7. When the polluter is Government

One of the biggest polluters in Virginia is not a hog producer, a shipyard, or a utility. It's government–the same authority that's supposed to protect the environment.

—Ledyard King and Scott Harper
The Virginian-Pilot*, 3 July 2000*

Federal and state environmental laws in a number of fields have established the general principle that, where practicable, the polluter should pay. This is not only a fair notion, holding people responsible for their actions, it's also an intelligent one. When people pay to clean up their own messes, they have an incentive not to create them in the first place.

And what happens when the responsible party is not a person, or a private citizen, but another branch of government, such as a federal agency or another local or state government? Well then, it should pay. This is its clear obligation and duty. Even so, many practical problems arise when the party responsible for a particular environmental mess is not a particular private interest, but some governmental sovereignty. And if companies and citizens would like to avoid having to pay for clean-up, so would many government officials.

In Virginia, it seemed we had more than our share of periodic conflicts with other units of government. There were two cases in particular, though, that brought home to me the difficulty of holding governments accountable for their role in pollution. One involved a large private company–but one that had done much of its polluting while making things for the government. The other involved a federal prison operating in Virginia. Both cases taught

me that holding government responsible is not only difficult–it's important to do.

The first of these cases came to my attention in 1994, when the Attorney General's staff requested a meeting with me. My deputy, Tom Hopkins, joined the meeting, as did Harry Kelso, the new enforcement director of the Department of Environmental Quality. We listened as the attorneys laid out an offer to settle a long-running legal battle that had tied up Virginia, the federal government, and several private companies for years. From the way the attorneys explained it, settlement sounded attractive.

In October of 1989, Avtex, a rayon manufacturer with operations in Front Royal, Virginia, had shut down its plant and, by the following February, filed for bankruptcy. The problem from our perspective was that the firm still owed the state millions of dollars in environmental fines. Since then, Virginia and other creditors had been slugging it out over the only valuable thing it had left: several thousand platinum jets used in the manufacturing process. Because the company's owner also left behind a huge environmental liability, Virginia taxpayers were being soaked for substantial clean-up costs and incurring the obligation for future site maintenance.

The idea of putting such a complex and enervating conflict to bed certainly had its appeal. But as the lawyers talked on about the complexities of the case and the desirability of limiting the damage to the state that might follow extended litigation, I kept waiting for them to tell me who was going to clean up the site and when. And the lawyers, for their part, never seemed to get to that point.

In truth, the case was even more tangled and troublesome, than the lawyers conceded in making their case to "get the thing settled." The federal government declared Avtex a Superfund waste site in 1986. In this case, that meant, under the federal Superfund law, Virginia must pay 10 percent of the initial clean-up expenses, and then potentially 100 percent of ongoing maintenance and monitoring costs–customarily a 30-year obligation to ensure that the clean-up goals are reached. The sums could be

astronomical. The abandoned Avtex site sat on 440 acres, half of which was covered by 30-foot lagoons filled with chemical sludge. Miles of underground pipe contained calcified waste–including residual carbon disulfide. The building, twice the size of the Pentagon, was a labyrinth of rusting steel, corroded vats, and asbestos lining. Already 4,500 tons of scrap metal, 2,000 tons of chemicals, 8,000 tons of contaminated soil, 2 million gallons of liquid chemicals and contaminated water, and 5,000 drums of toxic material had been either removed or neutralized…and the surface was barely scratched.

Virginia's share of the clean-up and maintenance bill could have topped $100 million.

One thing the lawyers said caught my interest. Avtex, they said had been a government contractor. For many years the company (under the name American Viscose Corporation) manufactured a rubber synthetic for the war production board during World War II. Later the firm made carbonized rayon used in missiles and rockets for several federal agencies. I knew Superfund operated on the principle of "polluter pays"–that taxpayers foot the bill for the clean-up only when the culprit is unknown or unable to pay. I was beginning to wonder if the federal government could in some way be responsible. "Polluter pays" is an important concept that I did not feel we should surrender. No one could answer my questions. *Someone knows who the responsible parties are here*, I thought; and until one of those people was me, I wasn't signing off on any deals.

"Wait a minute," I said to the AG's lawyers. "Virginia is not a polluter here, so why are we on the hook for clean-up costs?"

The attorney general's staff didn't have a good answer for me, and I wanted to find out what was going on.

After the meeting, I asked Kelso to step into my office. "What do you think of this?" I asked him, restating my own concern. "What kind of liability are we exposing Virginia taxpayers to?"

Kelso agreed that something was amiss in the case as it was presented. What he reported back was interesting indeed.

"There is a provision in Superfund by which the Commonwealth can get all its money back," he told me, "and most likely insulate itself from ever getting dinged again in the future." It would require smoking out the responsible parties, and that could be time-consuming. But Kelso had been trained in the Justice Department as Counsel to the Assistant U.S. Attorney General for the Environment and Natural Resources Division, and had served as an environmental enforcement and defense litigator. There he had learned how to turn over every rock hunting for information and evidence. Remembering I had asked for his advice, Kelso gave it to me straight.

"Secretary Dunlop, we ought to think very seriously about suing to recover all our clean-up costs," he advised, "and to put ourselves in a position where we're [Virginians are] not going to be stuck with 10 percent of the costs and potentially 30 years of clean-up operations and maintenance."

"All right," I said. "Let's poke around and see what we find." Mindful it could be a dry hole, I added, "And if we find nothing, then we'll close the door."

Reading Avtex case law, Kelso learned that FMC Corporation–the Chicago-based chemical company and defense contractor that owned the production facility from 1963 to 1976–had sued the federal government to help share the costs. The feds had settled the case, agreeing to reimburse FMC for 35 percent of its clean-up costs. Kelso knew that meant FMC had evidence the feds were somehow culpable. So he papered official Washington with Freedom of Information Act requests, which he filed with the Departments of Justice, Commerce, and Defense, the National Archives, the Navy, the Army, and–a source no one else had thought of–the Reagan Library.

Kelso also learned that FMC had sued its insurance carriers to recover the losses it sustained in clean-up costs and knew the company could be reimbursed only if the damage was deemed

sudden and accidental. Kelso checked the verdict; FMC's insurers had not been ordered to pay. That meant the insurers had been able to show FMC was also complicit, Kelso calculated. So FMC was a liable party, and FMC must have had the goods on the feds meaning some part of the federal government was a responsible party also.

"If I can build a paper trail," Kelso told me, briefing me on his progress, "then I can checkmate the feds and FMC and force them to pay Virginia back and insulate us from gargantuan liability if things go wrong [at the site]." I gave him my full support.

For the next few months Kelso worked diligently, quietly fitting together the pieces. Eventually he found a smoking gun. It was a series of memoranda written by the Air Force, buried in the closed-case files Kelso had obtained from the Justice Department. Shuffling through them, incredulous at what he was reading, Kelso knew the case was won. It would take another year to make the facts presentable, but ultimately, Virginia would prevail.

Documents in hand, Kelso walked over to show me the winning ticket. In my outer office, he found Deputy Secretary Tom Hopkins waiting. I was on the phone. Kelso showed him the memoranda and Hopkins, an experienced environmental lawyer himself, understood its implications instantly.

The Defense Department, the Air Force, the Commerce Department and particularly NASA all were culpable in the Avtex mess. They had helped sponsor this environmental liability, and– which I found both disappointing and shocking–*they had known what they were doing when they did it and declined to accept responsibility and help pay for clean-up of the site.*

Hopkins finished reading and looked up, wide-eyed. I was off the phone. "Let's go talk to her," Hopkins said, and listened as Kelso told me this amazing tale that he had pieced together from the documents he had uncovered.

Since its opening in 1940, Avtex was an economic linchpin of Front Royal, Virginia, a small community 90 miles west of Washington, D.C. At its peak, the manufacturing plant employed 3,000 people. But on October 31, 1988, John Gregg, who had bought the company from FMC and renamed the facility "Avtex Fibers Corporation," announced the plant would close on November 18. Gregg said he no longer could afford the dual drains of international competition and environmental regulation.

