UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

JUL 08 2019

The Honorable Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515-6371

Dear Chairman Pallone:

I am writing in response to your letter of April 12, 2019, requesting responses to Questions for the Record following the February 26, 2019, hearing on EPA's Enforcement Program before the Subcommittee on Oversight and Investigations.

The responses to the Subcommittee's questions are provided as an enclosure to this letter. If you have any further questions, please contact me, or your staff may contact Carolyn Levine at (202) 564-1859 or levine.carolyn@epa.gov.

Sincerely,

Joseph A. Brazauskas
Associate Administrator

Enclosure

Questions for the Record
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
Hearing on
"EPA's Enforcement Program: Taking the Environmental Cop Off the Beat"
February 26, 2019

Ms. Susan Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency

The Honorable Frank Pallone, Jr. (D-NJ)

Proposed National Compliance Initiatives

On February 8, 2019, EPA published a notice of public comment period in the *Federal Register* soliciting public comment and recommendations on the National Compliance Initiatives to be undertaken in fiscal years 2020-2023 (EPA-HQ-OECA-2018-0843). The notice announces new initiatives and indicates EPA expects to return several current initiatives to the standard "core" enforcement program, including "Reducing Air Pollution from the Largest Sources." The notice also states that EPA 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.

1. Regarding enforcement cases and investigations of potential noncompliance in the steel manufacturing sector:

    a. How many investigations were pending as of January 20, 2017? How many of those currently remain under investigation?

    b. How many new investigations has OECA commenced since January 20, 2017? How many of those currently remain under investigation?

    c. How many enforcement cases have been initiated from January 20, 2017 to present?

    d. How many cases have been referred to the U.S. Department of Justice from January 20, 2017 to present?

Response: For civil enforcement activities, we are defining the steel manufacturing sector to be facilities in the Integrated Compliance Information System with a North American Industrial Classification System code associated with steel manufacturing. Clean Air Act investigative activities (inspections/evaluations, information requests and compliance investigations) were conducted at 340 facilities within the steel manufacturing sector between October 1, 2002, and January 20, 2017. There is one ongoing investigation that was initiated before January 20, 2017. Clean Air Act investigative activities were conducted at 76

facilities within the steel manufacturing sector since January 20, 2017 and there is one ongoing investigation. Since January 20, 2017, 17 enforcement cases have been initiated and one enforcement case has been referred to the U.S. Department of Justice.

Regarding criminal enforcement activities in the steel sector, EPA's Criminal Investigation Division (EPA-CID) did not have any investigations pending on January 20, 2017; EPA-CID has opened one investigation since January 20, 2017; EPA-CID has not brought any enforcement cases since January 20, 2017; EPA-CID has not referred any cases to DOJ since January 20, 2017.

2. Regarding enforcement cases and investigations of potential noncompliance in the coal-fired power plant sector:

    a. How many investigations were pending as of January 20, 2017? How many of those currently remain under investigation?

    b. How many new investigations has OECA commenced since January 20, 2017? How many of those currently remain under investigation?

    c. How many enforcement cases have been initiated from January 20, 2017 to present?

    d. How many cases have been referred to the U.S. Department of Justice from January 20, 2017 to present?

Response: For civil enforcement activities, the Coal-Fired Power Plant (CFPP) universe of facilities is identified in the Integrated Compliance Information System using a Facility Universe Indicator, which was populated using data from the Acid Rain program database, and North American Industrial Classification System codes. Clean Air Act investigative activities (inspections/evaluations, information requests and compliance investigations) were conducted at 204 coal-fired power plants between October 1, 2002, and January 20, 2017. There is one ongoing investigation that was initiated before January 20, 2017. Clean Air Act investigative activities were conducted at 22 coal-fired power plants since January 20, 2017 and there is one ongoing investigation. Since January 20, 2017, four enforcement cases have been initiated and one enforcement case has been referred to the U.S. Department of Justice.

Regarding criminal enforcement activities in the coal-fired power plant sector, EPA-CID did not have any investigations pending on January 20, 2017; EPA-CID has not opened any investigation since January 20, 2017; EPA-CID has not brought any enforcement cases since January 20, 2017; EPA-CID has not referred any cases to DOJ since January 20, 2017.

3. Regarding enforcement cases and investigations of potential noncompliance in the industrial boiler sector:

    a. How many investigations were pending as of January 20, 2017? How many of those currently remain under investigation?

    b. How many new investigations has OECA commenced since January 20, 2017? How many of those currently remain under investigation?

    c. How many enforcement cases have been initiated from January 20, 2017 to present?

    d. How many cases have been referred to the U.S. Department of Justice from January 20, 2017 to present?

    Response: For civil enforcement activities, the industrial boiler sector was identified based on applicable regulations reported on the facility record in the Integrated Compliance Information System. The applicable regulations used are MACT Subpart DDDDD, and NSPS Subparts Db and Dc. These regulations apply to commercial, industrial, and institutional boilers. Clean Air Act investigative activities (inspections/evaluations, information requests and compliance investigations) were conducted at 2,270 facilities with boilers between October 1, 2002, and January 20, 2017. There are 27 ongoing investigations that were initiated before January 20, 2017. Clean Air Act investigative activities were conducted at 552 facilities with boilers since January 20, 2017, and there are five ongoing investigations. Since January 20, 2017, 87 enforcement cases have been initiated and 13 enforcement cases have been referred to the U.S. Department of Justice.

    Regarding to criminal enforcement activities in the industrial boiler sector, EPA-CID did not have any investigations pending on January 20, 2017; EPA-CID has opened one investigation since January 20, 2017; EPA-CID has not brought any enforcement cases since January 20, 2017; EPA-CID has not referred any cases to DOJ since January 20, 2017.

4. What input, if any, was received from other EPA offices with regard to returning several current initiatives to the standard "core" enforcement program? Please explain the process by which this input was received and a description of input provided from each EPA office.

    Response: In developing its NCI proposals, part of the internal Agency deliberations included discussions between OECA senior managers and senior managers in EPA's regional offices. We discussed our proposals with enforcement and compliance managers in the EPA regions, and sought input on areas of focus for new NCIs.

In addition, OECA senior managers met in person with senior managers in EPA's Office of Air and Radiation (OAR), Office of Land and Emergency Management (OLEM), Office of Water (OW), and Office of Chemical Safety and Pollution Prevention (OCSPP). The purpose of these meetings was to discuss our proposals and to seek input on areas of focus for new NCIs. OAR, OLEM, OW, and OCSPP were supportive of OECA's proposals in terms of which NCIs to continue, modify, or return to the core enforcement program. In particular, OAR suggested adding a new NCI to focus on mobile sources and OW supported proposing a drinking water NCI.

5. How were the two new initiatives - increasing compliance with drinking water standards and reducing children's exposure to lead - selected? What input was received from other EPA offices?

   Response: The NCIs for the next NCI cycle (FY 2020-2023) have not yet been selected, but it is correct that two of the NCI proposals under consideration are for a lead (Pb)-focused NCI and for a drinking water-focused NCI. OECA's guiding principle for developing new NCI proposals has been to focus on areas that would support the goals of EPA's FY 2018 – 2022 Strategic Plan. These goals include: addressing air quality nonattainment areas, impaired waters, public health threats posed by drinking water noncompliance, populations vulnerable to air toxics or chemical accidents, and children's health exposure to lead. The proposed NCI to increase compliance with drinking water standards directly supports the longer-term strategic plan measure to reduce the number of community water systems out of compliance with health-based standards. The proposed NCI to reduce children's exposure to lead is intended to help implement EPA actions under the interagency Federal Lead Action Plan and support the EPA's stated objective to pay particular attention to vulnerable populations, including children, the elderly, low-income communities, minority communities, and tribes. Members of these populations may experience increased lead levels through multiple exposure pathways. OCSPP and OW were supportive of these proposals. Regional offices provided good feedback on how reduction of exposure to lead is a priority across the Agency and how to integrate this proposal into those cross-program efforts.

<u>Civil Penalties</u>

6. What is the total amount of year-to-date civil penalties for fiscal year 2019, and the total amount of those penalties that are a result of the January 10, 2019 settlement with Fiat Chrysler?

   Response: The total amount of civil penalties assessed in FY 2019 reported to the Integrated Compliance Information System, EPA's system of record for enforcement and compliance data, as of May 24, 2019 is $318,920,000. This amount includes the United States share of the $305,000,000 penalty assessed in the Fiat Chrysler consent decree ($262,300,000 of which is due to the United States and

$42,700,000 of which is due to the California Air Resources Board). The Fiat Chrysler consent decree was entered on May 3, 2019.

No Action Assurances

7. How many requests for No Action Assurances has OECA received since January 20, 2017?

8. How many No Action Assurances has OECA provided since January 20, 2017?

9. Please explain the process by which Assistant Administrators for other program offices request No Action Assurances.

    a. Please list any verbal requests for No Action Assurances made to OECA, including the date of the request and the name, title, and office of the requesting individual.

    b. Please list any written requests for No Action Assurances made to OECA, including the date of the request and the name, title, and office of the requesting individual.

