



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

November 9, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the responses of Ronald Tenpas, nominee to be Assistant Attorney General for the Environment and Natural Resources Division, to the written questions received from yourself and Senator Cardin following Mr. Tenpas confirmation hearing on October 24, 2007.

Sincerely,

A handwritten signature in black ink, reading "Brian A. Benczkowski".

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Responses to Written Questions for Ronald J. Tenpas
Submitted by Senator Patrick Leahy
Chairman, Senate Judiciary Committee
October 31, 2007

1. Last week, Homeland Security Secretary Michael Chertoff invoked a waiver from the Real ID Act of 2005 that allowed him to bypass several environmental and conservation laws to restart construction on a United States-Mexico border fence in the San Pedro Riparian National Conservation Area in Arizona. Work on the fence had been suspended after a Federal judge ordered the work halted until an assessment of the environmental impact of the project could be carried out.
 - A. This is the third time Secretary Chertoff has used the waiver power as to circumvent our Nation's environmental and conservation laws. According to an October 22, 2007 Associated Press article entitled, "Chertoff Waives Laws for Border Fence," Mr. Chertoff exercised his waiver authority on "September 22, 2005 to finish building 14 miles of fence in San Diego, and on January 19 for fencing in the Barry M. Goldwater Air Force range in Arizona." Are you concerned that this pattern of unilaterally waiving Federal conservation laws allows other Federal agencies to circumvent the very environmental and conservations laws that the Environment and Natural Resources Division enforces?

Response: *I am committed to ensuring that the law is followed, particularly the statutes affecting environment and natural resources. I understand, however, that Congress, in passing the Real ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, set out at 8 U.S.C. § 1103 note, concluded in Section 102(c) that the domestic security concerns associated with border fence construction warranted providing the Secretary of Homeland Security with waiver authority when it is "necessary to ensure expeditious construction of the barriers and roads under this section." The waiver authority that Congress has provided the Secretary for construction of roads and barriers attendant only to border security efforts is unique and limited. I do not anticipate that other Federal agencies would attempt to waive inappropriately environmental or conservation laws. I certainly would be very concerned if any Federal agency sought to act outside authority that Congress chose to provide and to thereby improperly circumvent our environmental or conservation laws.*

- B. Given Secretary Chertoff's repeated decisions to use national security statutes to waive Federal environmental and conservation laws, should Congress revisit the waiver authority in the Real ID Act in order to balance securing our Nation's border with protecting our environmental resources? Does it concern you that by exercising this waiver authority, the DHS disregards the views of the States and their role in acting as stewards of the environment?

Response: *Congress should always carefully balance the protection of our environmental resources with our need to secure our Nation's borders. The waiver authority in the Real ID Act of 2005 is unique and limited. States should, and do, have a strong and real role in enforcing environmental laws.*

2. Since Congress began investigating the scandal involving the firing of eight U.S. Attorneys, the Justice Department has had resignations at its highest levels of leadership, including the Attorney General, Deputy Attorney General, Associate Attorney General, and several Assistant Attorneys General. The crisis of leadership that led to these resignations has taken a heavy toll on the tradition of independence that has long guided the Justice Department and protected it from political influence.

Your Division has experienced some turbulence in its leadership over the last number of years. The recent scandal of the Division's former Assistant Attorney General Sue Ellen Wooldridge was an unfortunate example of a Federal official who lacked the independence necessary to lead such an important division. What assurances can you give Congress and the American people that, if confirmed, you would commit resist any improper political or industry influences in the enforcement of our Nation's environmental laws?

Response: *I am committed to resisting any improper influences in the enforcement of our Nation's environmental laws. While I am always open to hearing from concerned parties, whatever their interest in particular litigation, ultimately my decisions will be guided solely by what the law and facts dictate.*

3. In July, I sent a letter to then-Attorney General Alberto Gonzales asking whether the circumstances surrounding Ms. Wooldridge's appointment to, and subsequent resignation from, Assistant Attorney General for Environment and Natural Resources raise concerns about potential conflicts of interests. Three months later, I have received no answers to my inquiry. If confirmed, will you commit to ensuring that my July questions on potential conflicts of interest by Ms. Wooldridge are answered and returned within three weeks of your confirmation?

Response: *I have been advised that the Department will make every effort to respond to your letter within three weeks of my confirmation based upon information available within the Department. I have also been advised that some questions may call for information not within the Department.*

4. If confirmed, will you make a commitment to ensure that Congress's questions, pursuant to its oversight authority, are promptly answered?

