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Prepared Statement of the Honorable Ronald J. Tenpas

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Chairman DeGette, Ranking Member Guthrie & Members of the Committee:

Thank you for the invitation to participate in today's hearing and to offer my perspective on environmental enforcement efforts, both as it relates to the current Administration and more broadly. Just to explain my perspective on this – in my roughly thirty year legal career I have spent more than twenty focused on enforcement of federal law and regulation, seeing it both from the perspective of the government and the perspective of those who are subject to those laws and regulations. I spent twelve years in the Justice Department, beginning as an Assistant United States Attorney – a line prosecutor – investigating and trying a full range of cases, ranging from violent crime and narcotics to white collar corporate matters. I also spent six years as a senior political appointee, including two Senate confirmed posts: United States Attorney for the Southern District of Illinois and, later, Assistant Attorney General for the Environment and Natural Resources Division. That last job involved running a seven hundred person division responsible for nearly all of the federal government's environmental litigation occurring under approximately 150 different environmental statutes. The Division included about one-hundred eighty attorneys who focused on civil and criminal investigations – what amounted to the most significant enforcement cases the United States was investigating or which the United States brought to court. During my tenure as Assistant Attorney General, thanks to the excellent work of those many career attorneys, we resolved a variety of matters that were pathbreaking at the time – to name just two, 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.

[1] This statement and any associated testimony are the views of Ronald J. Tenpas and do not represent positions of Vinson & Elkins, LLP.

For the last ten years in private practice, I have frequently assisted clients in assessing their environmental obligations and in addressing potential violations and, thus, interacting with Justice Department or EPA lawyers and agents on matters involving the major environmental statutes such as the Clean Air Act, the Clean Water Act, RCRA, CERCLA and TSCA. Based on that collective experience, there are five major observations that I would offer the Committee today. I will summarize them briefly initially and then turn to each in more depth later in my statement.

First, while it is common for both EPA and DoJ to try and measure and report on their enforcement results annually, the typical metrics used are incredibly "noisy" – from year to year, single case outcomes can drive the annual numeric results, making it difficult to discern more fundamental trends. That isn't to say that such data are useless but it is to say that one should be cautious in drawing strong conclusions based on such numeric reporting alone. And, as I look at the most recent EPA data that has been published, I see what I regard as a pretty typical mixed bag – some enforcement metrics are up from what was observed during preceding Administrations, some are down, some are roughly in line with prior history. Thus, to me, that data does not suggest there has been an abandonment of environmental enforcement

Second, it is not surprising to me that the overall results of the last two years are roughly in line with many prior years. Between the EPA and the DoJ, there is built into the two major federal enforcement agencies a very large and dedicated group of career professionals who are skilled at investigating matters and preparing them for efforts to settle or, when necessary, bringing them to court. Therefore, regardless of Administration, there is always likely to be a meaningful and continuous enforcement effort, as there should be. While changes in Administration may allow for shifts in emphasis, or in priorities for types of investigations and cases to pursue, the steadiness and competence of the career staff ensures a level of continuity and baseline enforcement that remains relatively constant.

Third, for all of the attention that the annual statistics may get, at the end of the day, they are proxies, and somewhat poor proxies, for the real objective, which is consistent compliance with our environmental regulations. Put another way, enforcement cases are a means to an end, not the end themselves. We use enforcement both as a threat to encourage compliance – i.e. for purposes of deterrence – and also as a means to force those who are not into compliance to come into compliance through the force of court orders and similar directives. Sometimes the enforcement mechanism becomes the vehicle by which disputes are resolved over what the regulations actually require – for example, a company may believe it has been in compliance, the EPA or DoJ disagrees, and a judge is needed to sort that out. Sometimes the government wins those cases, but sometimes it loses. Ultimately, all of this enforcement activity serves to clarify what the rules are and to achieve compliance with those rules.

Fourth, a corollary of the third point is that we should always remember that the ultimate goal is compliance, not enforcement for its own sake. Thus, we should be open to the possibility that better ways, or alternative ways, exist to secure compliance. Use of the enforcement "stick" need not be, and likely should not be, the only strategy. In particular, voluntary disclosure programs – at both the federal and state level – can be very effective "force multipliers", providing strong incentives for self-audits and similar programs that detect problems and result

in improved compliance without requiring the investigative resources and litigation efforts that an enforcement action typically requires.