10. For each No Action Assurance provided, please list date of the request, the date the request was provided, and the name, title, and office of the requesting individual.

Responses combined for 7-10: EPA's *Policy Against "No Action" Assurances*, states that NAAs are only to be used in "extremely unusual cases." Because they are rare, OECA has not created a system to track them. Thus, to respond to these questions, EPA manually collected the relevant information. Note that it is particularly difficult to track requests for NAAs that are for the purpose of facilitating emergency response and recovery efforts following hurricanes, severe weather or other disasters. While OECA's preferred practice is to require a written request for a NAA, due to the exigency of the circumstances following a disaster, sometimes those emergency requests are conveyed orally. Between January 20, 2017, and June 28, 2019, OECA issued over two dozen NAAs, some of which were extended or amended, to assist with extensive disaster recovery efforts following Hurricanes Harvey, Irma, Maria, Florence and Michael, and flooding in the midwest and south. General details of these NAAs are provided in the following table:

Emergency NAAs Issued to Assist with Disaster Recovery		
Date NAA Requested	**Date NAA Provided**	**Requesting Individual and/or Recipient of NAA**
September 2017, various dates following Hurricanes Harvey, Irma and Maria	Various dates, including extensions (over a dozen NAAs, some of which were extended or amended)	Richard A. Hyde, Executive Director Texas Commission on Environmental Quality
		Chuck Carr Brown, Secretary Louisiana Department of Environmental Quality
		Noah Valenstein, Secretary Florida Department of Environmental Protection
		Tom Pugh, Government Relations Yamaha Motor Corporation, U.S.A.
		Virgin Islands
		Puerto Rico
		Adam Kushner, Partner Hogan Lovells US LLP on behalf of the Puerto Rico Electric Power Authority (PREPA)
		Edward McTieman Arnold & Porter Kaye Scholer LLP on behalf of Merck, Sharp & Dohme Corp.
September 2018, various dates following Hurricane Florence (seven NAAs)	9/11-9/13/18	Michael Abraczinskas. Director Division of Air Quality North Carolina Department of Environmental Quality
	9/11-9/14/19	Rhonda Banks Thompson, P.E. Chief, Bureau of Air Quality South Carolina Department of Health and Environmental Control
	8/13-9/14/18	David K. Paylor, Director Virginia Department of Environmental Quality
	9/14/18	Karen Hays, P.E. Chief, Air Protection Branch Georgia Environmental Protection Division
October 2018, various dates following Hurricane Michael (4 NAAs)	10/11-10/12/18	Jeffery F. Koerner, Director Division of Air Resource Management Florida Department of Environmental Protection
	10/12/18	Karen Hays, PE Chief, Air Protection Branch Georgia Environmental Protection Division
4/25/19	4/26/19	Catharine Fitzsimmons Chief, Iowa Air Quality Bureau Iowa Department of Natural Resources
6/10/2019	6/11/2019	Becky W Keogh,

		Director, Arkansas Department of Environmental Quality

To the best of our knowledge, also between January 20, 2017, and June 28, 2019, OECA has received ten requests for an NAA unrelated to disaster response. OECA has issued five NAAs in response to these requests, denied three requests, and two requests are pending. The details for the non-emergency NAAs that OECA received between January 20, 2017, and June 28, 2019, are in the following tables:

Non-Emergency NAAs - Provided		
Date NAA Requested	**Date NAA Provided**	**Name, Title, Office of Requesting Individual**
12/22/17	1/4/2018	Bill Wehrum Assistant Administrator Office of Air and Radiation
3/5/18	3/5/18	Bill Wehrum Assistant Administrator Office of Air and Radiation
6/13/18	6/21/18	Amanda Kohler, Chief Permits Branch Program Implementation and Information Division Office of Resource Conservation and Recovery Office of Land and Emergency Management
7/6/18	7/6/18	Bill Wehrum Assistant Administrator Office of Air and Radiation (Note, Fitzgerald Glider Kits had written Administrator Pruitt on June 14, 2018, requesting an NAA)
2/15/19	3/8/19	David H. Lax Scientific Advisor API

Non-Emergency NAAs – Denied or Pending as of June 28, 2019		
Date NAA Requested	**Date NAA Denied (if applicable)**	**Name, Title, Office of Requesting Individual**
12/21/17	May 2018	DC Water and Sewer Authority
4/9/19	4/19/19	Allegheny County, PA
12/10/18	6/26/2019	The Beaver Village Council, AK
2/14/19	Pending	Waste Management, Republic Services, Solid Waste Association of North America, and National Waste & Recycling Association
5/6/19	Pending	Bristol-Myers Squibb

There is no formal written procedure by which Assistant Administrators from other programs request a No Action Assurance (NAA) from OECA. As a general practice, however, OECA requires that a request from a program office be made in writing, be signed by the Assistant Administrator, set forth how the request is consistent with the exceptions in OECA's NAA Policy, and confirm that the action to be taken (or refrained from) under the NAA is appropriate from an environmental health and safety perspective. Thus, OECA is not aware of any verbal requests made by an Assistant Administrator for an NAA since January 20, 2017. The few written requests are set forth in the second table above.

11. Regarding the No Action Assurance regarding glider vehicles OECA issued July 6, 2018:

    a. How did you first become aware of this request? Please included the date and time you were made aware.

    b. What was your role in developing this No Action Assurance?

    c. Did you express any concerns with granting this No Action Assurance? Please explain if you shared any concerns with then Administrator Pruitt or any other EPA political appointees.

    Response: I first became aware of a request for a No Action Assurance on or about June 15, 2018, when I first saw a letter dated June 14, 2018, from Fitzgerald Glider Kits to Administrator Scott Pruitt requesting a No Action Assurance. In conversations with EPA political appointees and career staff about the company's request, I discussed OECA's policies that govern the issuance of No Action Assurances. The Office of Air and Radiation (OAR) made an initial request, and OECA assisted OAR in submitting a formal request for a No Action Assurance that adhered to OECA's policies. I then issued the No Action Assurance based on my exercise of enforcement discretion.

<u>Coordination with EPA Program Offices</u>

12. Please describe OECA's role in the drafting and review of EPA's December 7, 2017, memorandum titled, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability" ("DTE Memo"), which reversed EPA's prior position in litigation against DTE Energy Company.

    Response: OECA provided comments on the December 7, 2017, memorandum but did not draft it.

13. Did you or anyone from OECA attend any internal EPA meetings concerning any issue related to the DTE Memo? If so, please state the date of the meeting, who attended the meeting, and what specific issues were discussed.

Response: In my capacity as Senior Advisor to the Administrator, I recall attending four meetings with participants outside of OECA. The first was on December 4, 2017. The invitees included Mandy Gunasekara (OAR), Justin Schwab (OGC), and Patrick Traylor (OECA). The general topic was comments on the draft memorandum. The second was on December 5, 2017. The invitees included William Wehrum (OAR), David Harlow (OAR), and a wide range of OAR, OGC, and OECA political appointees and career staff. The topic was comments on the draft memorandum. The third was on December 8, 2017. The participants were Administrator Scott Pruitt and Patrick Traylor. The topic was the final, issued memorandum. The fourth was on December 11, 2017. The invitees were William Wehrum (OAR), Patrick Traylor (OECA), Mandy Gunasekara (OAR), Justin Schwab (OGC), Liz Bowman (OPA), and David Harlow (OAR). The topic was the final, issued memorandum.

14. Are you aware of any meeting, including any meeting on or near December 5, 2017 attended by William Wehrum, Assistant Administrator for the EPA's Office of Air and Radiation (OAR), or David Harlow, Senior Counsel in OAR in which any issues related to the DTE Memo were discussed? If so, please state the date of the meeting, who attended the meeting, and what specific issues were discussed. Please describe any participation of Mr. Wehrum, Mr. Harlow, and yourself in these meetings.

    Response: Please see my response to Question 13, above. I recall that William Wehrum and David Harlow attended the meeting. However, DTE and the DTE case were not discussed.

15. Did you include Mr. Wehrum or Mr. Harlow on any emails in which you provided any comments on the DTE Memo either before or after it was finalized? If so, please state the date of any emails, who was included on the emails, and what specific comments were raised.

    Response: Yes. I included Mr. Wehrum on three emails dated December 7, 2017, and one email dated December 8, 2017, all of which raised OECA comments on the application of enforcement discretion. However, I did not discuss DTE or the DTE case.

<u>National Enforcement Investigation Center</u>

16. The most recent Employee Viewpoint Survey (EVS) results at EPA's National Enforcement Investigation Center (NEIC) reportedly revealed extremely low morale and high distrust of management, and that staff turnover is high. Please provide a summary of Employee Viewpoint Survey (EVS) results of staff morale for 2014, 2015, 2016, 2017, and 2018 and explain in detail what actions, if any, EPA Headquarters and NEIC management have taken since January 20, 2017 intended to improve employee morale.