NASA officials went into orbit when they heard the news, because Avtex was the sole supplier of the rayon used in the space shuttle. If the plant closed, they would have to shut down the program for two years–at a cost of $485 million–until a new supplier could be cultivated.

Immediately, government officials discussed with Avtex what it would take to keep the plant afloat. Auditors estimated that $38 million was required to re-start operations. In addition, they recommended another $5 million for a contingency fund. NASA said it would advance the company $18 million immediately if the Department of Defense would agree to pay the remaining $20 million.

On November 7, 1988, Roger Dekok of the National Security Council (NSC) sent a memo to National Security Advisor Colin Powell, advising him of the situation. Internal National Security Council documents record that "NASA and DOD are still evaluating the effect of last week's closure of the AVTEX Fiber Inc. plant," Dekok wrote. "AVTEX was the single manufacturer of a rayon fiber that is in rocket nozzles and other parts of the space shuttle and missiles. NASA's preliminary reading is that their supply of the product will run out in May 1989."

The National Security Council approved the bailout.

Two days later, NASA advanced Avtex $7 million to fund its short-term operation, along with $70,000 to meet payroll. The government was pushing a rayon production in a plant it knew to be a serious environmental problem for the Commonwealth of Virginia.

On November 29, 1988, there was a staff-level meeting of the NSC in the Old Executive Office Building on the White House grounds. A broad host of agencies were represented, including the Air Force, the Defense Department, NASA, the State Department, the Departments of Commerce, Transportation, and Justice, the Office of Management and Budget, the Federal Emergency Management Agency and the Environmental Protection Agency.

Jim Miskel of Powell's staff opened the meeting by asking for an update on the situation. George Abbey from NASA reported that the factory was about two days away from re-opening and expected to be fully operational again by mid-December. Steve Wassersug of the EPA described the environmental programs affecting Avtex and handed out a matrix showing probable costs for clean-up. He said the EPA was modeling the carbon disulfide emissions, which could prove to be an imminent and substantial danger to the public health and the environment.

"Will any of the money that has gone to Avtex be used to finance clean-up?" asked John Richards of Commerce.

"No," Wassersug told him.

Marcia Mulkey of the EPA said notice letters would be sent out the next week to parties considered potentially responsible for the environmental liability at Avtex. That raised some interesting issues regarding liability, she warned. Because NASA was an investor into Avtex, Mulkey explained, the federal government could be considered a responsible party. Wassersug asked both NASA and the Defense Department to have a chat with their legal staffs. But neither he nor anyone else from EPA is known to have objected to the federal government subsidizing what it knew was a huge environmental liability. Meanwhile, Virginia continued pursuing litigation against Avtex for violating environmental laws, which the company, flush with cash from the feds, blithely refused to obey. In August, 1989, Governor Gerald Baliles wrote to EPA Administrator William Reilly relating the events and the state's persistent problems with the plant. Baliles said he was "appalled" to learn how poorly the EPA had responded to chronic problems and asked that the agency institute an enforcement action against

Avtex and clean up the facility. Finally, on November 9, 1989–citing more than 2,000 pollution violations–the state's Water Control Board decided to revoke one of Avtex's operating permits, effectively shutting down the Front Royal plant.

"You cannot close the plant overnight," Gregg warned Virginia Deputy Attorney General Claire Guthrie. "It is going to be an ecological disaster for someone to try to clean up after viscose [material] sets [in the system]. The other problem obviously is that we have on hand a substantial inventory of heavy chemicals, acids, caustics plus CS2." Once power was shut off, he explained, "we no longer have the ability to do the work necessary to clean these liquids from the Front Royal site." Gregg asked Guthrie for more time. "[I have] instructed our people to shut this plant down unless we get an extension," he told her, "and it essentially means a 'walk-away' because we will not have the ability to do anything in terms of cleaning up."

Guthrie refused to grant his request, and Gregg fired back a petulant response. "The Plant will be down between 5 and 6 p.m. today, November 10, so we will be in compliance with your Order." That evening he closed the doors and left the mess to the care of the Commonwealth.

Because the plant represented an environmental "emergency," Virginia taxpayers and EPA immediately began pouring millions into trying to clean up the mess, while the two principally responsible parties, Avtex Fibers and the U.S. space agency, contributed nothing.

When FMC sued the government in 1991 to make it pay its share, though, government lawyers recognized a problem. Major Richard Sarver of the Air Force's environmental litigation branch assessed the pros and cons of reaching a settlement.

> The clearest reason to accept this offer [is financial prudence]. There is also a potential for adverse publicity attending either a victory or loss on the liability issue…. The theme of any such publicity will be the United States bailing

> out an environmentally unsound company and walking away from the mess after getting what it wanted.
>
> EPA will testify that the Avtex site was 'an abomination' and one of the worst sites ever observed by a very experienced on-site coordinator, Sarver continued. The Virginia witnesses will testify that Avtex was the worst polluter in Virginia during its last year of operations and that this information was conveyed to DOD and NASA. Avtex employees will testify that the plant could not have been reopened but for the infusion of cash from NASA and DOD.

All things considered, Sarver concluded, NASA and DOD benefited greatly from the reopening of the Avtex plant. "Perhaps it is right that we contribute to the clean-up."

Its hand forced, the government had reimbursed FMC thirty-five cents on the dollar. But left Virginia holding the bag.

Kelso had uncovered the answers I was seeking, and now he offered advice. "The people of this state should not have to pay a dime for the catastrophic environmental mess that the United States government caused," Kelso said. I agreed.

At this point, having ascertained the facts, we met with the Governor. Surprising neither of us, Governor Allen agreed that, far from dropping the case, we should press the federal government to correct the injustice. If it did not, Virginia would take the United States to court. I directed Kelso to press ahead.

The first order of business was to brief Virginia's congressional delegation that the state was about to take on the feds. "I am second to none in supporting the military," Kelso told them. "But we can't have the state left holding the bag for a catastrophe the military and NASA knowingly caused and the EPA ignored." Virginia's congressmen agreed.

In September, 1996, Kelso began negotiations with the Justice Department's Environment and Natural Resources Division. After a second meeting at the end of December, Justice

halted discussion. Though they had to understand Kelso had the goods, the government's lawyers decided to ignore him.

So on February 19, 1997, Tom Hopkins, now the Director of DEQ, sent a letter to Attorney General Janet Reno. On behalf of the Commonwealth, he insisted that the federal government should reimburse Virginia for what the state had spent so far on clean-up, pick up its share of future costs, and assume responsibility for any problems the site might cause in the future. Additionally, the Allen Administration wanted the government to pay a civil penalty of nearly $500 million. The feds either could pony up voluntarily, Hopkins said, or face a lawsuit in which the courts would order payment. Their "deliberate concealment" had yielded a situation "nothing short of cataclysmic," he wrote–cataclysmic, of course, for their credibility.

Hopkins was not coy with Reno. He made it clear he had her dead to rights, quoting the excruciatingly incriminating Air Force memos.

To be specific, Hopkins wrote, the chief environmental lawyer for the U.S. Air Force, in a 1991 memo, stated in part:

> First, there is evidence that [the Department of Defense] and NASA did not act responsibly toward the environmental problems at Avtex. There is evidence that DOD and NASA knew of the huge environmental problem facing Avtex and did not take any action to ensure that these problems were solved. There is also evidence that DOD and NASA pushed Avtex for as much production as possible, all the while knowing that an environmental disaster was brewing…. There is evidence that the last year of operation added disproportionately to the cost of clean-up of the site. There are other problems with our case, but the reason for considering these elements in evaluating this settlement is that during the allocation phase of trial the so-called "Gore factors" will be used to determine the shares of liability. Under those factors our share of liability may increase because of what may be perceived as irresponsible conduct in connection with Avtex's last year of operation.

