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CRIMINAL AND CIVIL ENFORCEMENT OF ENVIRONMENTAL LAWS: DO WE HAVE ALL THE TOOLS WE NEED?

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME AND DRUGS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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CRIMINAL AND CIVIL ENFORCEMENT OF ENVIRONMENTAL LAWS: DO WE HAVE ALL THE TOOLS WE NEED?

TUESDAY, JULY 30, 2002

U.S. SENATE,
SUBCOMMITTEE ON CRIME AND DRUGS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:22 p.m., in room SD–226, Dirksen Senate Office Building. Hon. Joseph R. Biden, Jr., Chairman of the Subcommittee, presiding.

Present: Senators Biden and Sessions.

OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE DELAWARE

Chairman BIDEN. The Subcommittee will come to order. Let me begin with an opening statement here and then introduce our first panel.

Today, the Crime and Drugs Subcommittee will be addressing the criminal and civil enforcement sides of the Federal environmental laws. We will be asking whether or not law enforcement has all the tools they need to combat those who would pollute our Nation's air and water knowingly and in a criminal manner.

We recently concluded a series of three hearings on the devastating impact of the recent spate of scandals involving corporate America, and as part of the larger issue this Subcommittee heard testimony from a wide range of experts on whether or not penalties for white collar crime are sufficient to deter corporate wrongdoing. We found that there was a bit of what one might call a penalty gap that existed.

I was at the White House today when the President signed the Corporate Responsibility Act, and the first thing he mentioned was the same thing Mr. Greenspan did that he thought the single most—I am quoting Greenspan paraphrasing the President—paraphrasing them both, actually—the most important element of the Accountability Act we passed were the criminal penalties—and the President cited this—where a CFO and a CEO have to certify when a document is filed before the SEC four times a year that the information contained in the document is accurate.

If you knowingly lie in that submission, you go to jail for 10 years, and if you willfully alter that document and still submit it, then you go to jail for up to 20 years. The President cited that as the most significant deterrent, giving investors reason to believe

that the filing is accurate, at least to the best knowledge of the corporate officials.

As Samuel Johnson once said, and I am paraphrasing, there is nothing like a hanging to focus one's attention. I have found since my days on this committee, going back to the early 1970's when we were dealing with the international bribery statutes, that when you have CEOs in this country susceptible to a criminal penalty if they engaged in responding to bribe offers from abroad, all of a sudden things started to change.

So the real question here—and I have not reached a decision myself—is do we need any additional tools that we need to give the Justice Department and the EPA which they can bring to bear for those who knowingly and intentionally violate the Clean Air Act and the Clean Water Act, so that they know their violations will not be treated as merely a cost of doing business.

I find that when an individual is held responsible, they focus a lot more than the corporation being held responsible. But as I said, and I mean this sincerely, I am not sure we don't have enough laws already on the books relating to that, and the purpose of this hearing is to begin to discuss that issue.

There are three basic questions I hope our distinguished panel of witnesses will address today. First, are the existing Federal environmental laws sufficient to cover a full range of potential polluting of our air and our land and our water? Have we struck the right balance in terms of delegating the important enforcement activities from the Federal to the State governments? And do those statutes set the right standard of proof, or is the current standard too high to hold corporate polluters criminally responsible?

The second question is are existing environmental penalties adequate to deter polluters? For example, I understand that in many environmental contexts civil and criminal enforcement often overlaps. For that reason, we have an expert on civil enforcement here today as well. I want to ensure that we are using all the tools in our toolbox—tough criminal penalties, where appropriate, quick and forceful civil penalties, where appropriate, and in some circumstances a combination of both.

Third, are there sufficient resources to carry out the critically important job of protecting our Nation's air, land, and water? I know that the Justice Department and the EPA have incredibly dedicated and talented prosecutors who are staunchly committed to defending the environment. I want to make sure that we give them all the tools they need, just as we have done in the financial fraud cases. With the whole new emphasis, understandably, on terrorism and environmental terrorism, I want to know whether you have enough resources to do this job, as well as the new job you are being asked to do.

In conclusion, the recent spate of corporate scandals has reminded us that we can't take corporate integrity and responsibility for granted anymore. Likewise, we can't take for granted that on the environmental side of the equation there won't be similar activity.

Just as we crack down on white collar crime, we have to crack down on so-called green collar crime. Just as Congress needs to make sure that pensions and investments are protected, we need

to make sure that our statutory and penalty system is sufficient to protect the environment.

I am very pleased that we have such distinguished panels with us today, several of whom have been willing to make it back to the committee.

Senator Grassley, who was going to be here and who is not able to be here right now—I would ask unanimous consent—and since I am the only one here, I am sure I will get it—that his statement be placed in the record.