Finally, because "compliance" rates are comparatively hard to measure when compared to enforcement statistics, there is a tendency to equate the two. But that simply does not correspond to my personal experience – for example, I have yet to meet the client who has taken the view that because there is a popular impression that "enforcement efforts are down" (regardless of whether that is, in fact, true) it will cut back on its own environmental compliance efforts, such as by shrinking its environmental, health and safety staff. My experience is that the private companies with whom I work, instead, typically have professional staffs that believe in and are committed to complying with the law and who are well aware that there is an active and effective set of career professionals at EPA, at DoJ, and with other federal agencies and the States. Thus, even if those who are regulated perceive there to be some changes in emphasis or tone between one Administration and another, that does not lead them to reduce their efforts to comply with the environmental rules. In turn, it is likely to be a false narrative to assume that even when enforcement efforts are subject to some adjustment that the reaction within the regulated world is a corresponding increase in non-compliance. That level of cause and effect is simply not present in my observation.

Let me now turn to each of the above points in somewhat greater detail.

First, as to enforcement data. For at least fifteen years EPA and DoJ have produced annual reports that attempt to quantify the prior year's enforcement results. And, while the reports have had periodic adjustments in what is counted and how, and despite changes in political and career staff across the years, each of these reports has settled around a fairly stable set of metrics. EPA currently reports on twelve different measures annually, ranging from the pounds of pollution reductions that are secured through consent decrees or other actions, to cubic yards of soil and debris that are to be cleaned up through resolved cases, to total years of imprisonment and number of defendants criminally convicted, to civil penalties secured, to the cost in dollars of the environmental controls and improvements that defendants (typically businesses) have agreed to make, to the number of voluntary self-reports EPA has received. DoJ's Environment Division takes a similar approach. I believe one reason that so many measures are being tracked and reported, and that the data categories reported have remained fairly stable across many years and many leaders, is that those who have held leadership positions at EPA and DoJ recognize that any single metric, or even any three or four metrics, would give an incomplete and imperfect picture. Thus, rather than focusing on only one or several items, the better way to assess the direction and effectiveness of the enforcement program overall is to bring all of these measures into the picture and see if there are any dominant trends across all data and across multiple years. In addition to getting a broader picture, at least one other reason to take this approach is that single case results can have outsized impact on the annual data, giving a false sense of underlying fundamental trends if one focuses on a single category that has had a "big year" or a "low year."

With that in mind, I have looked at EPA's most recent OECA report[2] and the picture I see is one that is typical of what you could likely have found had you picked up the report in any of the last fifteen years – some measures appear up from historic trend lines, some are about even, some are down. What the Report does not support is a narrative that enforcement has gone off a cliff and disappeared. Let me give just a couple of examples:

- In the category of hazardous and non-hazardous waste treated the data runs from 2012–2018, seven years total. Two of the years, (2012 and 2016), appear to have had anomalous results, from individual cases dominating the results. Comparing the remaining five years – two from the current Administration and three from President Obama's Administration -- shows that the Obama Administration had both the lowest enforcement year (2013), the middle enforcement year (i.e. 3d, 2015) and the highest enforcement year (2014), with the two years of the Trump Administration generally situated right in the middle, with years that rank second (2018) and fourth (2017) , respectively.
- In the category of quantities of soil and water to be cleaned, the first two years of the Trump Administration resulted in higher totals than either of the the last two years of the Obama Administration but lower than some of the earlier Obama Administration years.
- In the category of criminal fines and restitution, the data runs for eleven years, back to 2008. In three of the years (2017, 2015 and 2013) there were single cases that so dominated the outcomes that including them in year-to-year comparisons would be problematic. Taking the remaining years – one involving the Trump Administration, five involving the Obama Administration and one involving the Bush Administration – last year's criminal fines rank third overall – lower than two years in the Obama Administration, higher than three years, and higher than the last year of the Bush Administration.
- Finally, in the category of voluntary disclosures, the number of self-disclosures in 2017 and 2018 are nearly identical to the 2016 number – and far above those in 2015 and 2014 – and the number of facilities covered by those self-disclosures in 2017 and 2018 has trended dramatically upward from prior years.

On the other hand, one can certainly find in the data other pieces where enforcement numbers are "down" during the first two years of the Trump Administration compared to recent years, for example, the area of civil penalties in 2018. But the point is that the data are mixed and that is commonly – indeed in my experience, routinely – the case.