"Other official U.S. documents not only confirm this posture," Hopkins went on, "but amplify on the contractual relationship" between the government and Avtex. Hopkins cited another incriminating memo, which read in part: "Evidence shows that NASA-DOD knew of environmental problems at site and did little or nothing to remedy them; that NASA-DOD pumped money into facility to revive it, and pushed it to produce rayon." The relationships between the government and Avtex, one of the government's own analysts admitted, "were arguably joint venturers." Those federal agencies, in fact, "had the power to make Avtex comply with environmental standards but failed to exercise it." In fact, U.S. officials had "pressured suppliers of Avtex to supply the facility with products which contributed to contamination."

Announcing publicly that Virginia was seeking a settlement from the feds, Allen summarized the situation. "Federal agencies were in a joint venture with the companies operating the rayon factory, knowing full well that by doing so the United States government was condoning an environmental catastrophe in the making," he said. "These operations have polluted our groundwater, contaminated the land, and generally denigrated the environment–and now Virginians are being expected to help pay for its clean-up. That's not right or fair."

Perhaps not wanting to make any concessions in a Virginia election year, and perhaps out of mere stubbornness, Reno refused to budge. Within days, we filed suit in U.S. District Court against the Defense Department, The Air Force and NASA, as well as FMC, claiming the government knew the site was a "serious environment danger, but did nothing about it, citing national security precautions."

In June 1997, Virginia's Deputy Attorney General John Paul Woodley and Assistant Attorney General Stewart Leeth recommended that I accept a settlement offer they had negotiated. "Specifically, the government defendants would collectively pay 35 percent of Virginia's past and future costs at the Avtex site,"

wrote Leeth. “I have reviewed the offer and the applicable law and recommend the settlement.”

I turned it down. Though the attorney general’s office kept encouraging us to take these offers, I thought we should keep pressing. First, we represented the people of Virginia, and it was our duty to get them the best deal possible. This was particularly true as the Superfund law generally holds each responsible party liable for 100 percent of all clean-up costs.

Second, and equally important, it was fair, and it was good policy to make the federal government meet its responsibilities. If we didn’t, I felt, we would just be encouraging more such cases in the future–more pollution, more bailouts, and more secret deals to keep a polluting plant in operation but stiff the states with the bill.

One month later, the lawyers tried to get me to accept another settlement offer. “EPA will reimburse Virginia for the balance of any past costs not recovered by Virginia from the United States Defendants and from FMC under the proposed settlement,” they informed me. Moreover, this offer was accompanied by threats. The EPA’s lawyer advised further that Virginia’s failure to cooperate with EPA would be “viewed by EPA as a breach,” Leeth wrote, of the mutual cooperation covenants found in the State Superfund Contract. If Virginia refused its offer, the agency’s lawyer continued, he would recommend that “the Avtex site would remain a Superfund site well into the future.”

“In light of these developments,” wrote Leeth, “I recommend that Virginia accept the offers made by the defendants and by EPA *as to past costs only* and reserve our right to pursue any and all of the defendants for Virginia’s future costs, if any.”

The timidity of our own attorney general’s staff stunned me. These attorneys were working for Virginia? I notified them that this offer, too, was unacceptable. I was insistent that “*the entire bill* for cleaning up this site and restoring it should be paid by those who caused the problem to occur and/or continue without regard to the people of the Commonwealth.”

I also briefed Governor Allen on the pattern of negotiations between the federal government and my office and the attorney general's. I did not want to proceed without the Governor having the chance to be made familiar with the issues and make his own decision. Perhaps the Governor would feel, with the attorney general's staff, that we should settle the suit.

After reviewing the issues with perspective from all the relevant offices, the Governor decided as I had expected he would– we would only accept a settlement offer in which the federal government agreed to pay the its full contribution to the site clean-up.

If the tables were turned, and Virginia or some private enterprise had the liability, the Governor asked during one conversation, what would the EPA do?

"They would make us pay," I answered. "There wouldn't even be the kind of discussion we're having."

With the Governor standing firm, the feds finally blinked. By October, there was a settlement. Virginia taxpayers would be reimbursed for what they had already spent cleaning up the Avtex site, and the EPA would allocate $33 million to demolish the building remaining. Kelso wanted one more thing: the feds to pay attorney's fees. He demanded they reimburse Virginia for what it had paid the bankruptcy attorney as well as the $10,000 it cost to put the case together. The feds paid.

"We brought this lawsuit to hold accountable those who were responsible for this environmental disaster," announced a satisfied Allen, "and we succeeded." Watching George Allen make that announcement, I was proud of him in a double sense. First, he had just plain hung tough, when the attorney general's office wanted to throw in the towel. Secondly, he had brought in significant funding to help Virginia's environment–and he was punishing the violators.

On November 11, 1997, at 9:50 a.m., the Avtex Fibers plant became history. Eighty pounds of dynamite transformed its 30-story smokestacks into a pile of brick rubble. Completing the clean-up will cost millions but now that the FMC Corporation has major responsibility for the remediation, Front Royal can expect parcels of this site to be restored to economic and community uses in just a few years. And, monitoring will continue for sometime into this century, but that will be the federal government's financial responsibility, not that of Virginia taxpayers.

Thanks to Governor Allen's willingness to demonstrate the importance of the "polluter pays" principle in environmental law, combined with Harry Kelso's masterful detective work, the state's taxpayers were spared from shelling out $100 million into a bottomless bank account with no responsible party and a perpetual Superfund lawyer's goldmine was put on the path of real remediation.

Lorton federal prison in southeastern Fairfax County was a boil on Virginia's backside. When it was built in 1916 to house prisoners for the District of Columbia, it was surrounded by miles and miles of farms. By the summer of 1996, Lorton held more than 6,000 inmates in the state's most populous county. Worse: District officials were utterly inept at maintaining the facility properly. Inmates escaped–once, seven at a time–operated drug rings inside the prison, and, peeved by the inherent limitations of confinement, had even set fire to the place.

But of greatest detriment to most Virginians was the delight the prisoners took in playing a game called "cretins." Simply put, cretins meant trying to flush unflushable items down the toilets, causing sewage-line breaks, overflows, and horrible smells not only throughout the prison, but for miles around the jail.

Lorton's inadequate sewage system had been a problem for nearly a decade. Although the District had agreed to upgrade the prison's treatment plant, and had done so repeatedly, the problem

was getting worse. Since August of 1995, separate overflows of the Lorton sewage system had dumped more than 2 million gallons into nearby creeks. The worst such episode was in April, 1996, when more than 2 million gallons of raw sewage overflowed from a prison manhole into Mills Branch, a feeder into the Occoquan River where Virginians boat, fish, and swim. A DEQ employee photographed the creek–teeming with toilet paper and other debris.

It was especially maddening that the EPA Regional Director and Earth Day maestro Mike McCabe, who was now responsible for overseeing D.C. water pollution performance, had time to antagonize Virginia about DEQ reorganization, undertake the overfiling of the Virginia Smithfield enforcement case, and micromanage other matters, but couldn't keep his own outhouse in order. Had Virginia been dumping raw sewage, especially in an election year, who would doubt that the EPA would be in hot pursuit? Why shouldn't the federal EPA be just as tough on the only prison for which it was responsible?

I wanted the District fined substantially, given its continuous violations even after repeated warnings and consent orders. I generally took a dim view of fines in the case of local governments, but thought differently when the federal government was involved–as it is in the case of almost any policy or dispute involving the District of Columbia, where final authority is an amalgam of home rule and federal oversight.

"The federal government is the nation's biggest polluter," I pointed out. "Do you really want to let the biggest polluter in the country get away with virtually no fine after the almost continuous violations of their consent order?" Even in baseball, you are out after three strikes. The Allen Administration had been faced with a persistent whine from EPA that our "compliance first" actions, as compared to the "fine 'em" first approach favored by EPA, was evidence of our supposed lack of commitment to protecting the environment. In this situation, we had worked to get the prison into compliance and it just was not working. A stiff fine was appropriate and deserved.

The lawyers from the AG's office weren't moved by any of my efforts at collegial, personal persuasion to get the federal government's attention on this serious Lorton problem. Deputy DEQ Director March Bell explained that we intended to take the matter public and it was up to the Attorney General's office to demand a reasonable fine from the District of Columbia. Bell advised that the Secretary would hold a press conference and announce she wanted a new consent order and a fine of $175,000, an amount commensurate with the continued violations. Then the lawyers could explain their position.