    Response: Sublevel agency reports for NEIC were not produced in 2014 and 2015. The EVS reports in 2016, 2017, and 2018 contained almost the same top 10 areas for

the highest percent scored positive and the same top 10 areas for the highest percent scored negative. In 2016, 48 staff responded to the EVS survey. In 2017, 40 staff responded to the EVS survey. In 2018, 26 staff responded to the survey.

Analysis by NEIC management of the EVS surveys since 2016 reveal that staff have consistently expressed their concerns in the following categories: limited resources, policies and practices of management, and lack of understanding regarding promotions and pay raises in government service. NEIC management held six listening sessions with staff during the week of March 18, 2019, to better understand their concerns and received active participation from over 95% of all staff. The listening sessions exposed the core problems or areas of concern in several key areas including:

- **Staff are concerned with the future of EPA and subsequently their own jobs.**
- **NEIC has an older workforce and with departures a great deal of institutional knowledge departs the Agency.**
- **Career management has focused on increased accountability and has embraced the Agency's emphasis on delivering products with decreased timelines. Historically, NEIC took an average of 256 days to complete an inspection report (often a 20-30 page report). Under new leadership, 85.6% of inspection reports are completed in 60 days and with the same level of quality as previous reports. Such changes as these create uncertainty and concerns among a limited number of staff. However, the emphasis on accountability and metrics is critical to maximizing the environmental benefit. The goal of significantly decreased timelines is to enable the Agency to achieve environmental results for the public quicker.**

Examples of steps that have been taken by the career management of NEIC to improve employee morale include:

- **Providing for strategic direction of the Center and ensure routine communication with staff to promote understanding and buy-in of direction through All-Hands meetings, branch meetings, and section meetings.**
- **Engaging staff in direction and leadership of NEIC through the development of a business plan that outlines the future direction of the organization and includes a detailed work plan of priorities that will help NEIC succeed in its mission.**
- **Focusing on innovation and streamlining by supporting a staff-led engagement group that evaluates and deploys cutting-edge technology and approaches to enforcement work.**
- **Revitalizing employee development through supporting details and reassignments that are more in line with employee goals, skillsets, interests, and organizational needs.**
- **Continuing emphasis and support for work-life balance through embracing the OPM approved programs that support such balance.**

17. Please list all NEIC positions vacated from January 2017 to present, including the reason the position was vacated (e.g. buyout, retirement, dismissal) and current status of the position (e.g. filled by new hire, currently vacant, eliminated).

Response: As of January 2017, NEIC had 71 FTE onboard. As of April 2019, NEIC has 58 FTE onboard and is in the process of hiring an additional nine FTE to bring NEIC to a total of 67 FTE by early summer 2019. The following information provides data and analysis of all departures since January 2017:

- **Buyouts: Eight staff departed NEIC when offered the buy-out. None of these positions have been backfilled per the VERA-VSIP requirements.**
- **Retirements: There have been eight retirements. One of those positions was backfilled through a permanent promotion of an existing staff member to a leadership position and another position is being backfilled through rotational promotion opportunities of existing staff members. Two of the other positions still need to be backfilled. Based upon current priorities, the remaining four positions lost to retirement are not being filled at this time.**
- **Resignations: Seven staff have resigned from NEIC for a myriad of reasons (including the desire for a geographic move or a change in their personal work/life balance). Of the seven positions, two have been backfilled due to the critical nature of the position.**
- **Dismissals: There have been no dismissals from NEIC since January 2017.**

18. Please list all NEIC positions created or filled from January 20, 2017 to present.

Response: Eight new staff have been hired and onboarded. An additional nine staff are in the process of being hired. The positions include management positions, a health and safety officer, chemists, an IT specialist, and engineers.

19. According to testimony provided during the hearing by Dr. Chris Sellers, EPA employees in confidential interviews reported "many pressures applied by the Agency's political leadership." Have any NEIC employees reported a fear of retaliation, either through EVS responses or any other method? If so, please explain how many reports have been received and any Agency corrective action to address fear of retaliation.

Response: As explained in the response to question #16, NEIC staff openly discussed with NEIC management concerns related to fear of retaliation. The staff explained that because they heard certain managers or peers received a disciplinary action, and in some cases were transferred to new positions, the staff assumed it was retaliatory actions because they didn't have any other information. Under civil service rules, management cannot discuss these cases with staff.

Approximately 12 NEIC staff reported a negative response on the 2018 EVS survey to the question of "I can disclose a suspected violation of any law, rule, or regulation without fear of reprisal." In response to this result, NEIC management reiterated to all staff their obligation to report such violations and encouraged them to report concerns to the Inspector General, the Office of Special Counsel, the union, any level

of management, and/or our office's own internal investigative unit. It is important to know that since new leadership arrived in 2017, there has not been a single formal report or allegation of retaliation at NEIC.

During the NEIC EVS listening sessions, NEIC management heard that most staff did not understand the genesis of claims of fear of retaliation and found it to be a distraction from focusing on topics of greater interest to them.

20. NEIC's investigations may require the use of non-standard methodologies and innovative investigative strategies, including complex process-based investigations, development of new analytical and field methods, evaluations and modification of existing methods, and expert technical consultation and advice. Please provide the total number of relevant trainings and conferences attended by NEIC staff for calendar years 2014, 2015, 2016, 2017, and 2018, including a list of trainings and conferences for each year.

    Response: A list of trainings and conferences for each year is included in the table below.

Year	Number of Conferences
2014	183
2015	204
2016	187
2017	161
2018	135

Product Compliance and the Good Laboratory Practices Standards (GLPS) Compliance Monitoring Program

21. How many inspectors conduct inspections pursuant to this program? Are GLPS inspections the sole responsibility of these inspectors?

    Response: As of May 1, 2019, there are three full time GLP inspectors and one inspector-in-training. GLP inspections are the only responsibility for the three full time inspectors. The inspector-in-training will conduct GLP inspections in addition to other duties.

22. What number of facilities are subject to inspection under GLPS?

    Response: Currently, there are approximately 1,200 laboratories in the United States that have submitted studies to the EPA that were required to comply with GLP and, therefore, would be subject to inspection.

23. How are facilities identified for inspection under this program?

Response: Facilities are identified for inspection in multiple ways – through a neutral inspection scheme, based upon a tip or complaint, or through a request by the EPA program office in furtherance of program responsibilities to register pesticides or chemicals. Additionally, as a member of the Organization for Economic Cooperation and Development (OECD), GLP Working Group, Mutual Acceptance of Data program, EPA conducts GLP inspections at the request of a member country.

24. Please explain OECA's role in ensuring the safety and integrity of pesticide products imported to the United States, including any ongoing efforts to coordinate with foreign countries to reduce counterfeit pesticides.

Response: OECA issues a National Program Guidance which identifies national compliance and enforcement priorities, discusses national direction for all compliance assurance programs, and identifies activities to be carried out by authorized programs. For the FIFRA program, OECA has identified product integrity and border compliance (imports) as focus areas in the National Program Guidance. This guidance document identifies specific activities to support these focus areas. Import inspections, pesticide production establishment inspections and marketplace inspections contribute to the safety and integrity of pesticide products imported into the United States by providing a deterrent effect to non-compliance with the law. OECA provides compliance monitoring guidance to support those state inspection activities (i.e. FIFRA Compliance Monitoring Strategy, FIFRA Inspection Manual, Worker Protection Inspection Manual, inspector training, etc.).

OECA and the U.S. Department of Homeland Security's Bureau of Customs and Border Protection (CBP) are working together to address environmental and import safety issues specific to pesticides which are regulated by the EPA. OECA and EPA regional personnel, address the illegal importation of non-compliant pesticide and device products with enforcement actions against importers and other persons, compliance assistance to manufacturers, importers and brokers; and cooperation with other governments, agencies and stakeholders to prevent and reduce risks of unsafe products entering the United States.

OECA provides the regional offices with technical and legal expertise on a case-by-case basis to ensure proper and nationally consistent implementation of existing regulations and enforcement response policies and guidance.

Prior to the arrival of pesticides or devices to the United States, the importer is required to submit the EPA Form 3540-1 "Notice of Arrival (NOA) of Pesticides and Devices" either electronically or to the appropriate EPA regional office of the CBP port of entry where the shipment is to arrive. CBP regulations prohibit the importation of pesticides without a completed Notice of Arrival (NOA). EPA reviews the NOA and makes a determination about whether to approve the

shipment or not. The importer must obtain EPA's approval before presenting the pesticide shipment to U.S. Customs and Border Protection (CBP) for entry into the United States. The submission and processing of the Notice of Arrival is the crucial first step in the responsible movement of pesticides and devices imported into this country. NOA review enhances our ability to assure the protection of human health and the environment by preventing noncompliant pesticides from entering U.S. commerce. If EPA determines that the pesticide is adulterated or misbranded or otherwise violates the provisions set forth in FIFRA, or is otherwise injurious to health or the environment, the pesticide or device may be refused admission or place under a Stop Sale, Use or Removal Order.