Response: *Yes. Appropriate oversight is an essential part of our constitutional structure.*

5. I am troubled by the recent enforcement record of the Environment Division. A May 23, 2007, report by the Environmental Integrity Project (EIP) found that “the Justice Department has become more reluctant to go to court when defendants refuse to clean up their pollution or pay the penalties that they owe.” That same report found that the Justice Department’s environmental suits have declined by 70 percent. Furthermore, another review conducted by the Transactional Records Access Clearinghouse at Syracuse University found that between 2001 and 2004, criminal prosecutions of environmental violations declined by 28 percent.

Given the recent scandals in the Department’s Environment and Natural Resources Division over the last few years, and its recent record of enforcement, if confirmed, will you make a commitment to restore the integrity of that Division and reverse the trend of declining enforcement actions? If confirmed, what would be your vision and specific plan of action to repair the integrity and enforcement record of the Environment and Natural Resources Division?

Response: *Since joining the Division, I have been very impressed by the commitment and competence of its career staff and believe that their work is characterized by the highest levels of integrity. If confirmed, I look forward to working with them to advance the mission of the Division. My goal as Assistant Attorney General is to enforce the nation’s environmental and natural resource laws forcefully and fairly, focusing enforcement on actions that are likely to be most effective in deterring future violations, remedying past harms, eliminating future injury, and protecting the public fisc.*

6. Do you agree that the Environment and Natural Resources Division’s priorities should focus on the most prevalent and significant environmental and conservation problems?

Response: *Yes.*

7. Do you agree that the Environment and Natural Resources Division’s environmental enforcement should have penalties high enough to motivate companies to comply with the law?

Response: *Yes.*

8. At your hearing, Senator Whitehouse raised the issue of the Department ‘suing to settle’ in order to allow environmental violators to avoid rigorous enforcement. Can you pledge that the Division, under your leadership, will resist any efforts to strategically settle, which would place the economic interests of environmental violators over meaningful deterrent remedies?

Response: *Yes.*

9. According to the May 2007 EIP report, “the Department filed 157 lawsuits in the last three years of the Clinton Administration, or an average of 52 a year – but

only 93 in the six years since President Bush took office, or fewer than 16 a year.” If confirmed, will you look into the reasons why the Department has filed so cases to enforce Federal environmental laws, and provide an answer to this Committee?

Response: *I am currently reviewing the performance of the Division and would welcome the opportunity, should you desire it, to discuss this with you and your staff. My examination of ENRD performance in this area will also include such qualitative factors as the scope of the filed action (individual, corporate, or national initiative), complexity or novelty, and the nature of the relief obtained.*

10. How should the Environment and National Resources Division go about making civil and criminal environmental enforcement actions a higher priority?

Response: *As a former Assistant United States Attorney in Maryland and Florida and the United States Attorney for the Southern District of Illinois, I have experience with and am committed to affirmative enforcement and defending the interests of the United States. During my tenure, civil and criminal enforcement will be a high priority for the Environment and Natural Resources Division. In that regard, my intent is to lead by example: encouraging, motivating, setting goals, and pushing results. I will work to ensure that career attorneys have adequate resources to bring cases successfully, including support from our client agencies that develop and investigate them for us.*

11. At the hearing, you testified that politics should play no role in any decision that the Justice Department makes. What safeguards will you have in place to ensure that partisan affiliation or any other political factor will not be considered in the hiring of attorneys for your Division?

Response: *I have instructed each of the Division’s ten section chiefs and the Deputy Assistant Attorneys General that partisan affiliation or any other political factor will not be a consideration in the filling of any career position in the Environment and Natural Resources Division. I am committed to ensuring that the Division’s hiring process incorporates a breadth of views from Division attorneys to eliminate the risk of such improper considerations playing a role.*

12. An October 2005 policy memo from EPA Deputy Administrator Marcus Peacock indicates that the Justice Department and EPA are declining to bring actions against electric utility companies that have violated new source review requirements, unless such violations are counter to proposed regulations that would legalize the majority of activities that EPA and DOJ have been successfully prosecuting. The main justification for the October 2005 memorandum is the claim that EPA will “refocus its resources on other areas that will likely produce significant environmental benefits.”

- a. What Clean Air Act-related enforcement lawsuits are EPA and DOJ actively pursuing or considering that would produce more “significant

environmental benefits” than the NSR enforcement lawsuits mentioned above that targeted violations of the current regulations rather than proposed EPA regulations? If you cannot identify individual defendants in those actions that are being considered, identify the industry sector and the nature of the violations (i.e., specific clean air act statutory and regulatory violations).