So the Attorney General publicly put Washington, D.C., on notice. Dumping sewage into Virginia's waters was "not something I can put up with," he said. "Enough is enough," Gilmore announced at a September 18, 1996 press conference. If his concerns were not addressed within the next 10 days, the Commonwealth would sue.

"These discharges threaten the water quality of Virginia waters, including Mills Branch, Giles Run, the Occoquan River, Belmont Bay, and Occoquan Bay," Gilmore said. "The Potomac River and the Chesapeake Bay are the ultimate targets of this pollution. I intend to do all in my power to protect these resources."

Questioned point-blank about his motives, Gilmore responded with vigorous righteous indignation. "I am not going to stand for the idea that because we are concerned for the public health, that is political," he declared. "I would hope [D.C. officials] would take this matter seriously. I consider it very serious."

I was glad Gilmore was on board. It was the right thing to do. And, having decided against the apparent counsel of the staff attorneys on his payroll, he was smart to do it aggressively and in public. Tom Hopkins represented the DEQ at the press conference making brief remarks in support of the Attorney General's action.

It always seemed to me that the career attorneys at the Attorney General's office preferred to negotiate settlements rather than litigate or take bold action again consistent violators.

Gilmore's announcement also meant our Administration was united in front of the press and in negotiating with D.C. and Administrator McCabe. The ultimate beneficiaries were the people up in Fairfax County who had lived with the Lorton pollution for so long a time.

Four months later, an agreement was reached. The District would pay a $25,000 fine and apply the balance of the $175,000 toward solving the problem and, most importantly, would now abide by all Virginia's environmental regulations, as well as correct the deplorable situation at Lorton.

Lorton would complete all repairs to the treatment facility within the next 18 months, by June 1998.

In addition, Virginia's DEQ could inspect the prison's sewage treatment facility at any time.

The feds would have expected as much of Virginia. I expected no less from them.

A sequel was reported in February 2000. The State Water Control Board filed a court motion to fine the District of Columbia at least $175,000 for alleged sewage violations at the District's prison in Lorton, according to the Associated Press. The District has violated a judge's orders by failing to fix the sewage system, according to Attorney General Mark Earley's office. And, EPA is still "missing in action" from this battlefield, the only one for which it has direct responsibility and authority.

8. The cost and hypocrisy of 0.00000004 less smog

November 27, 1996–it was the day before Thanksgiving; one of the few days in the year when Americans are completely unified in purpose.

Did you remember to pick up the cranberry sauce? Who is picking up Aunt Cora? Come on, get these toys off the living room floor. Have you forgotten company is coming?

For the next four days, the nation's attention would be collectively riveted on parades and footballs and family and food.

It was the perfect time for the EPA to announce onerous new regulations that would cost Americans billions of dollars and produce no measurable gain.

By releasing the information on Wednesday, the EPA ensured that reports about the proposed standards would appear in newspapers on Thanksgiving Day, editions likely to be read by only a few bored police officers, waitresses, and emergency-room workers.

Lamentably, many Americans would miss the news of the EPA's latest antics, which was this: If the agency had its way, by summer the legal limit for ozone concentration, or smog, would drop from .12 parts per million to .08 parts per million measured over eight hours, and there would be new standards for particulate matter. EPA would change the form of the current 24-hour PM 10 standard and add new standards for particulates smaller than 2.5 micrometers in diameter (PM 2.5).

To put those figures in context, an ozone concentration of .08 parts per million is only slightly higher than the level of ozone produced by natural vegetation. A level of .072 ppm has been

recorded in North Dakota's Theodore Roosevelt National Park, about as remote a place as one can find in North America. As for the 2.5 micron particulate-matter limit: a 2.5 micron airborne particulate of dust is roughly thirty times smaller than the width of a human hair.

"The EPA proposal would provide new protection to nearly 133 million Americans, including 40 million children," claimed Browner. But not only did she offer no data to support that claim, much of the agency's research directly contradicted it. In EPA experiments, subjects exposed to the lower ozone levels had not shown appreciably different lung function than under current conditions. As for children, the EPA's best-case scenario projected that lowered standards would help only about half of those with impaired lung function.

Browner acknowledged that many, including some Democrats in Congress, disagreed with the new standards. "and conceded the opposition's reasoning. By any measure, the Clean Air Act had already been a success. Since its passage a quarter century ago, the country's population has risen by 28 percent and the economy has nearly doubled. Yet emissions of the six major pollutants or their precursors have actually dropped by 29 percent. Why, then, many were asking, did the federal government propose to move the goal posts?

It was a good question for which Browner offered a boldly disingenuous answer. "Science now tells us that our air pollution standards are not adequate to protect the public's health," she said. "The best, current, peer-reviewed, fully debated scientific conclusions are that too many Americans are not being protected by the current standards." At a Senate hearing, she waved a bibliography of some 271 studies–we would have loved to have seen that document, but did not–purporting to show that "hospitalization" and "deaths" were resulting from pollution levels that were still too high.

The only science that was available for true scientific review, though–which is the only real science there is–hardly justified Browner's rhetoric. Unable to reach any firm conclusions,

the EPA's advisors the Clean Air Scientific Advisory Committee, had recommended the agency make an administrative decision. "The diversity of opinion expressed by the panel members reflected the many unanswered questions and large uncertainties," said the head of the advisory panel, George Wolff. As for the "best science" they had reviewed: Of the 185 ozone-related studies to which Browner referred, only 31 tested the health effects of ozone exposure alone. Most examined other factors, such things as sex-based reaction differences.

Only eight of the EPA studies actually were relevant, i.e., experimented with ozone levels at current and proposed standards. The studies reached different conclusions–one finding, for instance, that though more people tend to die on days with high pollution levels, the correlation disappears when humidity is factored in.

EPA also ignored what Ronald Reagan was once scorned for pointing out–that volatile organic compounds occur naturally as trees and other vegetation produce oxygen and hydrocarbons. A 1991 study by the prestigious National Academy of Sciences found that in Atlanta and other parts of the Southeast, vegetation produced more such chemicals than cars or factories.

Most critically, Browner was ignoring the Center for Disease Control, which had concluded after a 1996 study of asthma-related deaths that "no evidence exists that supports the role of outdoor pollution levels as the primary factor driving the changes in the epidemiological patterns of asthma morbidity."

Perhaps anticipating that many would question the astounding dismissal of data, Browner later said, "The question is not one of science. The question is one of judgment." This was a much more accurate statement. And her judgment was that not only scientists, but also economists should be ignored. When Browner claimed the new restrictions would cost no more than $8.5 billion annually, Alicia Munnell of the President Clinton's Council of Economic Advisers demurred. The EPA "understates the true costs of stricter standards by orders of magnitude," said

Munnell. “CEA estimates indicate that the cost of full attainment could be up to $60 billion.”

The EPA even went so far as to manipulate a critical report from the Office of Management and Budget, the agency required by law to analyze new rulings and determine whether they make sense. Like almost everyone else, the OMB concluded the new air-quality standards did not. The Office of Science and Technology had reported the line between soot and illness “cannot be established.” Assistant Transportation Secretary Frank Kruesi told a budget office official “it appears incomprehensible that the administration would commit to a new set of standards… without a much greater understanding of the problem and its solutions.”

But rather than report that conclusion directly to Congress, the OMB let the fox into the henhouse. When Tom Bliley asked the budget office whether the EPA had complied with federal guidelines in drafting the new rules, he received an answer that sounded as if it had been written by the EPA itself–and probably was. Internal memos indicate the EPA was unhappy with the budget office’s unfavorable findings, so proposed rewriting the report “line by line.” Browner’s deputy, John Beale, wrote that the budget office letter to Bliley must be reworded because “as written, the response could be very damaging.”

More worrisome for the EPA: The public was beginning to understand that the standards could bring additional government restrictions, such as when (or if) they could mow their lawns or cook burgers on the grill.

