congress has indicated the position to which we should default. Congress wants us to have a bias towards protection. Yet

in reality we don't. The Clean Air Act talks about setting healthy levels with "margins of safety." The Clean Water Act has different systems overlaying each other to ensure full protection. CERCLA is a remedial statute to be read broadly. In all three instances, Congress wanted agencies and courts to follow the axiom of "better safe than sorry" when it came to pollution. The environmental law community needs to speak clearly to change this presumption, change the default, and change the burden of proof in setting and enforcing pollution limits. We need to acknowledge that in this complicated world, the public health needs a legal edge. This would be in keeping with Congress's intent.

Let me address for a moment one of the key logjam principles: more reliance on "market-based" mechanisms. I'm all for them—when they make sense and if they're done right. But we must be wary, because often advocating for "market-based" systems is code for scrapping what is derogatorily called "command and control." And then, virtually everything we have today is thrown onto the pile of "command and control." That rhetoric, while common on the Wall Street Journal editorial pages, is very misleading, and should not infect serious discussions like the one we are having here today. Clean Water Act effluent guidelines or permits, for example, do not say what technology to use, but only what performance will be demanded. The level is set assuming, if you will, the worst case—that the industry will not change its production technologies. But any smart company is free to reduce pollution earlier in the process and in cheaper, smarter ways. In most cases where EPA tried to assume sensible, cost-effective upstream process changes in settling effluent guidelines, it was thwarted. The Clean Water Act is performance based; it does not "command" expensive end-of-pipe controls. Rather, that is how industry responded to performance standards. They have chosen end-of-pipe approaches, *not* cheaper upstream changes. Michael Porter, among others, has written extensively about this. The Clean Air Act is the same. By contrast, the places where the law does tell a facility exactly what to do—for example, stage I or II controls at gas stations or the UST program—that clear command is, in fact, the cheapest, easiest, and most administratively realistic approach. So let's look for new tools, but not throw out what we have in a fit of rhetorical glee.

Now, "market-based" is often another term for cap-and-trade,

but more broadly it also means using money—the currency of the market—as a policy tool. Put a price on pollution. NRDC is now working very hard to get a carbon cap through Congress and we've been very active with the Regional Greenhouse Gas Initiative in the Northeast and the Global Warming Solutions Act in California—both of which will create CO_2 markets under mandatory caps. We're also strong supporters of congestion pricing.

But there are important nuances. While putting a price on pollution is key, the question of who gets the money and what is done with it is also very important. In my opinion, making the polluters pay for pollution allowances, rather than giving allowances for free to polluters, is a much better approach. The 1990 CAA's acid rain program was a great innovation but gave allowances to polluters for free. We've now seen the problems with this approach and we shouldn't repeat it. Also, allowing companies to choose how much to clean up, and how much to pay, may work for pollutants like CO_2, which mix in the atmosphere, but does not work well for toxics like mercury. That was part of the reason states challenged EPA's effort to replace facility-specific limits for toxics from power plants with a cap-and-trade system. Fortunately, we won. So, while we should take advantage of market-based opportunities, we should consider all the details. Any old "cap-and-trade" may not be the best policy.

But there is a more fundamental problem with so-called "market-based" approaches that indicate it is not a panacea. Price alone cannot and does not capture all the factors that go into a decision. The consulting company McKinsey recently did a path-breaking study of 250 different greenhouse gas abatement technologies. They found that many opportunities were available at a negative cost—that is, they were available at a cost savings. Such savings make for favorable opportunities to advance efficient technology in the near future. But what the study also showed is that there are many non-price barriers to environmentally preferable behavior. So jacking up the price, while it will help and should be done, isn't always enough. That's why NRDC is pushing complementary policies such as efficiency standards and innovation support, as well as a declining cap on carbon, to curb global warming.

Adding to the difficulty of market-based approaches is the resistance to programs beyond regional caps and free allowances.

Pollution taxes are politically difficult, for example. And many polluters are fighting any program to sell allowances. Consider the natural resource damages [NRD] program of CERCLA and the CWA. They work like we tell our kids—make a mess, clean it up and pay for what you broke. Supporters of market-based approaches should support this. But polluters hate it. They litigate individual cases endlessly and also oppose efforts to streamline the process. NRD programs are woefully underfunded. But it is truly market-based. So I'm wary of a bait and switch here—rushing toward a new mechanism simply as a way to get rid of what we now have, and then only to see the new mechanism grind to a halt. NRD, cap-and-trade, and other market-based solutions are terrific, but they are only part of the answer, and we must pay attention to the details.

