Written Testimony

Bruce C. Buckheit, former Director, Air Enforcement Division, U.S. Environmental Protection Agency Before the Oversight and Investigations Subcommittee of the U.S. House Committee on Energy and Commerce

"EPA's Enforcement Program: Taking the Environmental Cop Off the Beat"

February 26, 2019

Chairman DeGette, Ranking Member Guthrie, and distinguished members of the Subcommittee, thank you very much for inviting me to participate in today's hearing. My name is Bruce Buckheit. I served in the Federal government's efforts to manage environment and safety issues starting in the Ford Administration and continuing into the Administration of President George W. Bush (Bush II). From 1984, when I filed my first action on behalf of EPA to enforce a New Source Review (NSR) violation, until my retirement in 2003 I was directly involved in the administration and enforcement of the Clean Air Act. During this period I served as a Senior Counsel in the Environmental Enforcement Section of the Department of Justice (DOJ), then as Deputy Director and then Director of the Air Enforcement Division at the Environmental Protection Agency. Upon my retirement I served for four years as a member of the Virginia Air Pollution Control Board, which oversees the rulemaking, permitting and enforcement activities of the Virginia Department of Environmental Quality. Since my federal retirement I have also provided research and consulting services to a variety of corporations, state and Federal agencies, tribes and non-governmental organizations, principally in the areas of energy and air pollution management. In recent years I have also addressed these issues in a number of foreign countries including Armenia, Australia, the European Union, India, Israel, Indonesia, the Philippines, Kosovo, Myanmar, and Viet Nam. I appear today on my own behalf and without compensation.

I understand that others on this panel will discuss the EPA enforcement data that demonstrates that there has been an historic decline in enforcement of our environmental statutes across the board. In my testimony today I hope to provide context to the objective enforcement data for the Clean Air Act in particular, "decode" some of the bureaucratic phrases in key policy documents and generally assist the Committee in its efforts to understand

the current effectiveness of clean air law enforcement and recent Federal air enforcement policies and programs.

Each of the different metrics for activities and outcomes for civil enforcement of the Clean Air Act reveals a different aspect of a mosaic that, overall, represents the overall program. My review of all of the relevant metrics shows that the air enforcement program has been substantially cut back from my time at EPA. Based on my personal interactions on these issues with Administrator Wheeler and Assistant Administrator Wehrum in the 1998-2003 timeframe, the more recent public statements of senior Administration officials, including the President, agency rulemaking proposals to roll back key Clean Air Act provisions and published Administration enforcement policies this decline is neither surprising nor accidental. Notably, these policies are devoid of any measures to deter future violations of the Clean Air Act. Until and unless the Administration fundamentally alters these policies the full measure of public health protection intended by the Clean Air Act under the Clean Air Act will not be provided.

CLEAN AIR ACT ENFORCEMENT AUTHORITIES PROVIDED BY CONGRESS

The Administration's push for a new "Federalism" to diminish or eliminate EPA's role in controlling air pollution and return air pollution control responsibility to states ignores the history of air pollution control that led to the adoption of the 1970 CAA in the first place. Precedent for regulating pollution under the common law and by regulation dates back to the 1600s. Modern air pollution regulation can fairly be traced to the California Air Pollution Control Act of 1947, and the Air Pollution Control Act of 1955. Federal authority under the latter statute was merely advisory to the States and contained no provisions to actively address air pollution. This approach was attempted for fifteen years before being declared a failure. To fix this and create some measure of an effective program Congress adopted the 1970 Clean Air Act (CAA). The CAA was intended (1) to end the "race to the bottom" among states competing for industrial development; (2) to improve air quality in unhealthy areas so as to meet minimum health based standards known as "NAAQS" and (3) to ensure that air quality in "clean" areas is not improperly degraded. While maintaining the role of the state in determining where to achieve emission reductions needed to achieve the NAAQS, Congress specifically assigned to EPA the obligation to set emission limits for the largest categories of

pollutants, including hazardous air pollutants, and to enforce any requirement issued by either EPA or the state. With respect to enforcement the CAA provides that

> *"whenever the Administrator finds that any person has violated or is in violation of any requirement of any applicable plan or permit, the Administrator shall notify The person and the state in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice is issued, the Administrator may" [take administrative or judicial enforcement action].*

Thus, while EPA must forebear for a short period of time to permit the state to take appropriate enforcement action, once the state has had that opportunity that the agency should otherwise act as appropriate. EPA and State and local air pollution authorities have over the years worked out procedures to balance the needs and responsibilities of state and local authorities with EPA's fundamental oversight and enforcement responsibilities. The current administration has adopted revisions to those earlier policies that will take us back toward those ineffective pre-1970 programs.