Browner accused her critics of playing fast and loose with the truth, a most brazen assertion. “I am disappointed that some have chosen to distort this important discussion by raising distracting and misleading pseudo-issues like ‘banning backyard barbecues’,” she told a Senate panel. But as Browner spoke, the EPA was pushing restrictions on lawn mowers, leaf blowers, fireplaces, lighter fluid, and motorboats. In March, the second phase of lawn- and garden-equipment regulations had been announced. Denver already had outlawed fireplaces in new homes, trying to placate the feds. Residents of Albuquerque faced

90 days in jail if they burned wood on days it was forbidden. If the EPA wasn't targeting backyard barbecues, certainly that day was coming. As the Clinton Transportation Department put it, "Control measures needed to meet the standards could…require lifestyle changes by a significant part of the U.S. population."

The problem Browner faced in trying to justify the stricter standards was that the clean-air battle essentially had been won. Industry and car emissions had been so sanitized that they no longer were primary pollutants. In Baltimore, for instance–which competed with Washington as the city with the dirtiest air on the East Coast–motorboats and lawn mowers contributed more to the city's smog problem than all the city's industry combined. That was not testament to Baltimore's filthy boats and grass clippers, but to the pristine quality of air required by the nation's stringent standards.

The rules were so strict that some experts estimated that if all cars were banned from Los Angeles and Washington, D.C., those cities *still* could not meet the EPA's new rules.

Faced with a gathering storm, Browner did what, in my experience, she nearly always did: She escalated her threats and rhetoric. She told a Senate panel that "scientists already know more about the ill effects of particulates than they knew about the dangers of lead when leaded gasoline was banned decades ago."

Former EPA assistant administrator Robert Sansom read the quotation in *The Washington Post.* Early in the 1970's, Sansom had made the first recommendation to reduce lead in gasoline, and he took issue with Browner's claim, writing the paper:

> I have seen much of EPA's documentation for its proposed more stringent fine particulate and ozone standards. What I have seen I find deficient in many respects… It is a gross exaggeration to compare this EPA proposal to the removal of lead from gasoline. It is nothing more than an effort by Ms. Browner to gain creditability by association rather than on the basis of scientific evidence.

The scientists who advised the EPA on the new standards essentially conceded as much to Congress, testifying that the agency made a "policy judgment" about regulations, not a scientific decision. "Right now, we are a bit in the dark," panelist Morton Lippmann told lawmakers.

Many Congressmen thought Browner was being dishonest and unreasonable. Not surprisingly, Republicans were denouncing the new standards as "regulatory fraud." Congressman Bob Barr suggested Browner recuse herself from discussions because she was clearly unwilling to be objective, pointing to a speech she had made in which she vowed she "would not be swayed" by data.

But even leading Democrats asked her to reconsider the new rules. Senators Robert Byrd, John Glenn, Wendell Ford, Chuck Robb, and John Rockefeller wrote her in March to express their concern. "Because of the significant uncertainty surrounding the costs, benefits, and impacts of EPA's proposed ozone and [fine particle] rules," the Democrats said, "we urge the EPA to reaffirm the current standards…before embarking on entirely new and costly undertakings."

The most stunning defection came when the late Senator John Chafee, one of the nation's most ardent advocates of environmental law, announced reservations about the new standards. Browner had achieved what many thought impossible: She had pushed Chafee to the limit. "These are very complex and far-reaching proposals," he said at a Senate hearing. "After careful review, I am concerned that they may be too far-reaching. It is possible to push too far, too fast." Coming from Chafee, that was akin to the proverbial man-bites-dog story.

Perhaps hoping to appease critics, the EPA did reduce to 15,000 the fictitious number of Americans it said died every year because of pollution. Using the EPA's own statistical model, a pair of private analysts calculated that figure at 840. "In fact the risk is likely lower. No biologically plausible mechanism exists to explain how particulate matter, at current concentrations, contributes to mortality," Kay Jones and Michael Gough wrote in

The Detroit News. "It is conceivable that the risk is zero at current exposures."

In ordinary circumstances–in real-world science–independent researchers simply would have replicated the original studies. If the results were the same, that would validate the initial findings. But this was EPA science. Joel Schwartz, the EPA contract scientist whose work was the basis for the revised standards, refused to share his data. He characterized public scrutiny of his work as harassment and denounced as "industry thugs" scientists asking to duplicate his findings. Schwartz refused "to have to spend endless time arguing about a continuing series of industry re-analyses."

Even Mary Nichols, an assistant administrator under Browner, had little patience with Schwartz's argument. "When lots of money and lives are at stake," Nichols said, "it's not appropriate to say, 'This is my data and nobody should be looking at it.'" But Schwartz would not budge, even as his declarations grew more hostile.

Bliley sent a letter to Browner pointing out that the agency had the right to get "the underlying data and supplementary materials for the studies"–for which it had paid–and that she should exercise her authority to request the data. His letter was answered by Nichols, but the verbiage in my judgment was vintage Browner.

"We do not believe…there is a useful purpose for EPA to obtain the underlying data….

"Securing more detail about this information is not necessary as part of EPA's public health standard-setting process."

Nichols, though, always the loyal lieutenant, soon had the mantra down pat. Testifying on the new standards to a House subcommittee, she recited: "Over the past three and a half years, EPA has conducted one of its most thorough and extensive scientific reviews ever. That review is the basis for the new, more

stringent standards for particulate matter and ozone that we have proposed in order to fulfill the mandate of the Clean Air Act."

Very few were buying it. One of the leading opponents of the new standards was Congressman John Dingell, a senior Democrat who helped rewrite the Clean Air Act in 1990. "I support the Clean Air Act," said Dingell. "I support the regulations now in place." The new rules, he argued, would "impose enormous economic burdens on American business," he commented, while conferring "doubtful health benefits." The agency, he added, was "making an emotional appeal" and was "not using good analytical work" to back it up.

"EPA," the senior Democrat concluded, "has not played with a fair deck."

In April 1997, Dingell, along with 41 other Democrats, wrote the President and criticized the proposed regulation. At an agency oversight hearing in May, Dingell took on Browner. Business leaders had unified to oppose the standards *en masse*. Led by Detroit Mayor Dennis Archer, a staunch Clinton-Gore supporter, the U.S. Conference of Mayors passed a resolution opposing the new standards. In Congress, legislation to postpone the new rules was rapidly gaining supporters and looked strong enough potentially to override a presidential veto. State legislatures began passing resolutions opposing the tightened standards. But nowhere was the debate fiercer than inside the walls of the White House.

President Clinton's advisers had explained to him that the new standards were scientifically indefensible and would be economically disastrous; he was reluctant to support them. On the other hand, Clinton did not want to cost Gore the support of environmental radicals. Clinton, naturally, wanted to have it both ways in the form of new, but much diluted, standards. Browner was not having any of that; she had drawn a line in the sand. Not science nor reason nor her boss's wishes had any impact on her.

The president was angry that Browner had boxed him in publicly. "He likes a good healthy debate," one adviser said, "but he likes it to be kept at the table." Browner's stubbornness also was causing trouble for Gore. With the 2000 election looming, Gore hardly could afford to lose the support of nearly everyone but a handful of extremists. His public silence about the new standards had not gone unnoticed by the radicals on the left, or by Democrats in the congressional center.

"Since this is a top priority issue for the national environmental community at this time," said Gene Karpinksi of the U.S. Public Interest Research Groups in a barely veiled threat, "any weakening of public health protection by the White House would certainly be a huge negative for Vice President Gore that would not be forgotten."

Though sources described Clinton as being "distressed" by the severe economic losses he had been assured by Treasury Secretary Bob Rubin were inevitable, he ultimately decided that needlessly burdening 250 million Americans was a fair price to pay to protect Gore's career. Browner knew Gore had won over Clinton, and she couldn't help gloating about that. The Vice President had added "the right push at the right time," she boasted, to gain Clinton's support for the new standards. An editorial in *The Washington Times* urged readers tongue in cheek to give Browner her due.