Our first panel is Tom Sansonetti, Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice. Mr. Sansonetti has a long history of government service. He was Associate Solicitor on Energy and Natural Resource Issues in the Interior Department under President Reagan. He was then nominated in 1990 to be Solicitor for the Interior. He also is the founding partner of his law firm, which specialized in energy concerns. We are very glad to have him here today.

Timothy M. Burgess is the United States Attorney for the District of Alaska.

Thanks for making the trip. I hope you had other reasons to come. I hope we weren't the only reason, but welcome. I know it is a long trip, having made it.

He is a U.S. Attorney and Chairman of both the Attorney General's Advisory Council Environmental Subcommittee and the Department of Justice's Environmental Criminal Task Force. Mr. Burgess previously served as an Assistant U.S. Attorney in the District of Alaska, since 1989, and was an associate in the law firm of Gilmore and Feldman, in Anchorage, from 1987 to 1989. He received his undergraduate degree and his MB and A—you can tell I am from Delaware—MBA from the University of Alaska and his J.D. from Northeastern University. We want to thank him for coming.

I might point out to him that when I first got here, facetiously, when I was in another State they would slip and say "now I want to introduce the Senator from DuPont—I mean Delaware."

Leo A. D'Amico is the Director of the Office of Criminal Enforcement, Forensics, and Training, and leads the Criminal Investigation Division at the EPA. Mr. D'Amico has been working at the EPA for 9 years doing criminal enforcement, and he is submitting joint testimony with Mr. Sansonetti, on behalf of both the Department of Justice and EPA. So Mr. D'Amico will not be testifying, as I understand it, but we are eager to have you respond to questions, if you may, since you have 9 years of experience here. We thank you, as well, for coming.

With that, why don't we begin with you, Tom—I should be more formal—General, why don't we begin with you and then we will go our friend from Alaska and we will move from there? The floor is yours.

STATEMENT OF THOMAS L. SANSONETTI, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.; ACCOMPANIED BY HON. TIMOTHY M. BURGESS, UNITED STATES ATTORNEY FOR THE DISTRICT OF ALASKA, ANCHORAGE, ALASKA, AND LEO D'AMICO, DIRECTOR, OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS AND TRAINING, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSISTANCE, ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, D.C.

Mr. SANSONETTI. Chairman Biden, I am pleased to be here today to discuss the Department of Justice's environmental crimes program.

Firm and fair enforcement of the laws is an important component of environmental protection. It helps ensure that, one, our citizens can breathe clean air, drink pure water, and enjoy our Nation's natural resources; two, that law-abiding businesses have a level economic playing field on which to compete; and, three, that those who fail to comply with the law know that they will be penalized and will be deterred from non-compliance.

Attorney General Ashcroft has identified protection of our natural resources through strong enforcement of the environmental laws as a top priority for the Department, and our environmental crimes program is a crucial part of those enforcement efforts.

Tim Burgess, as you noted, the U.S. Attorney from Alaska, is also the head of the Department's Environment Subcommittee of the Attorney General's Advisory Council. Of course, he will be here today and joining me in responding to questions that you may have, along with Leo D'Amico, from the U.S. EPA. As you noted, he is the head of the EPA's criminal enforcement efforts.

In my situation, the Environment and Natural Resources Division has ten sections. Two of those sections are responsible for prosecuting environmental crimes: the Environmental Crime Section, known as ECS, which is responsible for prosecuting individuals and corporations that have violated the major environmental and pollution control laws; and, second, the Wildlife and Marine Resources Section, which is responsible for cracking down on the major worldwide black market in wildlife.

The Environmental Crime Section has about 28 attorneys that are devoted full-time to criminal enforcement, whereas the Wildlife Section has 5 full-time prosecutors. To leverage the tremendous expertise of these prosecutors and to enhance our enforcement efforts, we also act as a resource for the training of and the dissemination of information to investigators and prosecutors across the Nation.

In this regard, we have forged partnerships with the 94 U.S. Attorneys' offices, the Environmental Protection Agency, the FBI, and other Federal, State and local agencies across the Nation. Through law enforcement coordinating committees and environmental task forces developed in the United States Attorneys' offices across the country, we have increased cooperation among local, State and Federal environmental enforcement offices.

I want to emphasize to the Subcommittee that we in the Division share responsibility with the U.S. Attorneys' offices around the country for bringing prosecutions. In fact, as a general rule, the

U.S. Attorneys' offices initially decide whether they wish to handle cases referred by investigators.

Sometimes, they decide to handle a case entirely on their own, while in other cases they prosecute them jointly with attorneys from ECS. In other instances, the Environmental Crime Section ends up handling a case in its entirety. Regardless of which office ends up handling a given case, we cooperate and offer assistance to one another as needed.

