Testimony of

Mr. Eric Schaeffer

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Thank you, Mr. Chairman and Members of the Subcommittee, for the opportunity to testify today. I am pleased to be here as Director of the Rockefeller Family Fund's Environmental Integrity Project, a nonprofit organization dedicated to improved enforcement of our nation's environmental laws. Until March of this year, I had served as Director of the Environmental Protection Agency's Office of Regulatory Enforcement, managing civil enforcement of the Clean Air Act, Clean Water Act and other environmental laws.

Let me start by thanking you for taking such an interest in how well our nation's environmental laws are enforced. Just by asking the right questions and pursuing them until you get answers, you will make both government agencies and regulated industries more accountable for their performance. And this hearing has already given hope to the communities living in the shadow of some chronic polluters that the laws that are supposed to protect them will finally have some meaning. With your permission, I would like to submit some of their experiences in their own words for the record.

The topic you have asked us to address - whether we have the right tools to enforce environmental laws - is broad, but here are four areas you might want to shine your spotlight:

We cannot measure compliance without measuring emissions; but when it comes to the Clean Air Act in particular, the quality of monitoring is typically so poor that unreported emissions often far exceed permitted levels;

Both EPA and state agencies are so starved for resources that many large industrial plants go years without a real inspection;

Loopholes in the Clean Air Act allow companies to shower neighboring communities with thousands of pounds of toxic pollutants every year without fear of penalty;

Most important, the Administration's own practices are jeopardizing a bipartisan tradition of fair, objective enforcement of environmental laws the public takes for granted.

Emissions Data are Chronically Unreliable: Monitoring of emissions is the bedrock upon which most laws, regulations and permits are based. According to EPA, about half of the emissions regulated under the Clean Air Act are from point sources, or the stacks and chimneys that capture pollutants and route them to the air. The remainder are the well-named fugitives, leaking from valves, flanges, pumps and other sources that can run into the thousands at refineries or large, complex chemical operations. These emissions are measured in a variety of ways, including direct and continuous monitoring, generally considered the most reliable; monitoring of parameters like heat and flow rate, which are correlated with emission levels; estimates based on the relationship between throughput and emissions; and periodic sampling to project annual emissions from a limited set of data points.

How well does this monitoring reflect reality? For point sources, we have made some slow progress toward greater use of continuous monitors for the most obvious applications, like large utility stacks. But for many industries, we still rely way too much on the occasional stack sample - which may take place once every three or four years, and allow industry to pick the most

favorable results - for information on how much pollution is being released and whether permit limits are actually met. And two years ago, the U.S. General Accounting Office found that emission factors were often wrong by an order of magnitude.
When it comes to fugitive emissions, our limited data is based on little more than guesswork. For example, the Clean Air Act requires refineries to repair valves, flanges and pumps that leak smog-forming volatile organic compounds (which may also be carcinogens) above 10,000 parts per million. Refineries typically report that somewhere between a half percent and 2 percent of their equipment leaks above that limit; but the National Enforcement Investigations Center, after intensively monitoring more than 20 refineries found leak rates were typically five times greater than industry estimates. The NEIC data was widely shared with refineries, both onsite and at industry conferences, and has not been disputed. I am attaching a table, published in one of EPA's periodic Enforcement Alerts, that compares leak rates reported by industry to those found by EPA.
More recently, scientists have discovered that large ethylene chemical plants on the city's outskirts apparently release at least ten times the volume of volatile organics from equipment leaks as previously reported. In another example involving mobile sources, most of the nation's diesel manufacturers computer programmed their engines to turn off pollution control equipment for extended highway driving, while recognizing and passing EPA's standard test pattern for measuring compliance. The problem is not limited to air pollution; we still struggling for such basic information as the number and volume of sanitary sewer overflows and stormwater discharges that are now the greatest threat to water quality in most coastal states.

Flying Blind: Without much more reliable monitoring data, we are flying blind and the consequences of assuming compliance where violations are widespread are fairly obvious. Equipment leaks that are undetected go unrepaired. A minority staff report for the House Government Operations Committee released in 2000 concluded based on NEIC's data that excess equipment leaks released 40,000 tons of volatile organic compounds a year, or about one and a half times more than the amount reflected in EPA's emissions inventory for 1999. EPA estimated that illegal nitrogen oxide emissions from diesel engines would ultimately reach 1.3 million tons a year, or about 50% above the two and a half million tons we assumed in the mid nineteen nineties. And cities like Houston are forced to seek ever more drastic, and more expensive, solutions to smog problems that are being force-fed by illegal emissions we thought were eliminated long ago. Finally, the lack of accurate and transparent data make it much more difficult to expand the use of more flexible permits, like Delaware's innovative plant-wide limits for the Chrysler plant.