> It was Mrs. Browner, after all, who carefully ignored the findings of the agency's own Science Advisory Board, which challenged the notion that the proposed ozone standard would be any more protective of human health than the current one. It was Mrs. Browner who couldn't be bothered to release the data underlying the rule, her public protests notwithstanding, for inspection by more impartial experts. It was Mrs. Browner who brushed aside the concerns of mayors, minority groups, scientists, and a bipartisan group of lawmakers to ram through the rule. And it was Mrs. Browner who backed the administration into a very public corner from which there was no way out by the announcement of the

President's endorsement. If you like the way this White House operates, wait until Mr. Gore takes charge.

Gore and Browner were essentially alone, pummeled by bipartisan opposition. But Gore had long made clear his willingness to foist change on an unwilling citizenry. "It is essential that we refuse to wait for the obvious signs of impending catastrophe," he had said. "There are terrible moral consequences to the current policy of delay, just as there were when we tried to postpone World War II. Then, as now, the real enemy was a dysfunctional way of thinking." That dysfunctional thinking manifested itself, he believed, in a recalcitrant public.

In the end, as in many other policies, the outcome may have satisfied a few hard core supporters, but at the cost of alienating many–and without a policy victory. Members of Congress threatened a congressional review and an overturn of the regulations, while private interests filed a lawsuit against them. Some years later, it is still possible the regulations will never be implemented–although in a Gore presidency it seems there would almost certainly be an effort to revive the proposal.

Tuesday, July 15, 1997–It was summertime in Virginia, and the living wasn't easy. A high-pressure system stagnated over the Mid-Atlantic States; Virginia, Maryland, and Washington, D.C., were sweltering. The nation's capital was a particular problem. Monday's high had been 97 degrees. Highs were in the upper nineties on Tuesday as well, and forecast to remain there for several days. Combined with high ozone levels, the weather pushed Washington's air-quality index to 156 on July 15th–on a scale ranking 100 as "unhealthful." In Baltimore, the index reached 180. Stuart Freudberg of the District of Columbia's Department of Environmental Programs said he was "pretty sure it's the highest rating we've had in the last five years." But no one

knew for sure how bad the problem was because the plane used by the University of Maryland to measure ozone levels was grounded–due to poor visibility.

City residents without access to air conditioning were welcomed at various "cooling centers" around town. At the YMCA's 30 summer camps in Washington, outdoor play was canceled. After one director tried to insist the youngsters in his program play outside, counselors brought the children back in, reporting breathing difficulties. Record-breaking amounts of electricity were being consumed, according to Potomac Electric Power Company. At noon, 64-year-old Mary Corsey was found dead in bed by her son. In her top-floor apartment, with the windows shut, she had succumbed to the heat.

Local governments and conscientious citizens were trying to cope with the conditions. Washington's Department of Public Works sent its employees home at noon for the second straight day. Some lawn-mowing services in the District had given their workers the day off, too. Officials had issued a Code Red ozone alert, asking everyone to avoid idling their car engines, refueling before dusk, or operating unnecessary motors such as lawnmowers.

In Virginia, I was doing everything within my power to hold down ozone levels. The state was urging workers to use public transportation. We had canceled road paving and highway mowing until the weather improved. State employees were told not to do any non-essential traveling. But at 3:20 that afternoon, the temperature had registered 98 degrees at Washington's Reagan National Airport, and forecasters were predicting another scorcher–another Code Red alert–which meant more ozone exceedances were likely–for Wednesday.

Three consecutive days in which the ozone level was exceeded in Northern Virginia was not helpful in our efforts to come into compliance with Clean Air rules and could put Virginians subject to more rigorous regulations. Oppressive heat was the gateway to more oppression from the federal government.

I decided that if ozone levels were as unhealthy as the EPA maintained, then certainly it threatened people's health to be out

and about in this weather. And didn't the federal government have an obligation not to create conditions for which it penalized states? When snow and ice reached levels considered dangerous, the feds instructed employees to stay home. Why should the dangerous conditions of high ozone levels be treated any differently?

At 6:00 p.m., I faxed a letter to White House Chief of Staff Erskine Bowles, asking that the federal government be shut down on Wednesday, July 16, for the sake of the environment.

"We believe this circumstance requires that the federal government demonstrate its commitment and leadership by closing for the day–as it would in a snow emergency," I wrote, "with only essential personnel reporting to work on Wednesday and for the duration of the 'Code Red' conditions." I urged Bowles to act "in the best interests of the environment and the health of our citizens–our children and others who may be at particular risk."

After allowing a little time to pass and hearing nothing from the White House, I followed up with a phone call, but I only reached Bowles's voice mailbox. Around 9:00 p.m., I called the White House operator, explaining that my question required immediate attention. Shortly thereafter I received a return call from Thurgood Marshall, Jr., newly appointed to his job in the Office of Cabinet Affairs.

The conscientious Marshall told me he would arrange a conference call among his office, the Office of Personnel Management, and the Environmental Protection Agency, and set about rousing people at home to discuss Virginia's request. OPM director Janice Lachance walked the others through the process. She explained, correctly, that there was no government-wide policy for when air quality threatened health. The "Misery Index"–in practice since 1920, when few office buildings were air-conditioned–had set cut-and-dry standards for heat. Workers could be sent home when indoor temperature-to-humidity ratios reached 95 degrees and 55 percent, 96 degrees and 52 percent, 97 degrees and 49 percent, 98 degrees and 45 percent, or 99 degrees and 42 percent. At 100 degrees, no matter what the humidity, employees were relieved from their duties. The guidelines became official in

the summer of 1963 as The Civil Service Commission Employee Letter B-193.

But in the summer of 1981, President Reagan replaced that with a new directive: Henceforth, "dismissals due to unusual employment or work conditions created by a temporary disruption of air-cooling or heating systems should be rare…. Employees are expected to work if conditions… are reasonably adequate in the agency's judgment, although these conditions may not be normal and may involve minor discomforts."

But the Reagan rule added: "Individual employees affected…to the extent that they are incapacitated for duty, or to the extent that continuance on duty would adversely affect their health, may be granted annual or sick leave."

Though the Reagan Administration was trying to install flexibility and bring the policy up-to-date–in fairness, it hardly was sensible to retain a policy written before air-conditioning was universal–many people preferred concrete standards to ones dependent on a supervisor's discretion.

"I'm not sure you can call it 'progress'," said one, "when the bureaucracy shifts from a simple policy with absolute, written numerical guidelines…to one in which the bottom line is it isn't unbearably hot until the boss says so."

Reagan's policy, moreover, did make an allowance the old one had not: the provision that workers should be sent home when weather conditions endangered their health. So if Browner insisted present ozone levels endangered the lives of half the country's population–and, with those levels exceeded, many more citizens evidently were in jeopardy–then why wouldn't the federal government take seriously such an enormous threat?

Lachance pointed out that giving a day off to federal employees in the Washington area would cost taxpayers $73 million, which was an odd argument, considering environmental extremism holds that the value of a clean environment is too important to be measured in dollars and cents. Indeed, the Clean Air Act expressly forbids the EPA from taking financial considerations into account when setting clean air standards. I

admitted the shutdown would be expensive, but "the question is the standard of air quality being unhealthy."

"Look, I used to work there," I reminded the White House staffers. "I know you have until about 6:00 a.m. to make a decision and get it announced on the news. Think about it."

Perhaps they did actually think, but the answer was *no*. Ozone levels were not considered serious enough to warrant such severe action.

Just as the forecasters had predicted, July 16 turned out to be another Code Red day in Washington. With the imprimatur of the White House, nitrogen oxides were billowing into Northern Virginia from typically heavy commuter traffic. I was annoyed, but did not know what more I could have done. The Clinton Administration had implicitly advised me ozone was not a problem real enough to treat seriously.

Meanwhile, in the Roosevelt Room of the White House–not the Rose Garden–a ceremony was beginning. The Administration was about to sign off on the new air-quality standards.

Browner was the first to speak. Opening the ceremony, she praised President Clinton–whom she knew was throwing a bone to Gore–and Gore, who had doggedly convinced the president to go along with her.