One example of successful cooperation very recently in May of this year was *United States* v. *Ashland Oil*. Ashland, which owned and operated an oil refining facility in Minnesota, pled guilty to negligent endangerment under the Clean Air Act for the draining of hydrocarbons into a sewer that subsequently ignited into a fire ball that engulfed several company firefighters, injuring one severely.

Under the terms of the plea agreement, Ashland will pay a criminal fine of $3.5 million, sponsor a workshop at a national petroleum conference dealing with the Clean Air Act's new source performance standards for petroleum waste water, take out full-page notices in the two major Twin Cities newspapers acknowledging what happened and how it was resolved, and pay $50,000 to each of the three local fire departments that responded to the fire, and another $50,000 to their own emergency response team. They have also agreed to spend another $3.7 million upgrading their facility to help prevent similar incidents in the future and to pay restitution to the victims. The primary victim, who happens to be a former Ashland employee, will receive $3.5 million and medical coverage for him and his family.

Cooperation with the U.S. Attorneys' offices and other law enforcement agencies has led to the development of initiatives to address problems as diverse as vessels polluting our oceans, environmental testing laboratories engaging in systemic fraud, and the smuggling of chlorofluorocarbons, CFCs, that destroy the protective ozone layer in our atmosphere.

I have described these initiatives in much greater detail in my written testimony, but I would like to take a moment to talk about our most recent success in our Underground Storage Tank Initiative.

The Underground Storage Tank Initiative is an aggressive effort to address the problem of widespread fraud by environmental contractors cleaning up sites contaminated by leaking underground storage tanks and non-compliance with UST regulations.

In another terrific example of coordination between my Division and the U.S. Attorneys' offices, last week we announced that Tanknology International, Incorporated, has agreed to plead guilty to ten felony counts of presenting false claims and making false statements to Federal agencies.

The guilty pleas were for false underground storage tank testing services performed by their employees at Federal facilities in ten different Federal districts; ten different States we are talking about here. Tanknology has also agreed to pay a $1 million criminal fine and restitution of $1.29 million to the U.S.

So in connection with Tanknology, and more generally, I want to tip my hat to the investigators out there in the field. As in other

areas of law enforcement, the environmental prosecutors depend on the investigators who initially develop the evidence for a case. The investigators in our cases are typically agents from the EPA's Criminal Investigation Division and the FBI, but we also receive substantial support from other agencies, including the Department of Transportation, the Coast Guard, the Fish and Wildlife Service, the Army Corps of Engineers, the U.S. Customs Service, and the DOD's Criminal Investigative Service, as well as State and local environmental protection-related officials and agencies. So it is these agencies, frankly, that are critical to the success of our criminal enforcement efforts.

In conclusion, the Department of Justice takes seriously its obligation to protect health and the environment, and it is committed to strong enforcement of the laws. In my written testimony, I provided the Subcommittee with a big picture of how the environmental criminal prosecutions fit into the larger picture of environmental enforcement.

Criminal enforcement is a crucial part of that picture because there are some individuals and companies who will always see a civil or administrative penalty, as you said earlier, as little more than the cost of doing business. We are committed to making them see the light regarding environmental compliance and the vigorous protection of public health and the environment.

So Mr. D'Amico, Mr. Burgess, and I would now be happy to answer any questions that you may have about the Department's environmental crimes program.

Chairman BIDEN. Thank you very much.

Let me ask you a question, and maybe the best place to start is with Ashland Oil. Did you charge individuals in the corporation with a criminal offense or was the corporation charged with a criminal offense?

Mr. SANSONETTI. I recall offhand that it was the corporation that we did, and I can look up the individual details as to what happened.

Chairman BIDEN. Do you remember, Mr. D'Amico?

Mr. D'AMICO. I believe it was only the corporation in Ashland Oil. Principally, the Criminal Investigation Division in our office focuses our cases on individuals. The most recent statistics I can give you from 2000 show that 80 percent of our defendants are individuals, versus 20 percent being corporations, and in some of those cases where it is corporations, it is also corporations and individuals.

Chairman BIDEN. Now, can you tell me—you may not know off the top of your head—what is the largest corporation where an individual officer in the corporation was charged with a criminal offense?

I asked my staff that. They came up with a number of instances where relatively small corporations that were essentially wholly owned by an individual, a major stockholder, were criminally held accountable. Has there been any Fortune 100 company or Fortune 500 company where a CEO or a plant manager or anybody, in the 9-years you have been there that you can think of, crossing both administrations, Democrat and Republican, has gone to jail?