EPA-CID investigates and partners with the Department of Justice to assist in the prosecution of cases involving the illegal importation of counterfeit, misbranded, and banned pesticides. These investigations often involve partnering with Custom Border Protection and other federal partners to hold those accountable for their criminal conduct and prevent them from bringing additional shipments of these dangerous substances into the country.

Regarding coordination with foreign countries to reduce counterfeit pesticides, OECA collaborates with member-states of the Organization for Economic Co-operation and Development (OECD) through its participation in the OECD Network on Illegal trade of Pesticides (ONIP); a network of "national competent authorities fighting illegal international trade of pesticides." Network members share best practices, brainstorm content of future training, and report on the results of enforcement and compliance initiatives. The following is a link to a collaborative ONIP document released in 2019 "Best Practice Guidance to Identify Illegal Trade of Pesticides": https://one.oecd.org/document/ENV/JM/MONO(2018)35/en/pdf.

25. You noted the agreement with Amazon regarding the sale of unregistered, illegal pesticide products. Many other possibly illegal products are being sold on Amazon, e.g. products containing unacceptable levels of asbestos, cadmium, lead, phthalates. Has OECA worked to investigate and enforce EPA regulations on the sale of online products available on Amazon and other outlets? If so, please produce a description of these efforts and any results.

Response: Yes, EPA monitors unlawful sales of noncompliant products that are sold online to ensure compliance with environmental laws, including those governing pesticides (FIFRA) and chemicals (TSCA). In the TSCA context, one of the elements of the draft 2020-2021 National Program Guidance (NPG) (https://www.epa.gov/planandbudget/draft-fy-2020-2021-office-enforcement-and-compliance-assurance-oeca-national-program) is Border Compliance; one of the avenues for addressing border compliance is a review of products made available via e-commerce sites. A similar FIFRA focus area has been proposed for the 2020-21 NPG: "eCommerce - Focus on assuring the compliance of pesticide products offered for sale on eCommerce platforms with emphasis on those which pose the greatest risk of harm to human health or the environment." EPA works with domestic

stakeholders such as the Association of American Pesticide Control Officials (AAPCO), partner agencies such as U.S. Customs and Border Protection, and international parties, e.g., OECD, on developing best practices and guidance for targeting violations and enforcing federal environmental laws in an e-commerce environment. EPA-CID is working with regulatory personnel within the Agency and Department of Justice to investigate and prosecute the on-line sales of illegal pesticides. We currently have open investigations and ongoing enforcement actions but cannot discuss their status.

Similarly, EPA enforces the Clean Air Act prohibition against the manufacture, sale, offering for sale, and installation of parts and components that defeat emissions controls on EPA-certified vehicles and engines. This includes both hardware and software products that hack into and reprogram electronically managed engines, and that completely remove critical emissions controls like filters and catalysts. The EPA is holding accountable the manufacturers of these aftermarket defeat devices, as well as the retailers who sell them online. The EPA has resolved numerous cases against online retailers of aftermarket defeat devices and has open investigations and ongoing enforcement actions but cannot discuss their status.

President's Proposed Budget for EPA

On March 11, 2019, the Office of Management and Budget released the President's proposed budget for fiscal year 2020. This budget proposes $6.1 billion for EPA, a $2.8 billion or 31 percent decrease from fiscal year 2019 levels.

26. What would be the impact of these proposed budget cuts on EPA's civil and criminal enforcement programs?

    Response: The FY 2020 President's budget requests nearly $478 million and 2,286 FTE for EPA's enforcement and compliance assurance programs. These resources will support robust enforcement and compliance assurance programs. While the budget request is a reduction from the FY 2018 enacted budget, it is important to understand that the reduction in part is due to the transfer of the Office of Environmental Justice and the work performed under the National Environmental Policy Act (NEPA) to the Office of Policy. Recognizing that states are the primary implementers of our nation's environmental laws, EPA focuses its resources where it can provide the most value, including matters affecting multiple states or tribes, serving as a backstop when a state or tribe does not address serious noncompliance in a timely fashion, and assisting states and tribes when they lack the capability, resources, or will to address noncompliance.

27. How would the proposed budget cuts impact EPA's ability to support state and tribal enforcement programs?

    Response: OECA primarily supports state and tribal enforcement programs through capacity building and work sharing. To ensure the best use of combined

resources where a state or tribal government is authorized to implement a federal enforcement program, OECA has recently released for public comment a revised policy on Enhancing Planning and Communication Between the EPA and states in Civil Enforcement and Compliance Assurance Work. The proposed replacement policy (to be published in the Federal Register for public comment) is available here: https://www.epa.gov/sites/production/files/2019-04/documents/guidance-enhancingregionalstatecommunicationoncompliance-190422.pdf.

Coordination with State and Tribal Enforcement Programs

28. Please explain instances from January 2017 to present where EPA had to rescind its delegated enforcement authority, including a stated rationale.

    Response: There have been no instances between January 2017 to the present where EPA has had to rescind its delegated enforcement authority. EPA does reserve the right to take enforcement action in delegated programs and will take action from time to time, for a number of reasons, such as at the request of a state because the state lacks the expertise or resources.

29. You testified that OECA's "goal is to eliminate inefficient duplication with state programs, and to direct federal resources to help achieve the Agency's Strategic Plan Goals," has EPA conducted any assessment that has been conducted on where duplication occurred? What metrics are used to make such a determination?

    Response: States authorized to implement federal environmental programs conduct large numbers of enforcement and compliance activities including compliance assistance, inspections and other compliance evaluations, and administrative and judicial enforcement actions. While authorized states provide EPA with information on a range of their activities, it would be too burdensome to collect and manage information on all activities. The best way to eliminate duplication in this complex environment is to ensure clear roles and responsibilities and robust planning and communication between EPA and states. Toward that end, I issued an interim policy for enhancing planning and communication between EPA and states in civil enforcement and compliance work and we are currently taking public comment on a revised, replacement policy that OECA plans to issue later this year. The interim policy is available at this link: https://www.epa.gov/sites/production/files/2018-01/documents/guidance-enhancingregionalstatecommunicationoncompliance.pdf. The proposed replacement to the interim policy (to be published in the Federal Register for public comment) is available here: https://www.epa.gov/sites/production/files/2019-04/documents/guidance-enhancingregionalstatecommunicationoncompliance-190422.pdf.

30. Please explain what types "state assist" actions EPA has conducted from January 2017 to present. For each type of action performed, please provide a total number of the types of these actions conducted for this time period.

Response: State Assists are limited to instances where the region has expended substantial resources to identify the violation, developed the injunctive relief, and/or helped the state take an action to remedy the violation. In short, any instance where the state couldn't or wouldn't take the action without the EPA's help or explicitly requests the case after EPA has identified a violation would be measured as a "State Assist." EPA's civil enforcement program began asking the regions for information on civil State Assists this past year, FY 2018. In FY 2018, the regions reported 185 civil State Assists. Specifically:

- **155 Inspections**
- **6 Information requests**
- **24 other (generally, working with states on problem facilities, encouraging them to comply with the state or face potential EPA action)**

In some instances, CID investigations of federal environmental crimes uncover other violations that are referred to state partners for potential prosecution. From January 2017 to the present, EPA-CID has completed 15 "state assists" – defined as a circumstance in which EPA-CID's investigation of an allegation leads to the prosecution of an environmental criminal case by state officials in state court.

Staff Resources

31. What is OECA's timeline for hiring staff to reach the office's current authorized FTE ceiling of 649?

Response: OECA's HQ ceiling of 649 is part of the operating plan to implement EPA's FY 2019 appropriations bill. This plan is submitted to the appropriations committees. OECA anticipates reaching that ceiling by September 30, 2019.

32. How many OECA staff have been hired for each month in 2019 to-date, and what are the hiring targets for each subsequent month this year? For what positions does OECA intend to hire?

Response: OECA has hired 25 new staff to date in 2019, broken out by month as follows:

January 2019:	**3**
February 2019:	**4**
March 2019:	**10**
April 2019:	**8**

An additional 33 new staff are anticipated to be onboard by the end of September 2019, broken out by month as follows:

May 2019:	**4**
June 2019:	**5**
July 2019:	**5**
August 2019:	**10**
September 2019:	**9**

The planned hires indicated above represent a broad range of specialties including scientists, engineers, analysts, attorneys, IT specialists, and criminal investigators.

33. What is EPA's timeline for hiring new criminal investigators to reach its authorized FTE ceiling of 164?

    Response: The FTE target of 164 for criminal investigators is an internal allocation of criminal enforcement FTE among the divisions that make up the Office of Criminal Enforcement, Forensics and Training. OECA anticipates having 164 criminal investigators on board by September 30, 2019.

34. Please detail EPA's justification for not maintaining 200 criminal investigators, as set forth in the U.S. Pollution Prosecution Act of 1990.