While I have not done a long and detailed statistical, my sense is that this kind of "mixed bag" is what you would see if you looked at any of the last fifteen years. For example, I believe we had very sound enforcement results during the time I was Assistant Attorney General, but I expect that if we looked at the data during the relevant two year period – 2007 and 2008 – some of those measures would have been up and some down when compared to surrounding years. But I wouldn't then take those isolated years and results to suggest that enforcement efforts were fundamentally better or different among the two times being compared. My overall point is that

[2] Available at https://epa.maps.arcgis.com/apps/Cascade/index.html?appid=0b9d73f351d648698f63bba3f3b15114.

you should look at all the data. And where some numbers are up, some are down and some are generally in the range of historic experience, it is difficult to conclude that environmental enforcement has been abandoned or undermined over the first two years of the Trump Administration.

One other point worth noting about the data, in part because it relates to a point I will develop later – it looks to me that there may be something of a long-term trend, that extending through the prior Administration, that the commitments to eliminate pollution metric (measured in pounds per year) is trending downward. But the fact that this enforcement number is going down over time, rather than up, is likely a marker of success in enforcement, not failure, because it is explained by the fact that the EPA has, over several decades already addressed a variety of facilities that produce the largest output of pollution. As a result, EPA also is now more likely to have cases addressing facilities with smaller pollution output. You might say that the "low hanging fruit" has already been addressed, even if there are still operating facilities that emit constituents that due to toxicity or other reasons warrant control under our regulations. In other words, sometimes declining enforcement numbers are a marker of success because the decline is explained by the fact that, over time, important facilities or industries are now achieving consistent compliance.

Apart from the data, there can, of course, be critiques that particular cases have not been brought that ought to have been brought or that cases were resolved in ways that were not sufficiently punitive. As to that, I would first note that it is easy when on the outside to imagine that a case would have been straight-forward to bring and easy to prove for the government. In reality, you need to be in the government's chair, hearing the defenses that will be put forward in a particular matter, doing the detailed analysis that a government attorney owes to each potential defendant to genuinely understand the merits and weaknesses of any particular case. Thus, I am always wary of critiques of particular case decisions, and I think all of us not in the chair ought to recognize that the decisions in any particular case and the complexities of a case may be more than we understand or, in fact, can ever be privy to due to appropriate confidentiality and privacy concerns that United States also has to recognize. And when there is a critique about a particular case not having been brought, at least one reality check is to consider whether any citizen suit or state action could have been brought and hasn't been. Where the federal government has not yet taken action, the lack of such citizen suits or state enforcement actions may at least somewhat indicate that the facts and law are complicated and the claim that a violation has occurred is less easily proved than might first appear.

Moreover, even as to cases that are brought and are resolved there have to be some "fairness limits" that will apply in any particular case. However effective it might be in terms of general deterrence theory to hit a minor violation with a major penalty as a means of "sending a message", in my view, it is unjust to do so and achieving fair outcomes to individual regulated entities needs to occur lest the whole system lose public respect and acceptance. In sum, not all violations are equal and the government owes a measure of fairness in outcome to each individual entity or individual against whom it brings an enforcement action. The words of Justice Jackson in describing the role of the prosecutor are well heeded not simply for the criminal enforcement lawyer but for all enforcement officials in the government: "the

[government lawyer] is the representative of not an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore . . . is not that it shall win a case but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Thus, before launching too far down the road in criticizing any particular case result or resolution, I always try to take a deep breath and remind myself that in any particular case there may be a complicated brew of factors that went into the overall resolution. Having said all of that, one thing we can generally expect is that, in the resolutions the United States does reach, it is insisting that compliance with rules and regulations be achieved going forward. My sense is that this has remained a consistent feature of this Administration's approach – companies are required to come into compliance as a required element of all settlements.

This brings me to my third overall point, which is to emphasize the purpose of enforcement is to incentivize, and when necessary to coerce, compliance with our environmental regulations. Enforcement is not an end in itself. Indeed, in my view, one indication that a regulatory regime is truly failing would be if you observed that the enforcement numbers year after year after year were consistently on the rise. Those kind of results, if you had them, would suggest major defects in the underlying regime because it would suggest that increasingly serious violations were occurring over time, resulting in greater need for enforcement and greater penalties for misconduct. But that is precisely the opposite of "success" and of what we should be striving for – we should be hoping to achieve a world where those who are regulated are regularly in compliance or, when they violate the rules, routinely and regularly quickly address that issue. In that world, we'd have little or no enforcement need at all. Now, obviously, that is not a world that we have today and there is, as a result, a legitimate need for enforcement activity today and that need will exist in the future. But I use this to illustrate the point that we always need to look behind the enforcement numbers – declining numbers may indicate underlying success in achieving better regulatory compliance and, conversely, ever increasing numbers might well be a sign of failure in the underlying regime and requirements. The challenge, and one I readily admit I never found a way to fully resolve when I was in DoJ's leadership, is how one gets good and recurring data on rates of compliance – how do you measure in a meaningful way whether overall compliance is improving within our regulated entities? Certainly there are some options through reporting that must occur under statutes such as the Clean Air Act and Clean Water Act. But even so, that is a tough nut to crack on a consistent basis and so there is a tendency to revert to "enforcement numbers" as a proxy for how well we are doing to insure compliance. But the two are not interchangeable and, thus, we should always be careful about making too much of movements in the enforcement data or assuming that such movements then presage that compliance will suffer.