Mr. D'AMICO. I believe so. There was a CEO that just comes to me right now without having anything prepared from Sable Labs who was one of the senior officers, either the CEO or the chief financial officer for that particular corporation. I would have to verify that and get back that information to you.

Chairman BIDEN. Well, I would very much appreciate it, and take your time, but if you could check to see when the last time anyone from a Fortune 100 company or an individual was sued.

Let me tell you, the cynics among us assume that there is not any difference between being criminally fined, like in the Ashland Oil case, and being civilly fined. As long as no one is going to jail and it is not coming out of anybody's pocket—it may impact the job prospects for someone moving up the corporate ladder, but it is not their money and it is not their time in jail.

Let me ask you a question. Mr. Burgess, you are from Alaska. If, in fact, you had a circumstance, for reasons relating to convenience, where a major supertanker was purging their bilges, violating the law, into the ecosystem or into the bay within the territorial waters of the United States, do we go after that outfit based upon the captain of the ship knowingly doing it, and criminally, or do we go after it based upon the civil responsibility that they have under the environmental laws and seek a civil penalty.

Mr. BURGESS. Well, Senator, first, we would have to start with the assumption that we have got evidence to support a criminal prosecution. If it is there, we would certainly look to see who made the decisions that led to those discharges that you mention.

Corporations don't make decisions. People do, and corporations act through their employees and their officers and directors. And it is funny you should mention that because we just recently had a series of prosecutions in Alaska in which we had foreign freighters coming into Dutch Harbor that were directly discharging overboard, as you suggested, and we have prosecuted and sent to jail the chief engineers who ordered that misconduct and the captain of one of the vessels. They have all been personally prosecuted and they are all facing jail time.

Chairman BIDEN. Good, good. Now, as a prosecutor, Mr. Burgess, would it make any difference whether or not major environmental criminal laws had an "attempt" provision in them? Right now, there is no attempt; we have to wait until the violation occurs before we can go after them, whereas I can be arrested for attempted bank robbery, I can be arrested for attempted murder, I can be arrested for attempted a lot of things.

Would the "attempt" standard give you more ammunition? Is it necessary, is it useful, is it counterproductive?

Mr. BURGESS. It would certainly depend upon the factual situation we were looking at in a particular case and it would be something that we would look at in making a decision on a particular case. I think most environmental cases almost always involve a host of Federal violations, not just environmental violations.

They frequently involve false statements, they frequently involve obstruction, so that would be another arrow, obviously, in the quiver of prosecutors that we would take a look at in making a decision as to whether or not to prosecute a case or if we could prosecute a case.

Chairman BIDEN. Yes?

Mr. SANSONETTI. In thinking about your comment about criminal attempt, I think that that is definitely worth taking a look at. I mean, right now the laws are written in such a fashion that you have to have harm occur before we can really pursue them down that line.

Attempted criminal violations can still be pursued, but usually, as I recall, under a conspiracy theory in Title 18, and it is a little more difficult to prove that. Particularly with conspiracy, you need two individuals to start with, as opposed to a situation where just one individual may be trying to pollute the water or something like that.

So I think that it is certainly worth taking a look at. Obviously, we would want to work with the other U.S. Attorneys to see what they thought about it and, of course, with your staff, but that might be one to take a look at.

Chairman BIDEN. Mr. D'Amico?

Mr. D'AMICO. I concur with Mr. Sansonetti. It would be to our advantage and the environment's advantage if we could stop the act prior to taking place if it is just one individual involved where we don't have the benefit of using the conspiracy statutes and charge that individual.

Chairman BIDEN. Now, help me out because I think average people wonder about this. A manufacturing facility has a process whereby the discharge into the air, the flaring of gases or whatever, is a violation of the Clean Air Act, but there is a consent decree—not a consent decree—a permit where they are allowed to do it under certain limited circumstances.

But beyond those limited circumstances, they knowingly make a decision to flare the gases outside of the permit because the cost of shutting down and not flaring the gases is so prohibitive for their overall company that it is cheaper to pay the civil penalty that is a fine that is attached to flaring those gases.

In your experience, is conduct affected, decisions like that affected, based on whether or not the manager of the plant or the policy of the officers of the corporation would be affected by a criminal prosecution versus a civil prosecution?

Mr. D'AMICO. No, sir. We would take a look at the information provided and try to do the necessary fact-finding to make a criminal referral to the appropriate U.S. Attorney's office or the Environmental Crime Section.

Chairman BIDEN. Most of the enforcement of the Clean Air Act and the Clean Water Act is left to the States, right, or is it?

Mr. SANSONETTI. Most of the States have their own laws, so they can, of course, prosecute individuals under their own laws through their State attorney generals' offices. The Federal Clean Air Act is one that can be enforced both by the U.S. Attorneys and by Main Justice, and it is, but there is a lot of coordination that occurs between those different groups.