"These new, stronger, more protective air quality standards were made possible by the leadership, vision, and courage of the president and vice president," she said. "They stood up for the public interest. They stood up for cleaner air. They stood up for our children and their right to breathe air that does not make them sick or do long-term damage to their standards."

Hoping to shore up Gore's support among those who had questioned his hesitation, Browner assured them, "No one has a greater, more sincere, more passionate commitment to protecting public health and the environment than Vice President Gore. The

vice president's wisdom and his determination to do the right thing have always guided us in the setting of important public health and environmental standards."

Browner reiterated the fantastic claim that the new standards would prevent 15,000 premature deaths, 350,000 cases of aggravated asthma, and ease breathing difficulties for more than a million children.

As if to refute any grudging doubters, the White House produced one of the 15,000 children supposed to benefit from its new policy: the asthmatic son of Sydney Lipsen-Moor of Takoma Park. Lipsen-Moor had been invited to the White House to bear testament to the ineffable burden of having to track air-quality reports to know when it was safe for her child to play outside.

After Lipsen-Moor had fully expounded on her plight, it was the vice president's turn at the podium. Gore was at his moralizing best.

> We are here today to take the most significant step in a generation to protect the American people–especially our children–from air pollution…. We're taking action to improve the quality of the air we breathe and doing so in a way that makes sense for our communities, for our families, and for our economy. Most importantly, we're moving forward on our greatest challenge, and that is to provide a better and safer and healthier world for our children and their children to come.
>
> We know that people who have heart or respiratory illnesses can die an early death because of bad air. And we know that even healthy people can suffer lung damage if they exercise or work outdoors in air that, until today, they were told was perfectly safe. We now know better. The scientific evidence is in, and it needs to be updated and reflected in the way our government acts. That's why the president made the decision to update the air quality standards for smog and for soot. From this day on, those standards will reflect what we now know to be true about the dangers of polluted air….
>
> On this hot summer day, you don't have to look very far to understand that, despite the progress of the past quarter century, air pollution is still a serious problem in this country.

> This is the fourth "ozone red alert day" in a row for people living in and around Washington, D.C.
>
> Do you know what that means? It means that parents are urged to keep their kids indoors. Elderly people, and those with heart and respiratory ailments, are warned not to go outside. Even healthy people are cautioned against jogging or strenuous outdoor exercise.

Not long before, the Clinton Administration had deemed ozone at current levels insufficiently dangerous to warrant a simple measure such as keeping non-essential employees home from work for a day. Indeed, a July 17 item in *The Washington Post* quoted an administration spokesman at the Office of Personnel Management, Doug Walker, as scoffing at our request for a government shutdown. "This air quality thing," he said, "while serious, doesn't seem to justify the cost of shutting down the government." White House spokesman Mike McCurry added that given the day off, federal workers would simply have gone shopping anyway.

Yet here were Browner and Gore, announcing that air quality presented such a threat to Americans' health that citizens must spend billions more dollars to make it microscopically cleaner on normal days all over the country.

Just what we need today, I mused. More hot air out of Washington.

9. Superfund, asbestos, and other confusions

The impetus for Superfund was Love Canal, this nation's best-known hazardous waste site. From 1943 until 1952 in Niagara Falls, New York, Hooker Chemical and Plastics Corporation buried 22,000 tons of chemical waste in a half-dug canal.

When the local school board later tried to buy the land, Hooker Corporation resisted, warning of potential health hazards because of the chemicals underneath. But the school board persisted, and finally the company relented, selling the property for only $1–a means of symbolically washing its hands of future consequences.

Hooker Corporation also was adamant that the land never be excavated under any circumstances, a caveat the city ignored. Instead, it built a housing project on the land, dug through the protective clay cover over the chemicals, and laid sewer lines through the waste.

Yet residents seemingly suffered no ill effects until a reporter for the local newspaper began writing articles telling them how sick he thought they should be. Suddenly every twinge and sniffle was blamed on Love Canal. The area became a *cause celebre* for environmental extremists eager to tout the evils of the modern industrial age. "Love Canal" entered the lexicon as shorthand for toxic terror.

It was later discovered that, not people, but truth had been poisoned at Love Canal. Extensive research by both the federal and New York state governments eventually concluded that residents of Love Canal had no higher incidence of illness than people in other communities. Residents of Pocatello, Idaho, might as well have blamed their ailments on proximity to potato farms. But by the time reasonable people began suspecting the truth–that

as the *New York Times* predicted in 1981, "It may well turn out that the public suffered less from the chemicals [at Love Canal] than from the hysteria generated by flimsy research irresponsibly handled"–Al Gore already had pushed through Congress the infamous Superfund law.

It has been an unqualified failure.

The statute's most egregious injustice is that it penalizes people for having engaged in perfectly lawful behavior by giving the EPA authority to declare a practice retroactively illegal. It is like putting up stop signs and then ticketing drivers for not having stopped there before the rules changed.

I objected to that non-sensical practice and told the EPA as much when the agency descended on a landfill in Buckingham County, Virginia, which had been declared a Superfund site.

From 1962 to 1982, Buckingham County Landfill was owned and operated by Joseph Love. In the beginning, Love's dump received only household garbage. But in 1977, his Sanitary Landfill Permit was modified to allow 200 gallons of "hazardous" waste per month. Two years later, the state board of health increased that to 40,000 gallons per month, and the county grew concerned. So in 1982, taxpayers bought the landfill from Love so they could close it–which they did.

The action proved the adage that no good deed goes unpunished. Four years later, the EPA, through a study local taxpayers were forced to underwrite, concluded that the site should be added to the federal Superfund list. From the name "Superfund," you might think this was some sort of a boon. What it actually meant was that taxpayers and former users–all of whom obeyed the laws as they were at the time, and had recently worked out an agreement that suited all of them–would have to spend millions of dollars cleaning up the site.

Because they took the initiative to protect their environment, in other words, the EPA was penalizing them. Had

they ignored the site and let the environment degrade, the agency would have left them alone. In addition to the county and other companies, the EPA named Thomasville Furniture Company a responsible party. So, Thomasville chiefly faced substantial penalties for having lawfully discarded refuse and for having deep pockets.

"Our plan for closing the site was approved by the state and reviewed by the EPA," said the Buckingham Commonwealth's Attorney. "It never occurred to us they would eventually decide everything had to be moved from the site."

In 1993, though, that's exactly what the agency had decided. One-fourth of the contaminants it had determined were in the landfill had to be taken to another site and incinerated. The rest of the landfill was to be capped, and the contaminated groundwater pumped and treated. The EPA estimated the costs at $20 million. Others put it closer to $35 million.

According to the agency's reports, the landfill had operated by the book. The EPA's own records noted:

> In November, 1972, the Virginia State Board of Health issued a permit to the facility to dispose of municipal waste. In 1977, the permit was modified to allow the disposal of chemical wastes that a local furniture-making industry [Thomasville] generated. In 1979, the solid waste landfill operation was closed and covered to the satisfaction of the VSBH…In 1983, the county closed the hazardous waste portion in accordance with state regulations…

"I think the whole thing is enormously unfair," I said. "If the government says something is legal and you do it, is it fair to come back retroactively, imply that you have done something wrong and say 'now you're responsible for cleaning it up' and provide no assistance or incentives when what you did was perfectly legal?"

(In fact, no attorney has ever been able to give me an explanation that made clear to me how this doctrine of EPA, which has been defended in some Republican Administrations as well, can possibly be squared with the constitution's explicit protection against *ex post facto* laws. Perhaps, like the Second or Tenth Amendments, the courts have simply decided they don't like those rules and aren't going to obey them. But this doctrine of re-defining behavior as illegal after the fact is surely one of the most noxious doctrines we have. It is the essence of tyranny.)

Buckingham county officials didn't get the doctrine either. They and the other responsible parties sought a second opinion. Independent waste-disposal engineers concluded that the EPA's goals could be accomplished simply by capping the landfill and adding monitoring wells–for only $1.3 million.

The alternative was pitched to the EPA, which said it would think about it.