Let me now turn to my fourth large point – enforcement is a necessary part of creating an effective compliance enforcement regime, but it is not the only part. One challenging aspect of creating an effective set of overall incentives for compliance is recognizing the reality that there are, and always will be, regulatory violations that will go undetected by the relevant enforcement agencies. That fact, in turn, creates some incentives for those who are regulated to "not look too hard" at their internal practices to identify possible problems. On the other hand, self-inspection and internally initiated company audits can be a very powerful "force multiplier" for identifying

problems, well beyond what the government can itself ever hope to achieve through a regime of inspections, investigations and similar traditional enforcement tools. Thus, to me it seems clear that a sound government enforcement program must, in many situations, create a meaningful incentive structure that rewards those who are regulated when they look for and correct problems, without then fearing that identifying failures will ultimately work to their greater detriment as an enterprise. This problem is hardly unique to environmental law – DoJ's Antitrust Division has had long-standing policies that provide strong incentives to be the first company to report any detected price fixing violations and the DoJ's Criminal Division similarly has programs that recognize self-detected and reported foreign bribery violations deserve lesser (or sometimes zero) enforcement sanction. Thus, it can be a sign of success in achieving the overall goal of compliance if an enforcement program generates significant self-reports of violations, assuming that self-reporting is also then paired with corrective action. My understanding is that EPA's self-reporting policies create this pairing – self-reporting can help avoid formal compliance actions or can limit the penalties assessed in connection with them, but only where there is corrective action that addresses the violation. I am not aware of any actions in the current Administration that have receded from this general principle. As a result, I think there is likely some positive news in terms of overall compliance reflected in the fact that self-reporting numbers appear to have been on the rise in recent years as those self-reports then also likely correlate to corrective actions to create compliance.

Finally, let me turn to my last major point and depart from my focus on the overall EPA enforcement data. It is admittedly always a little dangerous to generalize from one's own personal and somewhat anecdotal experience. Acknowledging that limitation, I do think it worth observing that, in my experience, those in the regulated community to whom I am most often providing advice and counsel do not tend to expand or contract their environmental regulatory compliance efforts in response to perceived ebbs and flows in the level of environmental enforcement activity. I certainly am not aware, for example, of companies who have responded to a narrative that "enforcement is on the decline" with concomitant decisions to deemphasize or downgrade their environmental compliance efforts. And the reasons are fairly straight-forward: first (and far and away most significantly), responsible companies simply believe in following the law and try to do so, whether it is environmental or any other area; second, environmental and operations business leaders are generally aware that there is a core environmental enforcement effort, driven by skilled and dedicated career staff found in both federal and state agencies, that is always present and at work; and, third, even if business was willing to consider ways of "cutting compliance," it would simply be too hard to draw a line from "decreased enforcement generally" to "we can cut here specifically and feel safe in doing so."

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To sum up, it is certainly the case that, as a country, we need our federal agencies such as EPA and the Justice Department to have available to them effective mechanisms to investigate potential environmental violations and to act against such violations when detected. And it is clear that we should expect those tools to be used in a meaningful way, calibrated to the nature and seriousness of violations that do occur. But it is also clear that, in measuring whether that is occurring, there is no single metric that can capture the scope of enforcement efforts, much less

provide us a definitive picture of these efforts on an annualized basis. And assessing the overall enforcement climate becomes even more complicated when recognizing that the States also play significant enforcement roles in the cooperative federalism design that Congress has embraced for our major environmental statutes. But for me, both from looking at the full range of data with all its variation, and drawing on my experience, nothing demonstrates that environmental enforcement has become so weak that we are, in turn, suffering a deteriorating level of environmental compliance. And achieving that compliance is, and should be, the basic goal for which we are all striving.