Our Division sponsors, for instance, an annual event this last year where we invite in each of the States to send someone here, whoever their chief environmental crimes enforcer is from Delaware, Wyoming, or wherever, and we sit and actually have presentations for two, 3 days on how we are handling not only Clean Air

Act cases, but Clean Water Act cases, Superfund, RCRA, things like that. We share tales of different trials and how you go about it.

We also do that with the States. In fact, yesterday I just gave a talk to the Council of Western Attorneys General from the 14 Western States on environmental crimes and how we want to work with the State AG offices to go ahead in the hypothetical that you put forward working on helping to stop the flaring. So it is a coordinated effort at this point and either can take the initiative.

Chairman BIDEN. According to a report to Congress issued in April 2001 by the Environmental Council of States, between 1995 and 1999 States conducted over 90 percent of the environmental enforcement actions taken by the States and the EPA combined. Does that sound right?

Mr. D'AMICO. They may be speaking of facility inspections, not necessarily criminal investigations.

Chairman BIDEN. In certain areas of criminal law, say financial fraud, the statute of limitations doesn't begin to toll until the victim learns of the offense. Do you think that the statute of limitations for environmental crimes should be extended in cases where the polluter takes affirmative action to conceal the crime?

Mr. SANSONETTI. I think that this falls into the category of your other comment about whether or not legislation might be valuable in the area of attempts. I think that certainly it is a problem. I recognize and understand where you are coming from in the sense where a defendant has acted to conceal his crime from the law enforcement official.

Right now, the burden rests on the government to prove that there was an affirmative act of concealment. So I think that it would be, again, worth taking a good look at to basically put an additional time limit there. Of course, the question is how many more years. I have to see the exact language, but I think that we would definitely like to work with your staff on that one.

Chairman BIDEN. In terms of judgments requiring restitutions, I assume there are some where you seek both a civil and/or criminal penalty and restitution for the damage done. Is that correct?

Mr. SANSONETTI. That is correct.

Chairman BIDEN. Is there anything in the law that allows, while the case is being taken, for a defendant to dispose of their property so that they are not able to pay restitution, or to shield their property or to shield their assets? Do you have any recourse in that circumstance?

Mr. SANSONETTI. I guess I would have to look at the exact provisions because, of course, one way of protecting one's assets in those situations is to file bankruptcy. That is a whole different area of the ability to discharge a potential or future penalty or fine through bankruptcy, but if a person is just charged and you are in the midst of the case, maybe there hasn't been the final sentencing or final determination. To my knowledge, there is no law that would prevent an individual from selling his car or selling his house in the interim.

If it can be, of course, shown that the activities taken were totally fraudulent in nature, so you just passed all of your property

off to your third cousin to avoid restitution, I think that there is an opportunity to try and crack that transfer of assets.

Chairman BIDEN. Do you have enough personnel, in light of the changed priorities after 9/11, to vigorously do the job?

Mr. SANSONETTI. Right now, our resources are adequate. To give you a couple of numbers, we have got 400 lawyers in my Division. We have about 190 that are devoted to the two topics we have talked about today, that is civil and criminal environmental enforcement, through our civil and criminal sections and through the Wildlife Section.

We, of course, interact with the U.S. Attorneys. Tim can speak for them, but you have to really look at this as really a big picture. It is not just my ECS group or Tim's U.S. Attorneys.

I think one of the things that has happened since post-9/11, which, of course, has strapped everyone's resources, is that it is making us pay more attention to leveraging the cases we have got and the good results that we have. I am trying to take special pains to work with our Office of Public Affairs so that when we do have a winning case like Ashland or Tanknology here last week that we put the word out as far and as widespread as possible, because I think there is a deterrent effect, as you noted, when you have got a criminal case where someone has had to pay a rather high fine. We are going to, of course, continue to work within the Department of Justice and the OMB process for budget to get the resources that we need, but right now we are doing OK.

Chairman BIDEN. As I understand it, the EPA Criminal Investigation Division is supposed to have an agent work force of approximately 250 agents. Last year, before 9/11, the work force was approximately 170, and after 9/11 approximately 40 agents were assigned to anti-terrorist activities. The work force has since increased to approximately 210, with the infusion of anti-terrorism funds.

What is the current work force of the Criminal Investigation Division?

Mr. D'AMICO. The number of agents today is about 220. Actually, a couple of years ago we were down to about 170 agents, and that includes me and other non-case-carrying agents that are with the Criminal Investigation Division and overall with the Office of Criminal Enforcement.