    Response: In 1990, Congress passed the Pollution Prosecution Act, which directed EPA to increase the number of criminal investigators over a five-year period reaching a total of 200 special agents at the beginning of FY 1996. The Act also authorized five years of appropriations to carry out the Act. EPA increased the number of criminal agents to 200 by FY 1997. However, EPA does not consider the Act to impose an ongoing obligation on the Agency. In fact, in the 22 years since 1996 EPA employed fewer than 200 more agents in 15 of those years. The Appropriations Committees have approved EPA's Operating Plan each year, whether the number of agents was above or below 200. This Administration is committed to reversing the years-long decline in the number of Special Agents and I have authorized the hiring and maintenance of 164 Special Agents. Increasing the number of agents to 200 would necessarily result in the reallocation of other criminal enforcement FTE resources, including from the National Enforcement Investigations Center.

Hurricane Harvey

35. In her written testimony, Dr. Bakeyah Nelson states that: "An alarming amount of pollution escaped into the air during Hurricane Harvey because of inadequate preparation for the storm by industry, EPA, and TCEQ. Yet neither EPA nor TCEQ have taken enforcement action against many of those responsible for the largest releases: Valero Refining, Magellan Terminals Holdings in Galena Park, and Arkema's Crosby plant." Does EPA intend to take enforcement action against the parties responsible for these releases?

    Response: EPA supports hurricane preparedness and response in many ways, including the assessment of conditions at major industrial facilities in a storm's pathway to identify potential impacts and countermeasures. The Agency conducts follow up inspections and damage assessments in response to reports within EPA jurisdiction. During the response to Hurricanes Harvey, the EPA and the Texas Commission on Environmental Quality coordinated with local, state and federal

officials to address the human health and environmental impacts of Hurricane Harvey and its aftermath.

In coordination with the Texas Commission on Environmental Quality (TCEQ), EPA took the following actions:

Valero Refining Houston

EPA Region 6 coordinated with TCEQ on the investigation and enforcement at Valero Refining Houston. Region 6 conducted a joint inspection with TCEQ at Valero Refining on September 14, 2017, to investigate whether two tanks that were damaged during Hurricane Harvey were contributing sources of emissions in the adjacent community. The inspection included an evaluation of compliance with emission limits, installation of emission control equipment, testing, monitoring, recordkeeping, and reporting requirements. That inspection report was provided to the facility and TCEQ and posted online in December 2017. EPA Region 6 also issued an information request to Valero on September 14, 2017 to request records to determine compliance with the Clean Air Act. Region 6 evaluated the company's response and provided our evaluation to TCEQ during a series of conference calls in the Fall and Winter of 2017. TCEQ took the lead on enforcement on the Valero Houston facility and referred the case to the Texas Office of Attorney General where it is pending.

Magellan

TCEQ took the lead on investigation and enforcement at the Magellan facility. The state conducted an inspection at the facility on November 1-6, 2017, and opened an investigation into the emissions event that began on August 31, 2017 and lasted 276 hours. That incident was reviewed and referred for a formal enforcement action because Magellan failed to prevent the unauthorized emissions during an emissions event. Specifically, Magellan released approximately 2,472,401.90 pounds of VOCs when Tanks 517 and 518 had floated and released their contents of approximately 10,988 barrels of gasoline into the standing floodwater in the aftermath of Hurricane Harvey. Magellan submitted an Act of God claim to TCEQ and that Claim is under review by TCEQ's Litigation Division.

Arkema

After the incident at Arkema Crosby, EPA Region 6 sent a short, targeted Information Request to Arkema Crosby on September 7, 2017, asking questions directly related to the incident. The response to the Information Request was received over the following months, which was then reviewed by EPA Region 6, EPA's Office of Enforcement and Compliance Assurance, and their contractor, Eastern Research Group, Inc. The organic peroxides at the facility related to the incident were not Risk Management Program regulated substances identified under 40 CFR § 68.130. EPA's evaluation of the information related to the incident did not identify significant noncompliance so formal enforcement was not initiated under 112(r) of the Clean Air Act. The Arkema Crosby facility has not yet reopened after the incident.

36. NASA reportedly offered to fly a DC-8 equipped with air samplers over areas impacted by Hurricane Harvey in order to monitor pollution levels, but reportedly both EPA and the State of Texas stated that the monitoring flights should not be conducted. Did EPA believe that these monitoring flights should not be conducted? Did EPA defer to the state of Texas as to whether NASA monitoring should be conducted and, if so, why? Did EPA independently request data collection be conducted by NASA after Hurricane Harvey? If no, why not?

Response: During Hurricane Harvey, the EPA and the State of Texas, through the Texas Commission on Environmental Quality (TCEQ), were working together, along with other local, state, and federal authorities and emergency responders to address the potential human health and environmental impacts of Hurricane Harvey and its effects. As part of this coordination, a Unified Command was established between the EPA, the TCEQ, the Texas General Land Office (GLO), and the U.S. Coast Guard (USCG) to oversee all emergency response efforts.

In advance of Hurricane Harvey's landfall, breathing zone air quality monitors managed by TCEQ were shut down for their protection. In order to provide the public with information regarding air quality, TCEQ asked the EPA for air quality support until these permanent breathing zone air quality monitors could be restored. The EPA responded to the request by making the Airborne Spectral Photometric Environment Collection Technology (ASPECT) system and the Trace Analytic and Gas Analysis (TAGA) system available.

By the end of the 13-day deployment, ASPECT flew 28 missions, providing over 100 hours of chemical screening, thermal imagery, and aerial imagery data from 134 Risk Management Plan facilities, 456 drinking water plants, and 105 waste water facilities impacted by Hurricane Harvey. This information was shared with the federal, state, and local governments involved in the hurricane response as part of a rapid needs assessment to aid in identifying priority target areas that needed additional attention. It also allowed them to provide the public with preliminary information about the integrity of facilities.

The EPA's TAGA system was also used to screen specific areas for target contaminants affiliated with the aftermath of Hurricane Harvey. TAGA is a self-contained mobile laboratory capable of real-time sampling and analysis of outdoor air quality in the breathing zone. If the TAGA monitoring values exceeded the TCEQ Air Monitoring Comparison Values Short Term benchmarks, hand-held monitors were employed to further isolate the area of contaminant exceedances.

Both TCEQ and EPA investigators spent numerous hours, both day and night, monitoring breathing zone air quality in neighborhoods and industrial sites with hand-held instruments, such as optical gas imaging cameras, toxic vapor analyzers, summa canisters, and portable multi-gas monitors. The use of these tools allowed for the most effective source identification for drifting volatile organic compound

(VOC) plumes so that swift action could be taken to address the cause of these emissions.

Additionally, EPA air quality technical specialists were deployed to Houston and conducted total VOC breathing zone monitoring in the Houston Ship Channel area. These specialists used a photoionization detector and a forward-looking infrared radiometer camera to monitor areas downwind of four refining and terminal facilities. Where the team reported VOC readings of significance, additional TAGA monitoring was recommended in the area. If TAGA identified elevated levels of VOCs of benzene, personnel conducted site specific evaluations.

During Hurricane Harvey, the State of Texas specifically requested assistance from the EPA for aerial high-resolution imaging of critical infrastructure in the widespread impacted area. EPA's mobile assets afforded response personnel the capability to identify potential sources of hazardous chemicals. NASA offered to fly a DC-8 plane used as part of their Atmospheric Tomography Mission (ATom), which studies the impact of human-produced air pollution on greenhouse gases and on chemically reactive gases in the atmosphere, in impacted areas during the response to Hurricane Harvey. The State of Texas did not authorize a mission assignment for the deployment of the NASA equipment due to the ground-based monitoring network already in place, including the EPA's deployment of the TAGA, ASPECT, and Portable High-Throughput Integrated Laboratory System (PHILIS) assets.

By the time NASA made its offer, there was no specific and immediate benefit that would have been derived from the measurements to address the on-ground issues occurring at the time that were not already being addressed by previous EPA or ongoing TCEQ monitoring. Additionally, the NASA asset was not able to 'pin point' the source of releases which is what TCEQ wanted so they could address any issues at the source.

<u>Ethylene oxide emissions and Sterigenics, Willowbrook facility</u>

37. Before the 2014 National Air Toxics Assessment (NATA) information was publicly available, several communities had voiced concerns about dangerous levels of ethylene oxide emissions. What is the record of EPA receiving such concerns and what was OECA's involvement in responding to those concerns?

Response: We interpret this question to ask how EPA responded to concerns about ethylene oxide emissions before the 2014 NATA was released. EPA Region 5 and OAR are not aware of communities voicing such concerns prior to release of the 2014 NATA on August 22, 2018. Around that time, the Air Enforcement Division (AED) in OECA learned of concerns about Sterigenics from Regional personnel; OECA was not involved in responding to such concerns.

38. How was OECA consulted when the ethylene oxide emissions from the Sterigenics facility in Willowbrook, IL were being addressed by EPA? How were plans put into place regarding ambient air monitoring and did other offices in EPA consult with OECA on those plans? If so, what were the recommendations of OECA career and political staff and what was EPA's response to OECA input?

