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Written Testimony

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“EPA’s Enforcement Program: Taking the Environmental Cop Off the Beat”

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Thank you, Mr. Chairman and Members of the Committee, for the opportunity to testify today. My name is Eric Schaeffer and I am the Director of the Environmental Integrity Project, a public interest group established in 2002 to advocate for more effective enforcement of environmental laws. I also spent twelve years at EPA and served as Director of the Agency’s Office of Civil Enforcement between 1997 and 2002.

EPA has a proud history of enforcing the Clean Air Act, the Clean Water Act and other laws that protect public health and our natural resources, in both Republican and Democratic Administrations. That tradition is in danger today for several reasons. Thanks to relentless budget cuts, the Agency’s enforcement staff of investigators, engineers and attorneys has shrunk nearly 16% over the last six years (Attachment A). While Congress thankfully rejected the even deeper cuts President Trump proposed, funding levels over the last two years have not been enough to stop the slow erosion of the workforce.

The dedicated professionals who remain at their post face headwinds that make it harder to do their jobs. They work for a President who promised on the campaign trail to reduce EPA to little tidbits. EPA’s political leaders spend most of their time weakening environmental rules and also relaxing monitoring requirements, making it even harder to know whether industries are complying with their air and water pollution limits. And new policies aim to reduce the federal enforcement presence on the pretense that that state agencies, facing their own budget cuts along with legal constraints on their power to enforce, can pick up the slack. These rollbacks will leave violators unpunished and too many communities exposed to higher risks from toxins like lead, or carcinogens like benzene.

Shackled by these budget cuts and political restraints, EPA’s enforcement results for the 2018 fiscal year were historically low by almost every measure. The number of inspections and investigations, civil

cases either referred to the Justice Department for prosecution or concluded with a consent decree, criminal cases opened, and defendants charged with environmental crimes fell to their lowest levels since at least 2001. Looked at another way, inspections and investigations in the last year were 40% below their average level during the last two Administrations. EPA referred 123 cases to the Justice Department in 2018 compared to an average of 211 per year under President Obama, and 304 under President Bush.

Adjusted for inflation, violators will spend less to clean up their illegal pollution than any time since 2003, as the volume of pollutants removed or treated as a result of enforcement actions has also fallen sharply.

To be fair, we could see more enforcement actions and better outcomes this year. The Agency will apparently recover \$305 million from Fiat-Chrysler for installing faulty emission control devices on more than 100,000 of its vehicles, though compared to the earlier Volkswagen settlement the company will not have to spend as much (per vehicle) on environmental projects to offset the harm caused by its illegal pollution. But one or two big cases against corporate defendants will not compensate for a smaller EPA enforcement presence almost everywhere else.

You'll hear "cooperative federalism" used to justify these cutbacks, based on the assumption that states will fill the void left behind when EPA leaves the field. States are critical partners when it comes to environmental protection, which is why they are authorized to implement and enforce most federal environmental rules. But for good reason, Congress gave EPA the right to continue to enforce federal standards even after states have assumed the responsibility for implementation. And although not widely known, many state agencies do not have the same kind of power that EPA has to enforce these federal laws. For example:

- Because federal penalties established long ago are periodically indexed for inflation, EPA can ask courts to fine polluters nearly \$100,000 per day for each violation of the Clean Air Act that occurs after November of 2015. In contrast, the maximum state penalties for comparable violations are much lower, dropping to no more than \$10,000 per day in some jurisdictions. (Attachment B).
- Unlike the federal government, many states do not authorize criminal prosecution of those who intentionally or recklessly violate federal environmental rules. Creative state or local

prosecutors can sometimes charge the worst actors under statutes that prohibit fraud, but even then may lack staff trained to investigate environmental crimes. Notably, one of former EPA Administrator Scott Pruitt's first acts as Oklahoma's attorney general was to disband the environmental crimes unit established by his predecessor.

- Unlike EPA, some states do not have administrative law judges with the power to make decisions for certain environmental cases. That means if defendants refuse to settle, the agency must refer even relatively minor violations to the understaffed offices of their state's Attorneys General for prosecution in state court.