EPA's NEW POLICIES PROMOTE LESS EFFECTIVE REGULATION OF AIR POLLUTION:

1. EPA HAS DE-PRIORITIZED NEW CAA ENFORCEMENT ACTIONS IN LARGE EMITTING SECTORS

In an attempt to maintain an enforcement "presence" in the very large numbers and types of facilities that emit significant air pollution with limited enforcement resources and thereby deter future violations, EPA-HQ has historically worked with the Regions and States to establish EPA regional and national enforcement priorities. Since the investigation and enforcement of these "nationally significant" cases can take several years, the agency's practice has been to develop a multi-year plan for addressing targeted sectors. As carried over from the Obama Administration, priority sectors for EPA investment in CAA enforcement included NSR enforcement in the electric power, glass, cement, and acid manufacturing sectors. EPA now proposes to declare "mission accomplished" within these sectors.

> "The EPA has almost completed this [National Compliance Initiative] NCI, obtaining significant improvement in compliance and major reductions in air pollution. Work in FY 2019 will be focused on completing ongoing enforcement cases and monitoring compliance with existing enforcement settlements."

In support of this decision EPA cites to the emission reductions that resulted from enforcement

actions undertaken against operators of coal fired power plants 20 years ago while I was at EPA and reductions from subsequent EPA regulations. However, our investigations at the time revealed a 70 percent *noncompliance* rate in this sector and our enforcement efforts were shut down by the incoming Bush Administration before we had completed our work. This sector remains the largest emitting stationary source sector in the country, with many aging units that are poorly controlled. When it established this sector as a priority three years ago EPA asserted that it was aware of substantial additional noncompliance within the sector. See, https://www.epa.gov/enforcement/air-enforcement. Based on my own recent work and industry statements concerning upgrades and modifications at coal-fired power plants, I believe that this assessment is very likely correct. Statements by the President and the EPA Administrator document the Administration's strong pro-coal sentiments and so it is reasonable to ask whether it is these pro-coal policies, rather than the actual potential for future emission reductions, that are responsible for the decision to drop investigations in this sector. It would also be useful to understand when and by what means the Regions were instructed to stop investigating this sector.

In discussing its decision to drop the glass, cement and acid manufacturing sectors EPA asserts that it has "has required controls **or commenced investigations** at 91 percent, 96 percent, and 90 percent of facilities in the glass, cement, and acid manufacturing sectors, respectively. However, **"commencing" an investigation** is not the same thing as **completing an enforcement action**. And so, these representations fail to support the agency's assertion that "this NCI no longer presents a significant opportunity to affect nonattainment areas or vulnerable populations nationwide." EPA may intend to complete those investigations, but based on the phrasing of EPA's announcement and past history, I rather doubt it. Indeed, it is possible that EPA is repeating the playbook that the Bush Administration employed when it shut down NSR investigations. At that time enforcement actions that had been referred to DOJ were allowed to proceed, but we at EPA were directed to cease ongoing NSR investigations at coal-fired power plants. A close reading of the recent NCI statement reveals that EPA states that it will complete the ongoing enforcement **cases.** It does not say that EPA will complete the ongoing enforcement **investigations.** In my world, a "case" is a matter that has been referred to DOJ and filed. For these reasons the Subcommittee should undertake to understand the status of investigations that were pending as of January, 2017, how many (if any) new investigations were commenced since that date, how many coal-fired units were under investigation at the

start of the Administration and how many still are under investigation. The Subcommittee should also obtain information about the activities and outcomes of the investigations in the other listed sectors.

Importantly, while disinvesting in the four listed sectors, EPA does not identify any other "large emitting" industrial sectors to replace the dropped sectors for intensive investigation and enforcement (including NSR enforcement). Instead, the agency places all "large emitting sources" in the low priority "core program" category. The decision to delete NSR investigations in the four listed sectors and not identify other major emitting sectors – such as industrial boilers or steel producers for NSR or other major investigations is exacerbated by other policies that set out EPA's heightened deference to states. Under EPA's new cooperative enforcement guidance, EPA is to defer to states, except in limited circumstances (and only then after the political managers at the state and EPA agree). One of those listed exceptions is if the matter involved a sector that is the subject of a national enforcement initiative. And so, where there are no a national enforcement initiative sectors, the options for EPA enforcement to take action are reduced.