Over the last year or so, we have been able to hire 60-plus agents. We are at about 200 right now, and it is a very active, very hard-working group of people. They not only have picked up their homeland security responsibilities, but they continue to provide leadership to the environmental task forces around this country.

To date, Senator Biden, as of third quarter this year, we have 100 more investigations initiated than we did as of third quarter last year. Our folks work very hard and they do take the opportunity to work with State, local, and other Federal agencies in a number of task forces throughout this country.

Chairman BIDEN. Thank you. As I understand it, though, you work very closely with the FBI, as well, correct?

Mr. D'AMICO. We do, sir.

Chairman BIDEN. And has their diversion of agents, 572 agents, affected you much?

Mr. D'AMICO. Where we had joint investigations with the FBI, some of their people have been redirected to other responsibilities and we and the other partners are picking up those cases. I am aware that the FBI is still dedicating some resources across country and it is a field office-by-field office decision as to who remains with environmental crimes, who can be pulled away from a particular investigation right now.

Is it best to bring in more State people or other Federal agencies to contribute to an investigation along with EPA? Those types of decisions are being made on a case-by-case basis.

Mr. SANSONETTI. Senator, if I may add on to that one, as I have noted, while between Tim's U.S. Attorneys and my folks in ECS, we have got the prosecutors ready to go, you are right. If we don't get the cases referred to us, there is no, as they say, grist for the mill.

So I was concerned post-September 11 as to what was going to happen this coming budgetary year, so I actually wrote the FBI Director and said, as I understand it, you have been supplying the equivalent of almost 40 full-time employees to environmental crime referrals. Are we going to be able to sustain that or not?

We have had some discussions. Letters have gone back and forth, and I am pleased to say that he has contacted me and the answer is yes, there is going to be a continuing——

Chairman BIDEN. So they are going to be able to sustain that effort?

Mr. SANSONETTI. We are going to be able to sustain the FBI agents for this coming year, and I am delighted, because they are in every State, in every one of the districts in the United States, whereas Mr. D'Amico's people, at the number of 220 or so, cannot cover the entire United States. It makes it much more difficult for you to do so, compared to 11,000 FBI agents.

Chairman BIDEN. I apologize. We have a vote on and there is about 4 minutes left. I was going to submit questions to you in writing, but Senator Schumer is coming from the vote here. I ask whether or not your guys would stick for a few minutes. It will take me about 9 or 10 minutes to get back, but I authorize Senator Schumer, if he comes back, just to convene the hearing and ask those questions.

We will recess until the call of the Chair, which I hope will be about 10 minutes while I go over and vote and come back. Thank you.

[The Subcommittee stood in recess from 3:10 p.m. to 3:30 p.m.]

Chairman BIDEN. The Subcommittee will come back to order. I indicated I would keep the first panel because Senator Schumer had questions. I got over to the floor and Senator Schumer had questions for me, not for you. He has questions for you, as well, but he is tied up on the upcoming amendment. He will not be here.

Fortunately, Senator Sessions, who also had questions, is here, so I will yield to my friend from Alabama.

Senator SESSIONS. Thank you, Mr. Chairman. I think you have raised some good questions here.

In the matters that I faced as a United States Attorney, it was often difficult to make a case criminally. It was very, very frustrating, and I would like to raise a couple of issues with the panel.

One of them—I guess, Mr. Sansonetti, you would be the person to do it, or U.S. Attorney Burgess, maybe you, but it seems to me there is a problem with the statute of limitations. As I recall, it is a 5-year statute, but that is from the commission of the crime, and often it may be years before this deposit or leakage is discovered to have occurred and by then you look at it and the statute has run. Most people may not know, but in a bank robbery, 5 years passes and if you can get away with it for 5 years, you can never be prosecuted for the crime.

Do either of you have any thoughts about how we might provide more ability for prosecutors to prosecute cases that have gone beyond the current statute?

Mr. SANSONETTI. First of all, Senator, I think it is a great question. Actually, we visited in the first session here today a little bit about some changes that might be made. The one about the proposed extension of statute of limitations on environmental crimes that involve concealment is certainly an area that we should take a look at.

You are exactly correct. The burden rests on the government to prove that an affirmative act of concealment occurred. But, boy, if the most egregious crimes involve affirmative acts of concealment by the violators and allow the criminals to hide their wrongdoing long enough for the statutes to foreclose prosecution, then we have really got ourselves a problem.

Tim, do you think that that is one worth looking at?

Mr. BURGESS. I agree. I think that would be something we should look at, and I can also talk with the other U.S. Attorneys through the Attorney General's Advisory Committee.