Enforcement is Short-Changed: EPA and state investigators can do much to improve the quality of monitoring by conducting their own inspections and pushing the use of more accurate measurement systems. But the public would be shocked at how thinly federal and state inspectors are stretched covering the tens of thousands of facilities and millions of transactions covered by federal environmental law. I have attached information from EPA comparing the number of EPA enforcement staff to the number of regulated industries or transactions under specific environmental laws. Here are a few of my favorite examples:
EPA by law must monitor compliance with pollution standards for cars and trucks by testing engine designs, checking for computer controls and other devices that turn off exhaust controls, assuring that fuels meet environmental standards at airports, refineries (both U.S. and foreign),

storage terminals, and pumps, and stopping illegal imports of vehicles that don't meet clean air standards. The Agency has fewer than two dozen staff for this mind-boggling task.
EPA is responsible for finding and stopping the illegal filling of over 100 million acres of wetlands in 47 states, and another 100 million acres in Alaska. The Agency has approximately 30 staff to carry out this assignment.
EPA is the sole authority under federal laws that require that renters and buyers of millions residential housing be informed of lead-based paint risks. The Agency was given no new resources for this program, aimed at protecting pregnant women and young children under six from unnecessary exposure to a potent nerve toxin. It relies instead on a handful of staff in regional offices, together with a few retirees, to conduct inspections that will take several hundred years to finish at current rates.
Under almost all federal laws, even where states have assumed responsibility for day to day management of federal programs like the Clean Air or Clean Water Act, EPA keeps its authority to enforce those laws. That's a good thing, because federal enforcement holds the playing field level, and is essential for tracking down multistate sources of pollution, like the power plants that surround Delaware on all sides. The Administration has proposed cutting key federal programs for enforcement by nearly 15%, either because they do not understand EPA's unique jurisdiction or do not care.
Shifting money to the states, as the Administration has proposed, is robbing Peter to pay Paul, when both programs are badly underfunded. Enforcement works best when EPA and the state agency set aside petty squabbles over turf and remember who they work for. EPA and Delaware joined forces in reaching a recordbreaking settlement with Motiva Enterprises in Delaware City, and I think Nick Dipasquale, who's here today, would agree we were both much more effective working together. Last year, the U.S. General Accounting Office recommended that EPA survey the environmental enforcement workload before undertaking any budget cuts, and you may want to ask if the Agency has plans to do so.

Too Many "Accidents:" Communities living in the shadow of refineries, chemical plants and other inherently dangerous manufacturing activities have long complained about the frequency of accidents and upsets that lead to spikes in air pollution, require plant neighbors to be evacuated or sheltered in place, and sometimes maim or even kill plant workers. The Clean Air Act recognizes an exemption for genuine malfunctions that are not "reasonably foreseeable," but too many of these accidents seem to occur repeatedly at the same source. Two weeks ago, Hilton Kelley from Port Arthur, Texas, presented some disturbing data about repeated malfunctions at the Premcor plant that, according to his review of data submitted to the state agency, resulted in the release of over 400 tons of sulfur dioxide in just the first three months of 2002 alone.
It's time to ask whether the repeated release of sulfur dioxide and toxic compounds like butadiene and benzene are really the result of accidents, or of poorly managed facilities without adequate pollution controls. When oil or a hazardous material is spilled into a waterway, the Clean Water Act allows us to recover penalties based on the volume of the spill and to recover damages to natural resources. But under the Clean Air Act, the release of thousands of pounds of a carcinogen in an afternoon right next to a schoolyard is either exempt from penalties altogether because it's an "accident," or subject to penalties of only $27,500 since the violation occurred in a single day. If we want penalties for pollution to reflect the seriousness of risk to human health, this is a good place to start. In the meantime, we can enforce the laws that are written by challenging repeated use of the malfunction defense. EPA settlements with almost a third of the

refining industry offer a model by requiring companies to install backup pollution controls to safely incinerate gases that would otherwise be released into neighborhoods during mishaps, and by requiring that upsets be diagnosed and fixed so they don't happen over and over again.

Restoring Respect for Environmental Law: In the final analysis, however, environmental laws will mean little unless the Administration and Congress recognize that even the most powerful industries have a duty to obey them. Teddy Roosevelt said compliance with the law is demanded as a right, not asked as a favor, but I am not sure that value is reflected in the Bush Administration's own environmental enforcement policies. The White House and EPA have opened the door to utility lobbyists trying to short-circuit enforcement actions by changing the law in their favor, mocking the very standards their own lawyers were defending in court. I am concerned that disrespect for the enforcement process may be the rule, rather than the exception. For example, the previous two administrations followed a bipartisan tradition of requiring communication on active enforcement matters to be directed through attorneys handling the case. But political appointees at EPA, at least while I was there, broke with that tradition and had their own private conversations with industry defendants on more than one occasion. And the Administrator herself, this spring, encouraged utilities not to settle New Source Review actions until courts had ruled on the matter. Ironically, by discouraging honest negotiation and settlement, these signals end up forcing the Justice Department and EPA into the kind of confrontational litigation the Administration says it wants to avoid.
Public opinion polls repeatedly show that large majorities think we should do more to enforce the environmental laws we have before deciding to change them. Perhaps with your help, the people's voice will be heard and we can live up to the high standards that Teddy Roosevelt set more than 100 years ago.