Thus, the combined effect of de-prioritizing enforcement at the largest emitters and the agency's Federalist policies can be read to mean that for the most part EPA is done with enforcing the class of violations that have over the years reduced stationary source emissions than any other set of violations. Here, it would be useful for EPA enforcement to explain what it means by these policies and document its plans (if any) to investigate and pursue NSR violations at major emitting facilities.

2. EPA FAILS TO EFFECTIVELY DIRECT RESOURCES TO THE MOST SIGNIFICANT PROBLEMS

As I discuss below, the resources available for Clean Air Act enforcement are far, far smaller than those necessary to properly police the very large number of diverse sources that pollute our airsheds. To manage this EPA and state and local agencies have worked out procedures that provide for what is known as the "enforcement pyramid." The precise relationship varies with the level of resources and political will available in the state or local jurisdiction, but as a broad generalization, state and local responsibilities can be described as "the cop on the beat", who maintain a presence within the regulated community and address

most routine enforcement matters. These matters are usually resolved administratively and only rarely involve actions filed in state court. EPA Regional enforcement staff provide oversight of state programs and are directly involved in a number of local inspections and enforcement matters. These matters typically involve larger sources such as steel mills or refineries, but also matters that the agency deems to be national priorities. So, perhaps a reasonable analogy for the roles of EPA Regional personnel is to staff at a police precinct headquarters and Assistants in U.S. Attorney Offices located throughout the country. The role of OECA technical staff might be likened to that of the FBI, while HQ attorneys serve a role similar to the technical sections at DOJ, such as the Environmental Enforcement Section. Having said that, the best legal and technical talent concerning a particular sector or issue may be found in Regional or State/local offices and so, a team from these different entities may be formed to investigate and pursue a particular manner of national interest.

EPA targeting begins with state, local and agency staff simply paying attention to trends within industries that might suggest areas that need attention. These might include new regulations or news reports of industries that might be increasing emissions. Today, such trends might include whether coal-fired power plants are complying with the recent MATS rules and whether, because of their age, they are once again undergoing life extension programs that unlawfully increase annual emissions. Other potential trends include recent public reports that major oil companies are increasing refining capacity in the Gulf because of increased "fracked" wet petrochemical production and reports that domestic steel producers have ramped up production as a result of increased tariffs on imported steel. In these areas initial targeting through publicly available information, or reports from state and local inspectors, would ordinarily be followed by more intensive inspections and document requests under section 114 of the Clean Air Act.

Additionally, the health issues associated with facilities that employ ethylene oxide to sterilize various products suggests that the agency may want to evaluate whether enforcement under section 112 or 303 of the Clean Air Act is appropriate at the dozens of such facilities located around the country. Here, where the issue may well be associated with so called "upsets" and "fugitive emissions" as well as stack emissions, the agency enforcement response

may include the installation of fenceline emission monitors to determine the risk to the public posed by facility operations. EPA solicits comment as to whether it should enforce regulations that limit leaks of pollutants at facilities such as refineries and chemical plants. These violations can be significant in some parts of the country and are relatively inexpensive to remedy as they ordinarily involve increased attention to the operation and maintenance of the facility rather than large capital expenditures. However, EPA reveals no attempt at objective analysis of potential priorities in large emitting sectors or targeting data supporting its suggestions for future consideration. In any event, it should not be a question of "either/or" as the agency has the resources to continue to enforce NSR violations in key sectors even as it considers leak detection and repair violations.

3. QUESTIONS ABOUT WHETHER EPA IS ENFORCING THE LAW AS WRITTEN BY THE CONGRESS AND INTERPRETED BY THE COURTS

Around the time I left the agency, senior EPA management had instructed me to advise the Regions that forward-looking enforcement of the NSR provisions would not continue under the regulations as they were written and interpreted by the Courts. Under the guise of enforcement discretion, the EPA would only go forward with enforcement of the regulations as the Bush II Administration preferred those regulations to be. The Administration pursued major weakening of the rules but was mostly unsuccessful. Nonetheless it only pursued enforcement actions if those actions would also have been violations of the proposed rules. The current Assistant Administrator for Air and Radiation was at the agency at that time and was likely involved in the decisions about what law to enforce.