Back to solutions. Fourth, we need to look increasingly to state action. States already do the vast bulk of the enforcement. When it comes to pollution limits, efficiency standards, and water policy, states have been the agents of innovation. Historically, this makes sense. Although we may have come to think of environmental protection as a federal responsibility, our first environmental laws were local ordinances regulating smoke, sewage, garbage, or animal waste. For many reasons, state and local governments make ideal plaintiffs and regulators. They are close to the victims of pollution. And they are closer still to the polluters, allowing them to negotiate more finely tuned agreements. They are more agile than federal government, and able to move more quickly.

But state action is neither alone sufficient, nor is it immune from attack. I worked in city government for nine years and state government for eight years. And so I'm a fan of state action. But I've also seen first hand that states are susceptible to all the challenges of other levels of government, such as bureaucracy, inertia, and politics. To adequately protect our health and environment, the question is not federal *or* state action; the solution is both federal *and* state action. We need a federal floor to prevent a race to the bottom, we need to keep local politics from ruling, and we need to guard against potential state ineptitude. We need federal science. We need consistency for interstate pollution. But we also need state initiatives, state on-the-ground investigation, and state innovation.

Unfortunately, now that states have become more active, the

real push by polluters is to preempt the states from acting, despite rhetorical support of state action. We see this in air, water, and toxic pollution. Of course, the most egregious, and disastrous, recent example is EPA Administrator Johnson's denial of the waiver for California's program to reduce greenhouse gas pollution from vehicles, which New York and a number of other states have followed. The U.S. Supreme Court has also far too often upheld preemption claims. It did not even mention the long-standing presumption against preemption in its last three cases. I would call on all here, consistent with one of your logjam principles, to do your every effort to oppose this push for preemption of state action.

Fifth, and finally, we need a lot more environmental information to begin to address the lack of public understanding of environmental harms. Others have called for this, such as Brad Karkkainen in his symposium paper. But it's not just the quantity but also the quality of the information. We need public information not only on pollution quantities but also on the full range of effects—health, environmental, cultural. It cannot just be about costs associated, and not just incomprehensible data, but must provide information to help inform the public.

This seems obvious, but it isn't. For example, at one meeting I was shocked to find the head of a state water agency opposing an effort to provide the public with more information on sewage overflows. His argument was that he didn't want to scare the public, and that the public wasn't sophisticated enough to understand the information. About swimming in sewage? If there is a concern about the reaction, the answer is to provide the public with more, or better, information, not less. We should have more respect for the public.

Similarly, we need to make the information available. The internet is a truly terrific opportunity for this. Environmental information should all be up on the web so anyone can find out about the permit (or lack of a permit) for the factory or whatever is down the street from one of their kids' schools. Again, in one EPA negotiated undertaking I was involved with, we were discussing electronic filing of permit applications, permits, and monitoring data. Many dischargers were first supportive—after all, it would save them time and money. But once they realized that if electronically filed it would be easily accessible, they changed their minds. They knew that publicly available information leads to

more awareness, more attention, and perhaps more enforcement. They were not sure that was good. But it also leads to cleaner air and water, and so we should be sure that better availability of information leads to higher environmental quality and we should press for all environmental information to be fully accessible on the web.

I acknowledge that data about the environment and our health can be very complicated. And, sadly, that public understanding of diffuse, indirect, or long-term impacts of these issues is minimal and the understanding of science is woeful. Many environmental harms are not direct: carcinogens kill over decades; endocrine disruptors maim over generations; air pollution from Midwest power plants kills thousands of people from respiratory disease and acidifies lakes a thousand miles away; CFCs [chlorofluorocarbons] released in Washington contribute to the Antarctic ozone hole. These complications, unfortunately, have given polluters the chance to even further confuse the public. Many polluters have intentionally obfuscated the science to create doubt where there really should be none, for example as to the toxicity of many pesticides, PCBs, or mercury. For years, the poster child for this industry disinformation campaign was the tobacco industry's claim about cancer. Today we see that the oil and coal industry's deliberate deceptions on climate change are even more egregious and even more damaging.

I noted earlier that in 1965 climate change science was strong. Twenty-five years later, in 1990, in what was the first case on climate change, the D.C. Circuit stated, "[n]o one, including [the federal government], appears to dispute the serious and imminent threat to our environment posed by a continuation of global warming," and that "[n]o one disputes the causal link between carbon dioxide and global warming."[2] And yet in 2006, in the EPA's briefs to the Supreme Court in *Massachusetts vs. EPA*, the Justice Department argued that the science of climate change is uncertain. What happened? The answer is a decade plus long campaign of disinformation by the coal and oil industries. I'm sure I need not tell you about the millions of dollars ExxonMobil and others have given to outspoken climate skeptics, or the carefully organized campaign to turn natural scientific uncertainty regarding

[2] City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478, 495 (D.C. Cir. 1990).

details into fundamental doubt regarding major trends. We've all seen it and, sadly, are still seeing it. Because we've lost almost twenty years to disinformation, the job of combating climate change will now be harder and the cost higher.