Senator SESSIONS. Well, I remember a case in which you could see a brown thin line between the grass in the lower area where this pollution had washed and seeped over the years, and the company had gone bankrupt and they had been gone for quite a number of years. A person who has gone bankrupt or has no money cannot be punished with a fine, or any kind of other enforcement for that matter. He really needed to have gone to jail if, as it appeared to me at the time, he had deliberately allowed this toxic substance to be deposited outside the normal procedures.

I could see it being done as just a flat extension. I believe we extended the statute in savings and loan cases to 7 years because they take so long to develop, S and L cases and bank frauds. You could just extend or you could focus on from date of discovery, as long as maybe the damage was still existing. If it was maybe biological, like sewage or something, maybe you wouldn't want to extend it.

Would you consider submitting me a memorandum on some things we might do to deal with the statute of limitations problem?

Mr. SANSONETTI. We would be glad to work with you and your staff, Senator, certainly.

Senator SESSIONS. I was talking to Mr. D'Amico as we were waiting for Senator Biden to get back from the vote. Are we satisfied, Mr. Sansonetti, in your mind that there is sufficient cooperation between EPA's limited number of criminal investigators and the FBI or State attorney generals' offices and others to investigate cases?

I know it is easy for us to say, well, we will just give more criminal investigators to EPA and they can have a lot more. But in my observation, you have got FBI agents in virtually every community in America. They are trained criminal investigators. I think from what I saw in my experience, they like these cases. They are the kind of cases that generate community interest and they like to work them and they are good at that.

Could we do a better job of working with other Federal and State and local investigative agencies to produce these cases?

Mr. SANSONETTI. I think the answer is my observation, after the first 7 months on the job, is that the folks at EPA and the Criminal Investigation Division and those at the FBI do work very well together.

Your point is well taken. There are, as I understand it, some 11,000 FBI agents nationwide. There is no place where they don't have a presence. Of course, Mr. D'Amico's shop has got to leverage his 220 agents to the best of their ability.

Without the cases being investigated and referrals resulting from them, Tim's folks and mine don't have anything to do. So it is very key that those referrals keep coming and that the investigations do as well.

Maybe Mr. D'Amico wants to talk about his own dealings with the FBI.

Mr. D'AMICO. Our dealings with the FBI, Senator, are very positive. We participate in a number of environmental crimes task forces throughout the country. There are about 94 such task forces, probably 40 or 50 active ones that we are participating in with the FBI, Coast Guard, and State and local investigators and regulators, all looking to put our best effort forward to build these environmental cases. We also charge under Title 18—not only under the environmental laws, but our agents and FBI agents charge under Title 18, such as false statements, et cetera.

Senator SESSIONS. Well, I believe you can do that. I suspect it takes the driving force from EPA to make it really move because in the cases that I recall, we had delays in getting chemical analyses.

Mr. Burgess, what about the cases that you have dealt with that you are familiar with in your area? Who are the primary people that did most of the work, and have you had any problem getting laboratory work done and does that delay investigations?

Mr. BURGESS. We work primarily with EPA and the FBI. We also work on a number of cases with the Coast Guard. Those are the primary agencies for investigating environmental crimes in my experience.

As Mr. D'Amico mentioned, the cases often involve not just environmental offenses, but what are more typical, Title 18 offenses—fraud, false statements, and conspiracies. So the involvement of the FBI is very important. We have also been able to use not only EPA's labs, but the Coast Guard's and the FBI's. Between those labs, we can generally get our lab analysis done in a timely fashion for prosecutions.

Senator SESSIONS. That was a problem in my experience. Of course, a good false statement case is just as good as a so-called environmental case sometimes for putting people in the slammer.

Mr. BURGESS. Absolutely. As I mentioned, invariably when you have an environmental crime, the perpetrator is going to try to cover up their activity and that leads to false statements and conspiracies. So we almost always see those types of offenses in conjunction with the underlying environmental offense.

Senator SESSIONS. Well, I just believe that a lot of different times we are late identifying, or we find out the pollution has occurred, a company has gone bankrupt. There is material that somebody checks the soil and it is clearly improperly disposed. But years have gone by and there is nothing that can be done, except the criminal sanction, going to jail. They have no money, they have gone away. The company is bankrupt, or whatever.

I think the public does deserve to know that there was some punishment meted out, because what really happens is the taxpayer or some relatively innocent person has got to come in and clean up the site. So we all pay for it and the person who caused it is not caught.

Is there anything else that you have or would like to comment on?

Mr. Sansonetti, if you have any ideas on the statute, either extending it or going from some sort of date of discovery, probably under the conditions that the damage is still there, it would be something we could think about.

Mr. SANSONETTI. I would be glad to do so, Senator.

Senator SESSIONS. There has been a historical basis for having a fairly limited statute of limitations. We don't want to just play around too blithely with that historical principle, but I think in these cases we could extend it.