Response: In Fall 2018, at the direction of the Administrator, EPA's Office of Air and Radiation and Region 5 prepared and followed a monitoring plan to measure the ambient concentrations of ethylene oxide in the commercial and residential areas surrounding the Sterigenics facility in Willowbrook. This plan was developed with input from community leaders and based on air dispersion modeling using results of stack tests conducted at the Sterigenics facility in Willowbrook in September 2018 and subsequent technical analysis. Based on feedback from the community, EPA began monitoring in Willowbrook on November 13, 2018 and continued through the end of March 2019.

For limited monitoring conducted in May 2018, Region 5 coordinated with relevant individuals in the Office of Air and Radiation and Office of Research and Development.

On June 21, 2018, Region 5 enforcement emailed OECA management to notify them:

- **of the elevated risk near Sterigenics; and**
- **that the Region 5 toxics program was engaged with the facility and likely to secure voluntary ethylene oxide emission reductions.**

Subsequently, Region 5 provided OECA with occasional verbal updates and sent news articles.

In addition, the Waste and Chemical Enforcement Division (WCED) in OECA received a copy of a Congressional letter dated February 13, 2019, addressed to EPA Administrator Andrew Wheeler. United States Senators Tammy Duckworth and Richard J. Durbin, and United States Representatives Sean Casten, Bill Foster, Daniel W. Lipinski, and Bradley S. Schneider raised concerns about the Sterigenics facility in Willowbrook, Illinois and requested that EPA investigate allegations of misuse highlighted in the CBS News report and whether Sterigenics had violated its conditional registration for the pesticide ethylene oxide ("EtO") under FIFRA, among other things. WCED has been coordinating with EPA Region 5 and the Office of Pesticide Programs on the situation.

39. More than 100 ethylene oxide hotspot locations were identified in the 2014 NATA results (over 100 per million cancer risk). Are these communities being informed of those air toxics assessment screening results and will any of those communities, beyond DuPage, IL receive additional study and air monitoring by EPA? How will OECA be consulted about those plans?

Response: NATA is a screening tool, intended to help EPA and state, local, and tribal air agencies determine if areas, pollutants, or types of pollution sources need to be examined further to better understand risks to public health. NATA does not provide risk estimates for any individual facility, however NATA results can be used to identify pollutants and types of pollution sources (e.g., point sources) of greatest concern and to help set priorities for the collection of additional information. In the 2014 NATA, EPA identified 19 metropolitan statistical areas (MSAs) containing census tracts with elevated cancer risks from exposure to air toxics. Of those 19 MSAs, 18 of them have elevated risks due to emissions of ethylene oxide. These MSAs include multiple census tracts.

Consistent with OAR direction, Region 5 called mayors and other elected officials in Region 5 communities with these NATA-identified ethylene oxide hotspots shortly after the release of NATA, to explain the NATA results. Initially, this included the mayors and congressional delegation from Willowbrook, Waukegan and Grand Rapids. Region 5 has also been in contact with the mayor of Gurnee after it was discovered that Vantage Specialty Chemicals was inadvertently excluded from NATA. States, and sometimes local governments, are taking the lead on additional study of these hotspots, with support from EPA. For instance, EPA is providing advice and technical support to the Lake County, IL Health Department in their upcoming effort to monitor ethylene oxide.

At the national level, EPA is following a two-pronged approach to address ethylene oxide emissions. The Agency is reviewing air regulations that apply to industrial facilities emitting this chemical, beginning with the Agency's National Emissions Standards for Hazardous Air Pollutants (NESHAP) for commercial sterilizers and the NESHAP for Miscellaneous Organic Chemical Manufacturing. Additionally, EPA and its state and local environmental Agency partners have significant work underway to further characterize ethylene oxide emissions from facilities identified as contributing to potentially elevated risks and to identify early opportunities for emissions reduction. The agencies are focusing on census tracts in the 18 MSAs identified in NATA. The characterization work is important to ensure the currency of the potential risks identified in NATA, which is a screening tool that is intended to help EPA and state, local, and tribal air agencies determine if areas, pollutants, or types of pollution sources need to be examined further to better understand risks to public health.

The NATA released in 2018 is based on emissions inventory information from 2014, the most recent available at that time. Ambient air quality monitoring is not necessary for evaluating potential risk from individual facilities, and limitations in the current monitoring methods mean that ethylene oxide cannot be measured in the outdoor air at all levels of concern. There are other tools available to accomplish this work that may use resources more effectively, including stack testing, reviewing permits and air dispersion modeling.

40. Will actions to address the ethylene oxide emissions be a part of the upcoming Unified Agenda of Regulatory and Deregulatory Actions? If so, will OECA career staff be part of the action (e.g. rulemaking) workgroup(s)?

    Response: EPA is reviewing Clean Air Act regulations for facilities that emit ethylene oxide to ensure that they protect the public from significant risk. OECA is on the workgroups for the two reviews in progress: the air toxics standards for miscellaneous organic chemical manufacturing and the air toxics standards for commercial sterilizers. We expect to issue proposed updates to these two rules this summer. Both rules appeared in the Spring 2019 Unified Agenda (RIN: 2060-AU37; and RIN: 2060-AT85)

Settlement Agreements

41. You testified that EPA is "expanding the use of Expedited Settlement Agreements to correct less complex categories of noncompliance quickly, using a template agreement, freeing up our enforcement resources to focus on more significant noncompliance." Please explain the process used to develop that template, including any input and direction from management and staff from other relevant EPA offices, including but not limited to the Administrator's Office, Office of General Council, Office of Air and Radiation.

    Response: Model documents, or templates, for Expedited Settlement Agreements differ depending on the program. See, e.g., Expedited Settlement Offer for Storm Water (Construction): https://www.epa.gov/enforcement/expedited-settlement-offer-eso-program-storm-water-construction-may-19-2006. The model documents typically are developed by a workgroup comprised of enforcement technical and legal staff in OECA Headquarters and the Regions. For more information on Expedited Settlement Agreements generally, please see the Revised Guidance on the Use of Expedited Settlement Agreements: https://www.epa.gov/enforcement/revised-guidance-use-expedited-settlement-agreements.

The Honorable Scott H. Peters (D-CA)

A recent news article reports on a False Claims Act lawsuit in which the whistleblower alleges that for decades several large chemical companies have concealed from the EPA certain health hazards of their isocyanate chemicals in violation of Section 8(e) of the Toxic Substances Control Act. According to the article, the whistleblower alleges that the chemical companies fraudulently prevented the EPA from learning about the Section 8(e) information because they feared the EPA might limit or even ban the sale of these chemicals if it learned about the hazards. The chemical companies also allegedly breached the EPA's Compliance Audit Program contract by falsely certifying that they had audited and corrected past TSCA violations, when instead they were concealing this Section 8(e) health hazard information. The whistleblowers allege that these TSCA violations have "resulted in injury to many unsuspecting consumers and workers, and has prevented the EPA from discharging its hazard identification and risk assessment responsibilities."

1. When did the EPA first learn of the TSCA violations alleged in this whistleblower case?

2. Has the EPA obtained information about the alleged TSCA violations from the whistleblower, such as the chemical companies' "internal documents" mentioned in the news article?

3. Isn't it the duty of the EPA's Office of Enforcement and Compliance Assurance to enforce TSCA's reporting requirements?

4. Has the EPA initiated an enforcement investigation or proceeding?

5. Has the EPA at least attempted to obtain the concealed isocyanate Section 8(e) information from the chemical companies? If so, has the EPA assessed whether there are gaps or deficiencies in EPA isocyanate hazard assessments?

6. If not, why not? Specifically, does the EPA lack sufficient personnel or financial resources to uncover this type of alleged fraud or to pursue enforcement action once it is discovered?

7. What type of resources or other tools would be helpful to the EPA in enforcing TSCA?

8. Does the EPA believe that whistleblower actions like this one are useful to assist the EPA in identifying TSCA violations and enforcing TSCA obligations to protect workers and consumers from harmful chemicals?

9. According to the news article, the whistleblower believes the trial court's ruling "effectively eviscerates the EPA's statutory duty and right to collect any penalties for transmission violations that precede its determination of the violation." Has the EPA assessed whether and to what extent the ruling would affect its ability to assess penalties for TSCA violations? Does the EPA have sufficient resources, either internally or through the DOJ, to defend its penalty assessment authority against this ruling?

10. Including based on email or other communications with you, OCSPP or others at EPA, please identify the names and positions of all other witnesses/officials at EPA and the Department of Justice (including but not limited to attorneys at the Civil Division at Main Justice or at the U.S. Attorney's offices for the District of Columbia or the Northern District of California) who may have information, knowledge or documents relating to the alleged TSCA violations in the whistleblower case, and/or who have email or other documents or communications relating to the alleged violations or that case.