Now, with several of the same actors in place, the current Administration is again seeking to essentially gut the effectiveness of the rules as they apply to coal-fired power plants. Administrator Pruitt has also published a memorandum (the DTW Memorandum of Dec 7, 2017) announcing that the agency will not investigate or pursue violations where a source asserts that it is in compliance, irrespective of whether the underlying analysis is credible. This policy essentially puts the electric power sector on the "honor system", notwithstanding the fact that it is a crime to submit a false Federal permit document. Accordingly there is reason to ask whether the agency will pursue NSR violations under the law as written, and whether the

DTE memo is agency policy. The agency has not explained the status of the investigations conducted under the NCI respecting coal-fired power plants and whether (a) it is using projections of annual emission increases as the legal test and (b) whether it looks behind the source's projection to determine if it is accurate.

4. METRICS FOR EVALUATING THE PERFORMANCE OF THE ENFORCEMENT PROGRAM

As discussed above, there are many different metrics to track activities and outcomes within the CAA enforcement program and at this time, overall performance is not acceptable. However, it is a fairly simple matter for EPA-HQ to push Regional staff and state to generate enforcement statistics that look better but do not represent a real commitment to enforce the Act. In the past, such efforts have included the use of limited "drive by" inspections in lieu of detailed investigations. To examine whether there is a real willingness of senior EPA management to address the most significant violations, I recommend that the Subcommittee continue to track the following metrics.

1) The emission reductions achieved by the enforcement actions. Where this information is not available, the value of injunctive relief in judicial matters and administrative compliance orders can serve as a surrogate since the injunctive relief in these matters is ordinarily the installation of pollution controls.
2) The number of investigations that involve a significant investment of agency resources in complex matters. One surrogate for this metric could be the number of investigations that involved issuance of one or more information requests under section 114 of the Act or equivalent state authority.
3) The number and nature of referrals from EPA to DOJ for civil enforcement, including all referrals for NSR violations. Criminal enforcement is an entirely separate program. Criminal charges often are filed against small businesses for matters such as unlawful removal of asbestos containing materials (and such charges should be filed), but not against major corporations or the officers thereof, for filing false NSR permit applications or similar matters as these issues are considered too complex to put before a jury.
4) The number and nature of medium to large matters addressed. Statistics relating to

individual mega-cases, such as the VW matter, are certainly important, but can mask a broader failure of the program.

5) The number and nature of specific enforcement initiatives where EPA-HQ is encouraging and endorsing investigations in specific sectors; broad statements such as "improve air quality in non-attainment areas" are meaningless.

5. WARNING SIGNS OF POTENTIAL POLITICAL CONSIDERATIONS IN ENFORCEMENT MATTERS

Scattered throughout EPA's policy documents are several other items that raise concerns about political appointees improperly influencing law enforcement. These include:

1) Review of inspection targets, referrals and enforcement actions and disagreements with state officials by Regional Administrators or other political appointees. While additional review and co-ordination of politically sensitive matters is not unusual, the recent policy documents seem to expand and unduly emphasize this matter. Unless clarified, staff will "get it" and not send even minimally controversial matters to political appointees who will be assumed to be supportive of anti-enforcement policies.

2) Direct involvement of the air office in deciding and announcing enforcement policies. Matters, such as the "once in always in" policy, the DTE memo issues and the recent Sterigenics issue are enforcement matters properly decided by the Assistant Administrator for Enforcement, not the Assistant Administrator for Air and Radiation.

6. "ENHANCED" COMPLIANCE ASSISTANCE WILL NOT LEAD TO FEWER VIOLATIONS OF THE CAA.

EPA Enforcement, through a HQ office that is separate from the Air Enforcement Division and the Regions, has always provided substantial resources for compliance assistance to regulated entities that may have a question as to whether a particular regulation applies and what options are available for compliance. If, during the course of an inspection, an error is found and the company is willing to promptly correct the matter; that is ordinarily the end of the issue as the regulatory agencies do not have the resources or interest in pursuing such issues as enforcement matters. Enforcement occurs when the source either repeatedly fails to correct the problem or refuses to address it. In this context one has to wonder what EPA's new "compliance assistance" approach is and how it believes its new approach will increase compliance broadly within the regulated community