I didn't have to think about it too long. After meeting with the Thomasville people and the DEQ staff following the case, I concluded the EPA was being unreasonable. There was no evidence of groundwater contamination, and Thomasville was willing to pay for additional groundwater monitors, in case any ever developed.

Nothing justified the EPA's insistence on the more expensive remedy of digging up a portion of the closed landfill and carting off the contents.

"EPA doesn't have science on its side," I argued. "Plus, if they do this, Virginia will have to stop and apprehend the EPA agents for trucking hazardous waste through town and posing a danger to the citizens, including small children."

The EPA planned a public hearing, and I made it clear that I would not be lending the power of Virginia to do the agency's dirty work. To the contrary, I said, "Virginia officials will come and be an advocate for the lower-cost remedy."

At the public hearing, with Virginia officials in attendance, the EPA modified its demands somewhat, but negotiations continued for another year. In September 1995, the other companies, excluding Thomasville, agreed to pay off the EPA with a cash settlement; the agency issued a Unilateral Administrative Order to Thomasville Furniture, saying "do it our way, or else."

By then I had more thoroughly reviewed Superfund's sorry track record. It was not reassuring.

The law had cost taxpayers and private industry $30 billion. Yet, in all those years, only 90 of the 1,300 sites had been cleaned up.

Two of those 90 sites were in Virginia, and they had been cleaned up through natural remediation, with virtually no role for Superfund.

Moreover, only half the money had gone to pay for clean-up costs. The other half had gone to employ bureaucrats administering the program and enrich lawyers fighting for or against it. Nothing against lawyers, it is just that Superfund was supposed to clean up environmental problems, not enrich lawyers.

Virginia was one of 37 states that had found we could do the job much more efficiently on our own–primarily by cutting out the expensive middle men whose every incentive was to keep their cash cow going forever.

So I decided to block adding seven more Virginia sites to the Superfund list, in accordance with an arcane provision in the law that allows the EPA to designate a Superfund site only if the governor requests it. Our administration supported efficient, effective clean up of sites returning them to beneficial uses as soon as possible. This is exactly why Governor Allen enthusiastically supported the bi-partisan Voluntary Remediation legislation in 1995 and the bill in 1997 that expanded brownfield redevelopment.

Buckingham's experience bore out my long-held thought about dealing with the EPA's bureaucracy.

It's like a casino. They really don't mind losing a hand every now and then because they know eventually they will get

back everything and more. The real game is to keep the "suckers" at the table.

We decided to walk away from the federal Superfund program declining to serve as an administrative arm of EPA in Virginia. Our plan was to clean up sites through our new voluntary remediation and brownfield programs, advocate the interests of Virginians in Superfund disputes and constantly rely on sound science when considering solutions. Keeping sites off the Superfund list would allow our citizens, local governments and businesses much greater opportunities to responsibly clean the sites more quickly and cost effectively. We did add any U.S. Department of Defense sites and former federal sites that the feds were responsible for cleaning up anyway.

Like other "beneficiaries" of Superfund, the good people of Good Shepherd United Methodist Church in Dale City, Virginia, were victims of the manufactured asbestos crisis.

Even the EPA had announced, following its 1988 study, that it found indoor asbestos levels no more dangerous than the natural levels that are ubiquitous in the air and water.

Writing for the prestigious *New England Journal of Medicine,* Yale professor of medicine Dr. Bernard Gee said, "The basis for this fear is unreal, not founded in reality, a gross overreaction that's high in emotional content." There is no evidence asbestos is a public health threat, Gee said, and quoted a friend who described the phenomenon as "paratoxicology."

Though Congress took the lead on this synthetic scare by passing a law in 1987 requiring every school board in the country to come up with an asbestos-abatement plan, the EPA was ready to jump on board. When it came to writing more regulations, any excuse would do. The agency called for asbestos abatement when older buildings are renovated or demolished.

Because Good Shepherd was known to contain asbestos, every year the 500-member congregation was required to send an

individual to EPA-mandated training on how to follow the latest rules regarding the non-existent threat. That was expensive; plus, the church decided to expand. So in 1992 they hired a contractor to remove the insulation.

While the project was underway, one Friday evening after the church office had closed, a man who earned extra income doing inspections for the EPA paid a surprise visit to the site and found a teaspoonful of asbestos dust in a cinder block above a door.

After he reported his findings to the EPA, the agency informed the church that this was a violation of federal clean-up regulations. Asbestos dust is supposed to be dampened to reduce ease of inhalation; failing to do so "constitutes a substantive violation of the work practice standards," the agency said–and that meant a fine of $26,000.

Good Shepherd's members were stunned. For one thing, clean-up at the construction site was the contractor's responsibility. Why would the EPA punish the church? And though the dust may have been present when the inspector visited, the building was still sealed under a plastic tent. All asbestos dust had been removed before the church was re-opened. Why such an outrageous penalty for a minor infraction that had caused no harm?

Victor Bras, chairman of the church's administrative board, first tried reasoning with the EPA, explaining that such a punitive fine would cripple the church's ministry. The $26,000 fine represented nearly a tenth of the small church's budget. "You are talking about us not being able to minister to our community," Bras explained to Peter Kostmayer's legal staff. "[The $26,000] represents that much less that we could do for the poor or the people who need counseling and help." It soon became apparent Bras might as well have been sowing grass seed in the Sahara.

"What they said to us was, 'Look, we know you guys are a church and are trying to do right, but we're going to do this because we know we can,'" Bras reported.

"They were interested in convictions and were going after institutions like ours because we can't fight back very well."

For two years, the church's lawyers tried to wrangle an agreement with the EPA, but every time they would ask for a dismissal, the agency would counter and delay. At one point, Bras, the church pastor, and the church lawyer went to see Congresswoman Leslie Byrne, who assigned a staffer to meet with them and didn't even speak as she passed through the office.

Deliverance finally came after Senator John Warner complained to Carol Browner. "This heavy-handed and insensitive treatment of the church is an example of overzealous regulation at its worst," said Warner, along with Congressman Tom Davis, who had replaced Leslie Byrne representing the 11th District.

Publicly, neither Browner nor Kostmayer budged. But after two years of administrative hearings, litigation, and lawmakers' pleas, an EPA administrative law judge dismissed the complaint against the church. The agency said it would pursue instead the engineering firm.

Bras said the church fought the EPA as much on principle as anything else. "We were making a statement that, for once, we were not going to let the EPA beat up on a small institution," he said. "We thought they were taking action that had a lot of destructive purposes. These are bureaucratic victories for them. They prey on institutions like ours."

Undoubtedly, someone at the EPA recognized what poor public relations it was for the agency to be going after a small church congregation. But how many small businesses with similarly meager resources are socked for similarly minor infractions? Congressmen don't become heroes by defending Jimbo's Bait 'n' Tackle Shop.

Good Shepherd's predicament made the papers as far away as Memphis, Tennessee, where the *Commercial Appeal* rightly noted:

> A powerful federal agency that can't use a little judgment in deciding whom to pursue poses a greater public hazard than a few molecules of insulation.

The Voluntary Remediation Program, created by a law in 1995 was patroned by a Democratic member of the General Assembly and enthusiastically supported by the Allen Administration. It was Virginia's answer to the failed federal Superfund program.

Under this program, owners or operators of contaminated sites not mandated for remediation under existing environmental laws enter into an agreement with the state. The responsible party is required to submit three primary reports regarding planned clean-up and progress. Upon completion, the state granted immunity from future enforcement action.

Instead of simply writing a check to the state, which did nothing for the environment, owners of contaminated land could focus their energy and resources on actually improving the site and putting it back into a beneficial use.

The EPA called this "letting polluters off the hook." Most others called it common sense.

Since 1995. DEQ has negotiated voluntary remediation agreements for over fifty sites and more than fifteen have already completed their clean-up.

Following on the success of Virginia's own clean-up program, Delegate Jay Katzen worked with the Allen administration to pass a brownfield's amendment to this statute in 1997. This new law provided even greater flexibility to local governments that were interested in providing tax incentives for clean-ups of brownfields in their communities. It passed unanimously.