Responses Combined for 1-10: The EPA first learned of the TSCA violations alleged in the whistleblower case in the fall of 2015. The whistleblower alleged that certain chemical companies breached the EPA's 1991 TSCA Section 8(e) Compliance Audit Program by falsely certifying that they had audited and corrected their TSCA Section 8(e) violations. Specifically, the whistleblower took the position that under

the False Claims Act companies who participated in the 1991 TSCA Section 8(e) Compliance Audit Program entered into a contract with EPA to provide all information subject to TSCA Section 8(e). This legal theory is the subject of the whistleblower litigation. For more information, the public docket can be accessed through PACER and other legal research sites. The case cite is: *United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp., et al.*, Civil Action No. 16-2269 (D.D.C.) (J. Collyer). EPA does not agree that the trial court's ruling "effectively eviscerates the EPA's statutory duty and right to collect any penalties for transmission violations that precede its determination of the violation."

EPA is responsible for enforcing TSCA and whistleblower actions can be useful to assist the Agency in identifying TSCA violations. The Agency does not provide information regarding ongoing or potential investigations.

<u>The Honorable Brett Guthrie (R-KY)</u>

1. In August 2018, you issued a memorandum acknowledging that the best way to increase the environmental law compliance rate and reduce the average time from violation identification to correction was to, among other things, ensure that a broad range of compliance assurance tools are available for use. To help emphasize that the EPA's focus is increased compliance, the EPA is evolving the National Enforcement Initiatives (NEIs) program into the National Compliance Initiatives (NCIs) program.

   One of the changes in the EPA's enforcement framework that has received a lot of attention is the EPA's transition away from an enforcement approach that focused on specific industrial sectors to one that focuses on broader compliance with significant public health and environmental programs.

   a. One of the criticisms of this shift is that by no longer focusing on certain industries the EPA is implying that it considers enforcement efforts for those industries to be "done" or complete. Would you agree with that characterization? Why or why not?

Response: EPA's transition from focusing on specific industrial sectors to one that focuses on significant public health and environmental problems is about how the Agency sets priorities and focuses EPA resources. The Agency will focus on environmental outcomes, rather than limiting our focus to specific sectors. Thus, facilities that present significant public health or environmental risks will be a priority, even if they are from multiple sectors. The transition also emphasizes EPA's goal of increased compliance and the use of not only enforcement actions, but the full range of compliance assurance tools. These tools include helping regulated entities understand their compliance obligations, helping facilities return to compliance through informal enforcement actions, building state program capacity, supporting state enforcement actions, bringing federal civil administrative actions, and bringing federal civil and criminal judicial enforcement actions. These changes

will help EPA achieve its longer-term strategic measure of increasing the environmental law compliance rates.

b. Another criticism is that shifting away from the NEI approach will take away the deterrence effect for the industries that were previously listed by the EPA. Can you speak to whether that is true and if the deterrence effect has gone away with the shift to an NCI program?

Response: EPA will implement the NCI program with the goals of increasing the environmental law compliance rate and reducing the time from violation identification to correction, two of the Agency's longer-term strategic goals. To accomplish these goals, EPA will continue to conduct compliance monitoring activities such as onsite inspections as well as offsite reviews and evaluating electronic data and other records. These activities, along with applying our full range of compliance assurance tools, will ensure that EPA's enforcement and compliance assurance program will have a positive effect on compliance rates and will create a strong deterrence effect.

2. An Environmental Council of the States (ECOS)-EPA Workgroup was established to improve EPA-state collaboration on compliance assurance and their final report notes that the workgroup influenced EPA's transition from NEIs to NCIs. Can you describe the input provided from the states and how it influenced EPA's decision to make this shift?

Response: The Environmental Council of the States (ECOS) began the Cooperative Federalism 2.0 initiative in June 2017 to improve the working relationship between state environmental agencies and the U.S. Environmental Protection Agency (EPA). Shortly afterwards, ECOS and EPA established a joint Compliance Assurance Workgroup to find ways to improve the state-federal relationship in the context of compliance assurance. ECOS had issued the document entitled "Cooperative Federalism 2.0" which identified principles that informed the workgroup including: "U.S. EPA should involve states as partners early and often in developing federal environmental and public health policy, and should specifically seek state and other stakeholder input on the efficacy of new or changed standards or program requirements"; "U.S. EPA should respect the states' role as the primary implementer of national environmental regulatory programs..."; and, "U.S. EPA should seek to demonstrate [key outcomes] through environmental and service delivery (i.e., time) "outcome" metrics rather than "output" metrics".

The dialogue among the senior state and EPA leaders helped OECA consider ways to improve the National Enforcement Initiatives (NEIs) that ultimately led to three primary changes to the NEIs (now National Compliance Initiatives or NCIs): 1) emphasizing compliance assurance tools beyond enforcement; 2) engaging earlier and more continuously with states in the NCI selection, development, and implementation process; and, 3) expanding the NCI cycle to four years to better align with the Agency's two-year National Program Guidance cycle.

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

1. Assistant Administrator Bodine, since 2017, the Environmental Protection Agency (EPA) has sought to work together with the states and local communities to ensure the proper management and care of our nation's environment and protect the public health of its citizens. This approach stands in stark contrast to that of the previous administration, which leaned heavily on the punitive measures available to the EPA to enforce the compliance of federal environmental law.

    a. Assistant Administrator Bodine, can you elaborate on the actions the EPA has taken to develop consensus between the state and federal agencies toward ensuring compliance with federal laws regarding the environment and public health?

Response: In June 2017, The Environmental Council of the States (ECOS) began the Cooperative Federalism 2.0 initiative to improve the working relationship between state environmental agencies and the U.S. Environmental Protection Agency (EPA). Shortly afterwards, ECOS and EPA established a joint Compliance Assurance Workgroup to find ways to improve the state-federal relationship in the context of compliance assurance. ECOS had issued the document entitled "Cooperative Federalism 2.0" which identified principles that informed the workgroup including: "U.S. EPA should involve states as partners early and often in developing federal environmental and public health policy, and should specifically seek state and other stakeholder input on the efficacy of new or changed standards or program requirements"; "U.S. EPA should respect the states' role as the primary implementer of national environmental regulatory programs..."; and, "U.S. EPA should seek to demonstrate [key outcomes] through environmental and service delivery (i.e., time) *outcome* metrics rather than *output* metrics."

The dialogue among the senior state and EPA leaders helped OECA consider ways to improve the National Enforcement Initiatives (NEIs) that ultimately led to three primary changes to the NEIs (now National Compliance Initiatives or NCIs): 1) emphasizing compliance assurance tools beyond enforcement; 2) engaging earlier and more continuously with states in the NCI selection, development, and implementation process; and, 3) expanding the NCI cycle to four years to better align with the Agency's two-year National Program Guidance cycle.

In addition, in January 2018, I issued an interim policy for enhancing planning and communication between EPA and states in civil enforcement and compliance work and we are currently taking public comment on a revised, replacement policy that OECA plans to issue later this year. Input from ECOS and the states played an important role in the development of these documents and we look forward to receiving further input form states on the proposed replacement document. The interim policy is available at: https://www.epa.gov/sites/production/files/2018-01/documents/guidance-enhancingregionalstatecommunicationoncompliance.pdf.

The proposed replacement to the interim policy (to be published in the Federal Register for public comment) is available here: https://www.epa.gov/sites/production/files/2019-04/documents/guidance-enhancingregionalstatecommunicationoncompliance-190422.pdf.

b. As seen in FY 2018's EPA Enforcement and Compliance Annual Results report, there has been a trend of declining inspections and evaluations conducted by the EPA since 2013. In 2018, there were nearly half the number of inspections as in 2008.

   i. The report mentions that "data analytics and other tools" have increased the EPA's inspection efficiency. Can you explain how data analytics better inform resource allocation? Can you give examples of what "other tools" are used to increase efficiency?

Response: EPA develops and maintains a series of analytic tools that are available to state and EPA compliance staff. These tools have the capacity to identify potential pollution exceedances and target potential non-compliance with environmental requirements under the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and Safe Drinking Water Act related to those hotspots. The tools integrate a variety of databases containing information on regulatory compliance, pollutant loadings and ambient environmental conditions. Use of these tools allow states and EPA to develop inspection plans that are more focused on potential instances of non-compliance and better informed by key data indicators.

EPA is also developing new predictive data analytics approaches that also seek to better focus inspections and investigations on the worst environmental problems and non-compliance. Notably, OECA is nearly completed with a predictive analytics study, in cooperation with the University of Chicago, for the RCRA hazardous waste program that began in 2017. The study uses machine learning algorithms to select inspection targets. Preliminary results suggest that use of the algorithms is associated with higher rates of non-compliance detection during inspections. EPA and the University of Chicago are continuing the study in an effort to statistically validate the results; it is anticipated that the study results will be released in 2020. EPA also plans to expand the use of machine learning algorithms to support inspection targeting in other areas – particularly the CWA NPDES program. EPA has also been pilot testing innovative enforcement targeting approaches that involve integration of databases to identify potential discrepancies in hazardous waste shipments and using the results to target inspections.