The antidote to this disinformation is to provide more information to the public. But again, the details matter. It must be easily available, address impacts, and be of a higher quality. And we need to actively push back disinformation campaigns. All of us who believe in environmental law and care for its integrity should not tolerate the deliberate distortions of environmental science. We cannot sit quietly aside.

These five steps are a few modest suggestions. I think they would help. But we should ask whether there is something deeper and more profound going on here. Don Elliott points out in his symposium paper that good policy gets lost to politics. Why is that? There are good people out there. Why are their good instincts and rational abilities swept away? One possible answer comes to mind: Could it be that we've given too much power in the legal system to polluters, rather than the victims of pollution?

The reality is that in our industrial world, most pollution comes from large industrial corporations—power plants, auto manufacturers, chemical makers, and industrial meat factories. Five U.S. companies are responsible for about 2% of the entire planet's CO_2 emissions. I've got nothing against corporations or industry in general; companies drive our economy, produce goods we want, provide us with jobs. I believe that limited liability is an important part of entrepreneurship, and should be protected. But that said, should polluters have a larger role in our political process than do individual citizens?

In part, this query is based on a simple observation: corporations and individuals are very different. Corporations, for instance, don't die. Corporations don't breathe dirty air, they don't have children. You can't put them in jail. They don't live in a community. Sure, corporate employees are people the same as the rest of us, but corporations—as legally separate entities—are not. They don't make decisions the same way individuals do. Though they care about their pocketbooks, individuals care about other things as well—things like morality, religion, community, pride, and health that often aren't economically rational. This could not be more different than corporations, which tend to focus on just economics and, as many economists note, on short-term economics

at that. Indeed, some people argue that corporate leaders have a fiduciary duty to focus only on the maximization of shareholder economic value and that they violate that duty to consider any of the other values that individuals think about. Not all companies are so narrowly minded. In fact, many have become leaders in sustainable efforts. But history nonetheless suggests there really is a difference between the economic decisions of many large polluters and the civic decisions of many pollution victims. Despite this obvious difference, many polluters have a larger role in politics and policy because of their money. Money to buy ads, money to influence campaigns. I'm not the first to wonder about the role of polluter money in politics, but the unresolved logjam gives us another reason to think hard about solutions.

Make no mistake—polluters have a lot of money. We've all surely heard about ExxonMobil's funding of anti-environmental think tanks, purported public interest groups opposing environmental safeguards, and environmental lobbyists. Another example: Americans for Balanced Energy Choices, or ABEC, a lobbying organization of coal companies. Their expenditures are staggering. It's reported that in 2006 and 2007, they spent more than $77 million. In the same time, as the Senate was, and is, considering climate legislation, ABEC and its member companies employed 202 lobbyists from more than 50 firms. This is only one lobbying group. There are many others. In total, it's estimated that the influence industry in Washington spends around $6 billion a year. In the past eight years, this money has bought them access, and influence, in Washington's highest political circles. As Ross Gelbspan has noted, "the White House has become the East Coast branch office of ExxonMobil and Peabody coal . . . [and] . . . climate change has become the preeminent case study of the contamination of our political system by money."[3]

Consider a recent rebuke to the EPA by the D.C. Circuit Court. In their ruling, the court concluded that the EPA's "Clean Air Mercury Rule" violated basic language of the Clean Air Act by avoiding mandatory cuts in toxic mercury pollution from coal- and oil-fired power plants. Given what we know about the toxic effects of mercury, the EPA's rule was cause enough for outrage. But it was also discovered that the language of the rule, drafted in 2004,

[3] Ross Gelbspan, *Two Paths for the Planet*, 18 THE AMERICAN PROSPECT 45, 46 (2007).

was taken verbatim from industry attorneys closely tied to EPA's management. This practice has, sadly, become commonplace. But in this instance the court mocked EPA, saying their "explanation deploy[ed] the logic of the Queen of Hearts."[4] In another instance, the court said EPA's rationale only made sense in a "Humpty Dumpty world."[5] This is what happens when polluters are permitted to exert excessive influence on the political process. Money doesn't buy better policy. Most often, it yields bad policy. And it yields a political system averse to the kind of transformative change we need. To quote Gus Speth, Washington "has been captured by the very corporations and concentration of wealth it should be seeking to regulate and revamp, a pattern that has now reached alarming proportions."

