

Subcommittee on Oversight and Investigations
Hearing on
“EPA's Enforcement Program: Taking the Environmental Cop Off the Beat”
February 26, 2019

The Honorable Ronald J. Tenpas, JD, Partner, Vinson & Elkins LLP

The Honorable Brett Guthrie (R-KY)

1. In your testimony, you caution against critiques of particular case decisions because there are oftentimes so many complexities of a case that are only known to the government and not the public.
 - a. To the extent you are able, can you explain some of the factors that might impact the government’s enforcement approach in any given case?

Enforcement in any given case is influenced by factors such as the following:

- *How significant is the deviation from the legal requirement (e.g. repeated failures to file a required government report versus a single or episodic failure to file)?*
- *The nature of the legal requirement at issue (e.g. a failure to file a required report versus actual acts of pollution that endanger human health or the environment)?*
- *How consequential was the violation (e.g. loss of life, loss of property, disruption to the community)?*
- *How deliberate was the violation (e.g. did company officials know of the violation and sanction it or were they unaware that the legal requirement existed)?*
- *To the degree the violation was known or understood at the time it occurred, how senior were the company officials who had knowledge (e.g. was it known only to a small group of workers or known to senior management)?*
- *How strong is the evidence supporting the violation (e.g. is there a single witness or multiple witnesses to important events; are there reasons to distrust witnesses on whom the government would rely either because they have incentives to lie, such as animus toward the company, or because a witness’s account of events has been inconsistent over time)?*
- *How clearly established is the regulatory requirement that is alleged to have been violated (i.e. are there plausible legal arguments that conduct the government intends to prove does not even violate the law)?*
- *How have prior similar cases been resolved?*
- *Does the case involve a regulatory requirement that has been made an enforcement or compliance priority because of perceived problems of*

indifference or regular violations occurring over a long period by multiple industry participants?

- *What is the prior enforcement and compliance record of the specific company or facility involved (i.e. is this the first violation or one of a repeating pattern)?*
- *Did the company have a compliance and training program at the time of the violation, and, if so, how effective was that program at the time of the violation?*
- *What actions did the company take to remediate any problems and to prevent a recurrence?*
- *Did the company self-report the matter or did the government detect it independently?*
- *Did the company cooperate in the investigation of the matter?*

There are certainly other factors that can come into play, even beyond these, but these are factors that frequently recur in my experience.

- b. Can you elaborate on why it may be considered “unjust” to hit a minor violation with a major penalty to create a deterrence effect? What are the advantages of doing so?

Taking a relatively minor violation and imposing a major penalty is in tension with a widely-accepted notion of common law jurisprudence that each individual defendant deserves to be treated equally and according to the blameworthiness of the defendant’s own specific conduct. Admittedly, our enforcement and penalty regime must manage several competing values (such as deterring future misconduct by others who will now fear similar punishment). But even given these competing objectives, over-penalizing a minor violation for the sake of deterrence essentially abandons our duty of fairness to an individual defendant in order to achieve some perceived larger common good. One thing I prize about the United States, the rule of law, and our system of justice is that we consistently reject this way of thinking—we are consistently skeptical of claims that fairness to individuals must be sacrificed to achieve some greater common good. Much of our Bill of Rights is designed to prevent this approach, as are many other legal protections. Perhaps a simple example can capture this thought most readily: nobody would accept even one defendant receiving life imprisonment for going 60 miles per hour in a 55 miles per hour zone, even though such a penalty system would surely encourage greater obedience to the traffic laws. That same principle holds true across all areas of law. Violations vary in their significance. It is thus critical that we strive to calibrate the penalty in a particular case to the seriousness of the violation.

The Honorable Michael C. Burgess, MD (R-TX)

1. In your testimony, you describe two different matters that you and your team resolved during your time as an Assistant Attorney General. These include the largest Clean Air Act criminal penalty achieved up until that time and the largest Clean Air Act injunctive civil environmental settlement, involving an estimated \$4.6 billion in injunctive relief.

- a. Can you describe how long each of these matters took from start to finish to resolve?

I do not have access to the government records that would show precise dates, but each took several years to investigate and resolve. I believe the Clean Air Act criminal matter referenced in my testimony took approximately 2.5 years from the date of the incidents that generated the prosecution until resolution through a plea agreement. The investigation of the Clean Air Act civil matter referenced in my testimony had begun before I was appointed Assistant Attorney General. From my general familiarity with such matters, I expect that matter took at least three years from the start of the investigation to resolve and may have taken considerably longer. It would not surprise me if that matter lasted as long as five years from start to finish.

- b. How did the Department of Justice work with the EPA to resolve these matters?