EPA is also piloting other uses of enhanced data analytics and fraud detection processes to automate and improve targeting inspections and investigations. EPA has instituted requirements for comprehensive electronic reporting of permit compliance information in the Clean Water Act NPDES permit program. Electronic reporting of compliance information makes it easier to detect instances of non-compliance because many of these violations were previously reported on paper

forms that EPA and states could not easily review comprehensively. With the advent of electronic reporting, EPA is now using those data to focus EPA and state enforcement investigations on entities with the most significant or chronic instances of non-compliance. EPA is also beginning to implement automated reporting fraud detection programs.

ii. Has this administration's effort to seek compliance through cooperation with the state and local entities contributed to this efficiency?

Response: Yes. The *Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States* (referenced in the answer provided to the prior question) that I issued calls for the EPA Regions to engage each of the authorized states in periodic joint work planning meetings at a senior management level. Per the Interim Guidance, these meetings are to cover the full range of enforcement and compliance topics with the goal of determining "how the combined resources of the state and the EPA could be used to effectively address these needs and ensure a level playing field. The implementation of this policy has served to enhance the EPA-state coordination leading to enhanced efficiency.

iii. How do increasingly more efficient inspections benefit compliance, specifically in the realm of public health?

Response: EPA continues to incorporate new technologies that improve the effectiveness, efficiency and timeliness of the compliance inspection process. For example, EPA is making use of infrared (IR) video cameras to detect emission of hydrocarbon vapors from petroleum storage tanks, piping, and natural gas and petroleum wellhead production sites. These vapors are not visible with the naked eye, but leaks can quickly be spotted with the IR camera, allowing EPA and regulated entities to quickly and efficiently focus attention to where fixes need to be made. EPA is also developing digital tools for use by inspectors in the field to make the collection of evidence and documentation of inspection observations more efficient and timely, saving inspectors valuable time in organizing, writing up, and finalizing their inspection reports. The sooner inspector observations are conveyed to regulated entities, the quicker that the entities can address identified problems and reduce emissions that impact public health and the environment.

c. While compliance is the end goal, recent media reports claim the EPA's enforcement has been subdued. In 2018 however, the EPA broke a nearly decade-long decline in the amount of criminal cases opened. Furthermore, the agency sentenced criminal defendants to a total of 73 years of incarceration the same year. Can you explain the importance of criminal penalties in achieving EPA's mission of compliance with federal environmental and public health standards?

Response: The mission of the EPA's criminal enforcement program is as important as any in government - to investigate, help prosecute and deter the most egregious

environmental offenders. Environmental crimes are primarily motivated by the desire to illicitly make or save money. Perpetrators frequently enjoy an unfair competitive advantage over responsible businesses that are committed to meeting their pollution control responsibilities. Severe criminal fines aim to shift this financial calculus to ensure "crime does not pay." An even more powerful deterrent is the threat of incarceration, a cost which cannot be passed on to the customer. Thus, criminal penalties create a powerful deterrent against future violations, protecting human health and the environment while ensuring a level economic playing field.

2. In June of last year, the EPA and Magnolia Waco Properties, LLC, which does business as Magnolia Homes, reached a settlement to resolve alleged violations of the Toxic Substances Control Act (TSCA) Lead Renovation, Repair and Painting Rule (RRP Rule), related to home renovations conducted without adequate lead paint protections as depicted on the television show "Fixer Upper". Under the terms of the settlement, Magnolia will take steps to ensure compliance with lead-based paint regulations in future renovation projects, address lead-based paint hazards at high-risk homes in Waco, Texas, and educate the public to lead-based paint hazards and appropriate renovation procedures.
    a. In your opinion, was one of the reasons that this regulation was not complied with by this party because of the complexity of the laws and regulations relating to the RRP Rule?

Response: The TSCA Lead Renovation, Repair and Painting Rule requirements are not overly complex or difficult. EPA continues to work with the regulated community to increase awareness of the requirements. Although I cannot speculate about the thinking or reasoning behind the actions of any regulated firm, I can say that after EPA contacted this company about its apparent non-compliance with the RRP Rule, the company took immediate steps to come into compliance.

    b. What are you doing more generally to address lead exposure?

Response: OECA helps to prevent and reduce lead exposure by assuring compliance, supporting authorized states in implementing federally-equivalent programs, providing information and compliance assistance to the regulated community, ensuring clean-ups where legal authorities apply and other activities.

For example, in FY2018:

- **EPA had 140 lead-based paint enforcement actions. Also, we provided education and outreach to industry and consumers in our civil enforcement press bundle ((https://www.epa.gov/newsreleases/epa-enforcement-actions-help-protect-vulnerable-communities-lead-based-paint-health-0); in our civil-criminal Enforcement Alert (https://www.epa.gov/enforcement/enforcement-alert-lead); and in our multi-media Lead Bulletin (https://www.epa.gov/enforcement/enforcement-lead-bulletin-fy-2018).**
- **OECA has a multi-program workgroup focused on sharing information and addressing lead issues. OECA issues a National Program Guidance (NPG) which**

identifies national compliance and enforcement priorities, discusses national direction for all compliance assurance programs, and identifies activities to be carried out by authorized programs. OECA has identified lead risk reduction as a focus area under the TSCA program in the NPG. The NPG set forth specific activities in furtherance of this focus area. To support these activities, OECA provides compliance monitoring guidance, including the RRP Inspection Manual and TSCA Compliance Monitoring Strategy, as well as forums for inspector training and information. In addition to overseeing EPA's lead compliance monitoring activities, OECA provides grant funding to states to conduct lead inspections and to strengthen their ability to address environmental and public health threats from toxic substances such as lead-based paint. EPA provided $1,748,000 in such grants in 2018 and $2,000,000 in 2019.

- **EPA entered into or issued over 30 enforcement actions under the Superfund law at sites with lead contamination in soils, water, demolition debris, tailings piles, sediments and other situations. These are in addition to the Superfund actions initiated in previous years that are still ongoing to address lead contamination.**

EPA continues to work with states, territories, and tribes to help address lead in drinking water.

EPA released the Federal Lead Action Plan on December 19, 2018, which was a product of the President's Task Force on Environmental Health Risks and Safety Risks to Children (Task Force). The Task Force is the focal point for federal collaboration to promote and protect children's environmental health. Established in 1997 by Executive Order 13045, the Task Force comprises of 17 federal departments and offices. Currently, the Task Force is co-chaired by EPA Administrator Andrew Wheeler and HHS Secretary Alex Azar.

The Lead Action Plan is a blueprint for reducing lead exposure and associated harms through collaboration among federal agencies with a range of stakeholders, including states, tribes and local communities, along with businesses, property owners and parents.

The four goals of the Lead Action Plan are:
Goal 1: Reduce Children's Exposure to Lead Sources
Goal 2: Identify Lead-Exposed Children and Improve their Health Outcomes
Goal 3: Communicate More Effectively with Stakeholders
Goal 4: Support and Conduct Critical Research to Inform Efforts to Reduce Lead Exposures and Related Health Risks

EPA released the Implementation Status Report for EPA Actions under the December 2018 Federal Action Plan to Reduce Childhood Lead Exposures and Associated Health Impacts (Status Report). The Status Report describes EPA activities that are being conducted in support of the Lead Action Plan including those performed in OECA. Through the President's Task Force on Environmental

Health Risks and Safety Risks to Children, EPA continues to work with its federal partners to improve coordinated activities and implement objectives of the Lead Action Plan. The Status Report outlines EPA's commitment to work strategically and collaboratively on the Task Force to implement the Lead Action Plan.

The Honorable Morgan Griffith (R-VA)

1. Ms. Bodine, What is OECA doing to encourage the regulated community to identify, self-report and resolve violations of environmental law? Does OECA have sufficient flexibility in its penalty and injunctive relief policies to encourage self-reporting?

   Response: On May 15, 2018, EPA announced a renewed emphasis on encouraging regulated entities to voluntarily discover, promptly disclose, expeditiously correct, and take steps to prevent recurrence of environmental violations. Specifically, EPA's May 15 announcement clarified several features of the Agency's already highly successful self-disclosure policies and noted that EPA is issuing further clarifications in response to common misconceptions in the regulated community that may be discouraging even greater levels of self-reporting. Between FY 2017 and FY 2018, the number of facilities that voluntarily disclosed violations and certified a return to compliance increased by 47%, from 1,062 to 1,561

   As noted in the May 15 announcement, EPA also stated that it is expanding its outreach and education efforts to the regulated community and other stakeholders concerning its 2008 New Owner Policy, a policy that provides additional flexibility to new owners who disclose violations.

   In October 2018, EPA Region 8 signed a memorandum of agreement with Wyoming Department of Environmental Quality to encourage use of Wyoming self-audit law. See https://www.epa.gov/wy/epa-self-audit-agreement-state-wyoming

   Also, on March 29, 2019, EPA finalized a separate voluntary disclosure program designed specifically for new owners of upstream oil and natural gas exploration and production facilities. In addition to the incentives that EPA provides in its self-disclosure policies, the Agency's media-specific penalty and injunctive relief policies provide flexibility to encourage self-reporting of violations.