Every now and then, some environmental crisis catches the public attention, and the interests of the many, of the public, briefly trump the money of the polluters. The Clean Water Act was passed after the Cuyahoga River caught fire, Superfund after Love Canal, the Oil Pollution Act after Exxon-Valdez, a CAFE [Corporate Average Fuel Economy] standard increase during the second Iraq war and oil at $80 per barrel. But then the crisis passes and the good law falls victim to the money and influence of polluters. The laws aren't enforced or implemented aggressively. That's not the fault of the laws themselves—they represent our brief virtuous moments. It's in the time between that we get ourselves into trouble. We would do well to remember the crisis and simply enforce the law.

And when we are considering new laws, perhaps we can put in place mechanisms to ensure that the voices of pollution victims are truly heard. Perhaps we can require that important environmental studies issued by the Congressional Research Service, the National Academy of Sciences, and other universally-acclaimed research bodies be given sponsored airtime during political debates or during key broadcast times or on popular cable networks. Perhaps we can mandate greater disclosure of polluter influence in our national discourse in much the same way we have recently improved disclosure regarding federal campaign contributions and federal lobbying. We should also consider improving the vetting of polluter-sponsored claims—perhaps by

[4] New Jersey v. EPA, 517 F.3d 574, 579–82 (D.C. Cir. 2008).

[5] New York v. EPA, 443 F.3d 880, 887 (D.C. Cir. 2006).

charging a federal scientific panel to analyze any such claims for veracity, accuracy, and completeness. Precisely how we better give voice to the pollution victim is not yet clear to me—I believe there is much room for policy innovation here—but we surely can agree that we need to address this pressing issue with new solutions.

We need a better law-making process, as well as a better enforcement process, because we need new laws too. We are working hard at NRDC to put new laws in place. One example among many: we need an aggressive, declining federal cap on carbon emissions and stronger federal efficiency standards. We also need to re-think and dramatically enhance federal government support of clean energy technologies—in part through a federal renewable portfolio standard—so that we can scale up those technologies to be commercially competitive in a very short timeframe. And we may now be in a crisis moment to make it happen. You saw a couple of days ago that a chunk of ice seven times larger than Manhattan broke off from Antarctica and another piece the size of Connecticut is held on by only a thin band of ice. Maybe Katrina, the southeastern droughts, southwestern wildfires, and starving polar bears together will create an atmosphere where we can overcome polluter money. But then what? If the past is any guide, after the crisis, and after good laws are passed, the laws get implemented poorly. Perhaps *that* is the real logjam.

To be clear, corporations themselves aren't the problem. At NRDC, we're working with a number of corporations, some of which are doing terrific work. We believe that cooperative work with corporations must be a part of the solution. We worked side-by-side with the Texas Pacific Group and other private equity firms behind the $44 billion buyout of TXU. We stood side-by-side in Washington with the CEOs of GE, Alcoa, DuPont, PG&E, and others to launch the U.S. Climate Action Partnership. And we created the Center for Market Innovation at NRDC to continue our engagement with businesses to transform the marketplace to reward environmentally preferable business practices. All of these are significant steps. All of these are worth our effort. But the kind of vast economic power that has concentrated in the hands of the largest polluters, who are often far removed from the victims of pollution, is a subject environmental law scholars should address.

I began today by reminding you of the sense of urgency we, as environmental lawyers, feel today. We agree that we are not

making the sort of progress we need to, and that there is a logjam worthy of our attention. However, I've tried to argue that there is not one, large theoretical logjam—such as the laws being no good—but that there are many, specific problems of implementation compounded by the corrupting and disproportionate influence of polluters. To address these problems, we need major change—change on a scale that can often seem daunting. But I remind you that the stakes could not be higher.

The changed climate is bringing heat waves, more flooding and more droughts. Right here in New York, our lives are threatened by more severe storms, more heat waves, and spreading infectious diseases. All present a clear threat to our economy, our ecology, and our culture. I took the subway to work, as I'm sure many of you did as well. It will be flooded far more often with only a slight rise in the sea level and bigger storms. So will our sewers. We're not talking about generations into the future, either. We're talking about ourselves and our children.

At this moment of crisis, as we face the prospect of immediate harm to our world's ecosystem, we also need to face the fact that our environmental laws have not failed us, but that we have failed our environmental laws. As we consider how to move forward, I would suggest we need a reevaluation of polluters' status and influence, a recalibration of the pollution victims' voice in our national discourse, and a new paradigm of enforcement and implementation. In this new paradigm, we need to enforce the full mandates of existing environmental laws. After all, they are not bad laws. We need more enforcers, more information, and more environmentally protective presumptions. If we continue to breathe bad air, and swim in contaminated waters, or suffer the impacts of global warming, the fault is ours. We need to accept this responsibility, and then we need to live up to it. This step alone would be transformative.

Thank you.