Response: *I was not involved in the creation of the EPA memorandum you mention; however, it has not prevented the Department of Justice from litigating on-going cases or filing new cases against utility companies. As you know, we recently settled our largest power plant case, United States v. American Electric Power (S.D. OH), and were joined in that effort by the states of Vermont, New York, New Jersey, Massachusetts, Connecticut, New Hampshire, Maryland and Rhode Island. Under the proposed consent decree, lodged on October 9, 2007, the company will reduce its annual emissions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x) by 650,000 tons and 160,000 tons, respectively, at an estimated cost of \$4.6 billion dollars. American Electric Power has also agreed to pay a \$15 million civil penalty and to fund or perform \$60 million in mitigation projects to address the adverse effects of its past violations. Division attorneys expended more than 52,000 hours of work to obtain this successful result.*

In 2006 ENRD filed a civil enforcement case alleging Clean Air Act violations against East Kentucky Power Cooperative and in early 2007 against Kentucky Utilities. On September 20, 2007, ENRD lodged a settlement in the District Court for the Eastern District of Kentucky with East Kentucky Power Cooperative which resolved the case filed in 2006, the first case under the Acid Rain provisions of the Clean Air Act, securing NO_x emission controls, a penalty of \$11.4 million and the retirement of SO₂ and NO_x emission allowances that will cost the company over \$16 million. On September 24, 2007, in a separate case filed earlier, the District Court entered a consent decree in United States v. East Kentucky Power Cooperative (EKPC), in which the company agreed to system-wide tonnage limits on its emissions of SO₂ and NO_x, reducing annual emissions by approximately 50,000 tons per year. The reductions will be achieved by the installation of controls estimated to cost \$650 million. The decree also requires EKPC to pay a civil penalty of \$750,000, and to conduct an environmental mitigation project at a cost to the company of at least \$5 million. We also continue to litigate pending Clean Air Act claims against other power plants, including the ongoing cases of Duke Energy (M.D. NC), Cinergy (S.D. IN), Kentucky Utilities (E.D. KY), and Alabama Power (N.D. AL).

The Division has continued to make progress on a number of ongoing national enforcement actions. For example, ENRD recently obtained consent decrees with three more petroleum refiners in United States v. Total Petrochemical USA, Inc. (E.D. TX), United States v. Valero Energy Corporation (W.D. TX) and United States v. Hunt Refining Co. (N.D. AL), as part of our initiative to address Clean Air Act violations within the petroleum refining industry. These three consent decrees, when fully implemented, will result in total penalties of \$7.55 million, installation of pollution control updates estimated to cost \$317.5 million, annual emissions reductions of more

than 6,000 tons per year (including more than 2,000 tons of NOx and 2,600 tons of SO2), and mitigation projects costing \$1.6 million. With these settlements, the Division's national petroleum refinery enforcement initiative will have addressed more than 92 individual refineries comprising approximately 85% of the nation's refining capacity, and will reduce air pollutants by more than 325,000 tons a year.

The Department of Justice announced on October 25, 2007, that a British Petroleum subsidiary, BP Products North America, Inc., agreed to enter a felony guilty plea to resolve allegations related to an explosion at its Texas City refinery in March 2005 that killed 15 people. In this case, prosecutors from ENRD, working with federal prosecutors in the U.S. Attorney's Office in Houston, successfully obtained a guilty plea to a knowing violation of the Clean Air Act, under which BP Products has agreed to pay \$50 million - the largest fine ever assessed under the Clean Air Act - and serve three years of probation during which time the company will be required to implement facility-wide renovations to prevent excess emissions in its Texas City facility and improve its safety. This was the first such conviction ever achieved under Clean Air Act § 112(r), adopted by Congress in 1990, after the explosion in Bhopal, India.

- b. I also note that at your confirmation hearing you expressed an interest in identifying new areas in which environmental enforcement is needed. I agree that this is a worthwhile goal and I am confident that you could identify any number of new areas where environmental violations are occurring. But would you agree that there is an existing need for strong continued enforcement of the Clean Water Act and Clean Air Act, violations of which continue and directly affect the health of the environment and the American people?

Response: Yes. Moreover, as noted above in response to question 12(a), an initiative may well involve the Clean Air Act, but be targeted at a particular industry segment. Thus, new initiatives, depending on the focus, may serve to further enhance a robust on-going Clean Air Act or Clean Water Act enforcement program.

SENATOR BENJAMIN L. CARDIN

**RESPONSES TO QUESTIONS FOR RONALD TENPAS
NOMINEE, ASSISTANT ATTORNEY GENERAL
FOR ENVIRONMENTAL AND NATURAL RESOURCES DIVISION**

October 31, 2007

1. Maryland passed the Healthy Air Act on April 6, 2006 with the purpose of bringing Maryland into attainment with the National Ambient Air Quality Standards for ozone and fine particulate matter by the federal deadline of 2010. This is the toughest air quality act on the East Coast and requires reductions in nitrogen oxide, sulfur dioxide, and mercury emissions from large coal burning power plants. At full implementation, Maryland expects nitrogen oxide levels to decrease by 75%, sulfur dioxide levels to decrease by 85%, and mercury levels to decrease by 90%.
 - a. Maryland has passed this law to comport with the federal deadline. If you are confirmed as AAG for Environment and Natural Resources, what federal focus will you bring to assuring compliance with Clean Air Act requirements in order to meet the 2010 attainment requirements?