States have always had the authority to regulate emissions -both before and after passage of the Clean Air Act. They can inspect, investigate and sue if necessary. Under the CAA EPA must provide the state notice and an opportunity to take action before filing an enforcement action. In our earlier enforcement initiative, we actively sought state participation our cases, with mixed results. Some states and air quality management districts have shown a willingness and a capacity to enforce these laws. For these states, "enhanced" compliance assistance is not needed and will not improve outcomes. A larger number of states do not have the political will to force their companies to install expensive pollution controls. These views are not mere opinions, but are documented by the history of state air enforcement over the past 29 years. It is a simple matter to go back and look at the number of times that a state has filed a standalone enforcement action seeking millions of dollars of injunctive relief against a domestic manufacturer or utility. I have in the past, and for most states, it's a null set. EPA has offered no facts to support its adopted enforcement policies and there is no reason to believe that EPA withdrawing from the field will alter the value that the different states place on environmental enforcement.

BACKGROUND INFORMATION:

1. WHAT IS NSR ENFORCEMENT?

The 1977 CAA Amendments established a program, known as New Source Review (NSR), under which new and modified major sources would be required to install the "Best Available Control Technology" (BACT). The test for whether a unit is "modified" is whether it has undergone a modification that increases its annual emissions of a regulated pollutant (e.g., SO2, NOx, PM) by more than a specific amount. Certain sectors within industry have objected strongly to this requirement, but the law has remained on the books, unchanged, since 1977. These companies have continued throughout the years to lobby for changes to the rules that implement the statute and pressed the agencies and the states not to enforce the rules. But enforcing these rule as Congress intended is fair to investors and operators of new sources that put on these controls and far more effective in reducing emissions than other types of enforcement actions. If an enforcement action is brought against a facility that violates a permit limit by 10 percent for 10 percent of its operating hours, correcting that violation will

reduce the source's annual emissions by one percent. But if a NSR action is brought against a modified facility that has failed to put on controls, the resulting injunctive relief can reduce the facility's annual emissions by 90-99 percent depending on the pollutant. NSR enforcement is a very important tool to maintain air quality in clean areas and reduce pollution levels in non-attainment areas. However, determining that a particular modification at a complex facility increased annual emissions beyond what the facility was capable of emitting prior to the change can be a complex technical matter and for political reasons many states have failed to ever bring an enforcement action under these provisions. Accordingly, retaining EPA presence in this area is critical.

2. SIZE OF THE REGULATED UNIVERSE

The American economy is large and diverse and so, there is a very broad spectrum of sources of air pollution. There are approximate 15,000 so called "major sources," hundreds of thousands of smaller factories and other stationary sources and literally millions of cars, trucks, buses, off road construction equipment. To address each of these diverse categories in a manner that tailors the regulation to the characteristics of the category Congress has directed the agency to provide for specific regulations that are appropriate for that category. And so, the Clean Air Act itself is 300 pages of Federal legislative text. Federal implementing regulations are more than 10 linear feet of fine print. In addition, each the approximately 75 state and local air pollution agency develops its own set of federally enforceable regulations. Each these Federal, State and local regulations will be accompanied by agency administrative interpretations and Federal and State judicial decisions that also interpret the regulations.

3. AVAILABLE RESOURCES.

The available resources are wholly inadequate to monitor this important sector of American life. While there are somewhat larger resources available for the overall program, including "compliance assistance" and "permitting" staff, the actual number of enforcement professional FTE[1] is quite limited. Based on my recollection and an informal survey I conducted of recent state and federal retirees over the past few days, I would estimate that there are approximately

[1] Full time equivalent – a staffer that devotes half time to enforcement would be counted as 0.5 FTE.

20 FTE for attorneys at DOJ Environmental Enforcement Section available for Clean Air Act enforcement plus a handful of attorneys in three U.S. Attorney's offices. In the Air Enforcement Division we may have had 30-40 FTE of professional staffing, half of which were in the Mobile Source Enforcement Division – which had sole responsibility for cars, trucks, buses and other mobile sources. I estimate that regional professional enforcement staffing levels were in the range of 500-1000 FTE, including support from Regional Counsel's offices. State enforcement resources vary by the size of the state and the degree to which state policies support environmental regulation. Many states have fewer than 20 FTE available for inspections and no agency enforcement attorneys. Further, in many states co-ordination between state environment agencies and the State Attorney General's office may be limited. State judicial enforcement actions against in-state stationary sources seeking substantial injunctive relief and penalties are extremely rare in most states.