In each matter, the Department of Justice worked with the EPA in a cooperative manner. Generally, EPA provided the primary investigative resources for each case—for the criminal matter this was special agents with criminal investigative authority and for the civil matter this was legal and other expert technical staff within EPA's Office of Enforcement and Compliance Assurance. The Department of Justice would provide the lawyers likely to form the trial team if the matter went as far as a contested trial and would help guide each overall investigation to ensure a strong factual and evidentiary record to support an enforcement action. In each of the cases I referenced in my testimony, the defendant had a desire to resolve the matter without a trial and before a formal case was even initiated. The Department of Justice attorneys led the negotiating activity with the counsel for the defendant in each case, but those DoJ attorneys worked closely with their EPA counterparts to identify appropriate civil settlement and criminal plea agreement terms, respectively.

- c. Did the Department of Justice work with state and local governments to resolve these matters? [If yes, please describe]

In the criminal matter, I do not recall substantial state involvement. But it would not be unusual in criminal matters for state agencies to contribute investigative resources, such as agents who work on a combined federal-state environmental

investigations task force in their region or state prosecutors who are designated as “Special Assistant United States Attorneys” so that they are authorized to appear in federal court representing the United States on federal criminal matters. Factors that can affect the nature and shape of federal-state cooperation on a particular matter also include that, generally, under the Department of Justice’s controlling policy, the federal government disfavors duplicative federal and state criminal prosecutions and a State legally cannot be a “co-sovereign” in a federal criminal matter. See Department of Justice Manual, Section 9-2.031, Dual and Successive Prosecution Policy (“Petite Policy”), available at <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031>. As a result, the Department of Justice will sometimes consider “deferring” to a state criminal prosecution if one is pursued.

In the civil matter that I referred to in my testimony, there was coordination with several State Attorneys General who had an interest in the matter. Those States, through their Attorneys General, participated in the ultimate settlement. When the case was formally filed, with the settlement already agreed to, subject to public comment, those States participated as co-plaintiffs in the suit and were co-signatories to the settlement. This kind of cooperation is not unusual.

2. For the last ten years in private practice, you have interacted with both the Department of Justice and the EPA on behalf of clients on matters involving the Clean Air Act, the Clean Water Act, etc.
 - a. Can you describe how the EPA typically works with companies to help ensure compliance with environmental statutes?

The EPA works with companies in several ways to help ensure compliance. First, the EPA adopts the specific regulations that describe the detailed requirements with which companies must comply. Ideally, such regulations are clear and readily understood in application so that companies can have a fair opportunity to meet their compliance obligations. Second, EPA publishes guidance documents that can help to clarify the EPA’s views on what it believes the regulations demand for a particular industry or under a particular requirement. There is sometimes disagreement within the regulated community whether such guidance documents accurately restate or explain the regulatory requirements, but such guidance documents, which lack the force of law (unlike formally adopted regulations), at least provide some additional clarity regarding the Agency’s thinking. Third, the EPA (sometimes on its own and sometimes pairing with other entities such as trade groups or environmental non-governmental organizations, or state and local agencies) participates in public events, training seminars and similar activities and provides staff who speak at events such as industry conferences as a means to informally keep companies current on various issues. Fourth, at specific facilities, the EPA will conduct inspections and, as part

of such inspections, it will sometimes (but not always) provide an “exit interview” or “close-out discussion” with the facility staff, identifying matters of concern that were identified, allowing the facility to take immediate corrective action.

Finally, I would note that it is likely the EPA’s view that many of its “enforcement actions” constitute “working with the companies” to help ensure compliance. I do not think many companies regard such enforcement “force” as being equivalent to “working with the company” but I have, at times, heard EPA staff describe their formal enforcement litigation activities in terms like “working with the companies” or similar language.

- b. In your opinion, what actions can the EPA take that are likely to result in the highest compliance rate with environmental laws after EPA identifies a company that is not in compliance with federal laws and regulations?

In my view, the best and most effective course of action for achieving high compliance after violations are identified is two-fold: (a) the EPA (or the state or local environmental equivalent agency) should give prompt and clear notice to the company of the Agency’s concerns that violations are occurring and identify what the Agency considers to be necessary to correct the violations, and (b) the Agency must be prepared to have a frank and open-minded discussion with the company’s representatives (legal or regulatory) regarding the claimed violations and any defenses the company has to the Agency’s claim that violations have occurred. Prompt notification, such as through a post-inspection debrief (see answer 2a, above), allows companies to take action quickly for those violations it acknowledges, and frank and prompt follow-on discussions on disputed items can often clarify whether a violation is actually occurring and/or identify mutually acceptable solutions that can be promptly implemented.

Finally, I would note that bringing a level of consistency and stability to the regulatory requirements and their enforcement is essential. Compliance is fostered when there is general respect for the EPA in its administration of the laws and regulations. Few things breed cynicism and disrespect more quickly and powerfully than the sense that the EPA is being inconsistent or is changing the rules arbitrarily through new interpretations or enforcement theories, rather than changing the regulatory requirements through accepted rule-making processes of formal notice and comment rule-making.