Response: *I am committed to ensuring compliance with the law. Although the Environmental Protection Agency has the responsibility for assessing state compliance with national environmental standards, I will do everything in my power to support and assist EPA in fulfilling its statutory responsibilities.*

2. Congress established New Source Review in the Clean Air Act Amendments of 1977 to strengthen measures available to the States and the Federal government for improving air quality. An October 2003 rule change severely hampered existing enforcement cases and the development of new cases. The rule exempts any replacement of any identical parts from NSR guidance, classifying this replacement as routine maintenance.
 - a. In your time as Acting Assistant Attorney General, have you prosecuted Clean Air Act violations? If so, what were the cases?

Response: *Yes. I am pleased to be able to tell you that we recently announced a plea agreement for the largest criminal fine ever assessed under the Clean Air Act in the British Petroleum case and the largest Clean Air Act civil enforcement agreement in our history, the American Electric Power (AEP) case; and we have continued to vigorously litigate other pending actions against electric utilities and petroleum refineries. Under the proposed AEP consent decree, the company will be required to take steps to reduce its annual emissions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x) by 650,000 tons and 160,000 tons, respectively, ensuring that none of these pollutants will reach the Chesapeake Bay by means of air deposition. The consent decree also imposes a*

requirement that AEP take actions specifically to mitigate harm caused by deposition of nitrogen in the Chesapeake Bay as a result of its illegal emissions. Chesapeake Bay mitigation will be accomplished by actions designed to reduce future nitrogen-laden runoff from agricultural sources, likely in the form of establishing forested riparian buffer zones. In terms of other notable Clean Air Act prosecutions, on June 27, 2007, in the case of United States v. Citgo Petroleum Corp., a jury in the Southern District of Texas convicted the defendants on two Clean Air Act violations for operating two very large open tanks that contained oil without installing the proper emission controls. During my tenure as Acting Assistant Attorney General, the Division has also made other significant gains in improving the nation's air quality by concluding enforcement actions against numerous facilities operating in many diverse industries including United States v. Jupiter Aluminum Corp. (N.D. IN) (consent decree lodged August 13, 2007); United States v. Rhodia (N.D. IN) (consent decree entered July 23, 2007); and United States v. E.I. Du Pont de Nemours & Co. (S.D. OH) (consent decree lodged July 20, 2007).

- b. Is it your reading of the statute that EPA can ignore the documented increased emissions from these upgrades and waive the new source review requirements in the Clean Air Act that are now permitted under the new EPA rule?

Response: The October 2003 rule was invalidated by the D.C. Circuit in New York v. EPA, 443 F.3d 880 (D.C. Cir. March 17, 2006), rehearing en banc denied June 30, 2006, cert. denied 127 S. Ct. 2127 (April 30, 2007), before my arrival in the Division. During my tenure, we have consistently taken the position that all companies must comply with the Clean Air Act and its implementing regulations, including by obtaining permits and installing pollution abatement equipment when required by law.

3. The Mayor and City Council of Baltimore were parties in Massachusetts v. EPA, 549 U.S. ____ (2007), where Massachusetts successfully sued the EPA for not enforcing greenhouse gas emissions.

- a. Do you think it is significant that the states have felt forced to go to the Supreme Court to enforce federal environmental law?

Response: States have broad authority under federal law to bring environmental law suits. Although states and local governments brought the Massachusetts v. EPA case that you mentioned, a number of states, including Maryland and Massachusetts, joined with us in support of the petitioners in another significant Clean Air Act Supreme Court case decided on the very same day, Environmental Defense v. Duke Energy Corp. It is not unusual for the United States to be in a variety of litigation postures with states given the multi-faceted obligations of both states and the federal government.

- b. How are you planning to guide the DOJ Environmental and Natural Resources division in response to this ruling?

Response: Since the Supreme Court's decision, the D.C. Circuit Court of Appeals remanded the action to the Environmental Protection Agency on September 14, 2007, for

further proceedings in light of the decision. The Environmental Protection Agency is now developing proposed regulations under the Clean Air Act to address greenhouse gas emissions from new motor vehicles and fuels. The EPA Administrator has indicated target dates for announcing a proposed rule and final agency action. I will ensure that the Division is prepared to vigorously defend any federal rulemaking designed to limit greenhouse gas emissions.