Most enforcement cases are eventually resolved through settlement that offer penalties well below the maximum limit in return for cooperation and investment in cleanup. But as any business in America knows, you need to have leverage in negotiations if you want to get a good outcome. In too many cases, states don't have the same enforcement leverage that EPA brings to the table.

Budget cuts have also eaten into state capacity, making it harder to recruit or retain the kind of expertise needed to sustain an enforcement action, especially where the defendants are large and well-lawyered corporations. Some of the most dangerous forms of pollution are invisible to the naked eye, and can only be seen with specialized equipment like infrared cameras or uncovered through painstaking analysis of sample results and plant records. Routine inspections aren't enough to find the biggest violations and you cannot just wait for them to show up, like the highway patrol car waiting behind a billboard for someone to speed by.

EPA's work more often involves carefully targeted investigations to find serious violations exposing the public to dangerous pollutants that might otherwise never be found. You can certainly find that focus in the best state programs, some of which have done ground-breaking environmental work for years. My point is simply that there aren't enough states with both the legal authority and capacity to replace the enforcement work done by EPA.

Most regulated sources make good faith attempts to comply with the rules, and we would be lost without those efforts. But voluntary compliance will never be enough to prevent the serious violations that result from backsliding, carelessness, or the temptation to cut corners to save money. You can get some idea of that by reviewing the federal National Response Center's online record of tips from citizens reporting companies blowing lead dust into the air, illegally burning hexavalent chromium,

methanol, and other hazardous substances, dumping toxic chemicals or coal ash in the backlot, down the drain, or into creeks and rivers. We've been able to match company names to the location of these incidents and will ask EPA to investigate these allegations. (Attachment C).

Without stronger enforcement programs at both the federal and state level, we leave law-abiding companies at the mercy of unscrupulous competitors and too many communities exposed to pollution that is illegal, noxious, and in some cases downright dangerous. To illustrate what's at stake, Attachment 4 provides examples of some of the violations that EPA investigators have uncovered at sites across the United States, with some background on the people who live nearby. The data comes from discharge monitoring reports, notices of violation, or inspection reports that date back 18 months to more than five years ago. The allegations concern illegal emissions of lead, hydrochloric acid, dioxin, carcinogens that are deadly in minute concentrations, and smog forming chemicals, and unpermitted wastewater discharges of bacteria, nitrogen, and toxic metals. To the best of our knowledge, EPA has yet to take final action to require those responsible to invest in clean up and pay penalties for violating the law.

Three of these cases were unearthed by teams from EPA's National Enforcement Investigations Center in Colorado, which has lost a quarter of its staff over the past few years. Their inspection reports are worth reading. For example, NEIC's 2016 investigation found thousands of violations at the Denka polymers plant in Louisiana's St. John the Baptist Parish, including airborne chloroprene concentrations above open wastewater drains that NEIC estimated were up to 800 times above the level considered safe by the Occupational Safety and Health Administration. Chloroprene is a likely carcinogen, and while airborne concentrations in the adjacent African American neighborhoods have declined, cancer risks are still well above levels that EPA considers acceptable.

Louisiana has responded with an administrative order that incorporates Denka's "voluntary" agreement to take some action to reduce the plant's chloroprene sources. Based on the detailed findings in the NEIC's inspection report, now more than three years old, this company needs to pay a big fine and its cleanup needs close supervision. Complying with our environmental laws isn't voluntary, and it isn't something you have to do only after the government has knocked on your door.

The people who live near some of these sites include neighborhoods that are predominately African American or Latino, and almost all of the sites are in communities where poverty levels are high. But whether black, brown, or white, the Americans exposed to so much illegal pollution do not have

powerful political connections or access to well-connected lobbyists or expensive law firms. In other words, they are the very people who most need the protection of federal laws to protect public health and keep our air and water clean. They have never heard of cooperative federalism and can't afford to wait for it. They need EPA's help today.

Thank for the opportunity to speak and I look forward to answering your questions.