Thank you, Mr. Chairman.

Chairman BIDEN. Thank you very much.

Gentlemen, I appreciate your time and your effort. With your permission, we will submit to you several questions in writing.

Mr. Burgess, I thank you for making the long trip. It is a long way to come. I thank you for being here and I appreciate your effort, and we will look forward to working with you to see if we can suggest some of these changes from the possibility of "attempt" to statute of limitations and a few other things.

Mr. BURGESS. Thank you, Senator.

Chairman BIDEN. Thank you very much.

[The prepared statement of Mr. Sansonetti appears as a submission for the record.]

Chairman BIDEN. Our next panel consists of Eric Schaeffer, Director of the Environmental Integrity Project of the Rockefeller Family Foundation. Before that, Mr. Schaeffer worked for 12 years for the EPA. His last position was Chief of Civil Enforcement, a position he held from 1997 t0 2002. He resigned from the EPA earlier this year, citing differences with the administration's environmental policy. We are glad to have him here and to hear his take on the issues, particularly the intersection between civil and criminal enforcement in the environmental area.

Judson W. Starr is a partner in the law firm of Venable, LLP, where he is the head of their environmental and energy practice group. He is a former head of the Environmental Crime Section of the Department of Justice, having served in that position from

1978 to 1988. He has also written books on environmental crime and advised the United States Sentencing Commission on environmental crime issues. We are glad to have him here as well.

Mr. RONALD A. Sarachan is a partner in the law firm of Ballard Spahr Andrews and Ingersoll and a member of the firm's environmental group. Before that, Mr. Sarachan was the Chief of the Environmental Crime Section of the Department of Justice from 1994 to 1997. Prior to that, Mr. Sarachan worked as an Assistant United States Attorney and chief of the major crime section in the Eastern District of Pennsylvania. He is a graduate of Brown University and Michigan Law School. We look forward to his testimony as well.

Michael Penders is President and CEO of Environmental Protection International, an environmental consulting firm. He is a graduate of Cornell University and the Seton Hall Law School. He brings to us experience in two areas: first, as a New Jersey State prosecutor for 5 years who had to enforce laws on a daily basis. Second, he worked for EPA for 8 years, most recently as Director of Legal Counsel in the Office of Criminal Enforcement. We look forward to his testimony as well.

And an old friend of mine, Nicholas DiPasquale, is the Secretary of the Delaware Department of Natural Resources. Mr. DiPasquale is a graduate of the State University of New York at Brockport and Washington University. He previously worked in the Missouri Department of Natural Resources, and for the last 9 years has worked with DNREC in our State. I have known and worked with Nick for a long time, and can tell you he is a smart enforcer and knows the circumstances well in my State. I am delighted to have him here today.

I understand that Mr. Schaeffer has a 4:30 departure time. Is that correct?

Mr. SCHAEFFER. I think maybe I can make it quarter of five. It is a six o'clock flight.

Chairman BIDEN. Well, no. We can work it out.

Why don't we begin with each of you in the order I have called you with your opening statements. If you can keep them to 5 minutes, we would very much appreciate it, and then we will go to questions.

Mr. Schaeffer, thank you for being here.

STATEMENT OF ERIC SCHAEFFER, DIRECTOR, ENVIRONMENTAL INTEGRITY PROJECT, ROCKEFELLER FAMILY FUND, WASHINGTON, D.C.

Mr. SCHAEFFER. Thank you, Mr. Chairman and Senator Sessions, for the chance to testify, and I will take you up on the invitation to summarize and ask that my statement be included in the record.

Chairman BIDEN. It will be.

Mr. SCHAEFFER. I want to start by thanking you for just having the hearing and asking some of these important questions. Whether or not we end up agreeing, I think the kind of objective and critical oversight that you can bring to the enforcement program can do a lot for both EPA and the Justice Department, and I do hope you keep asking questions.

I am going to bring a civil enforcement perspective to the table. I understand you are focusing a lot on criminal authorities and re-

sources for the criminal program, but I think we have to answer a threshold question first for some of our more important problems.

If we can't prove that a violation occurred in the first instance, we don't even reach the issue of whether the conduct was intentional or knowing, whether it rises to a criminal standard. That is the kind of problem I want to focus on.

Very briefly, I think we have extremely poor monitoring in some areas of the law, especially under the Clean Air Act. I would like to speak to that quickly. The ability of EPA and States to challenge that monitoring, to act as a check, to perform an oversight function, is hamstrung by lack of resources.

We have a major loophole in the law that allows some companies to repeatedly have the same accident over and over again, to flare—I think you are familiar with that problem—over and over, in the hope that they can claim an exemption under the Clean Air Act, and I will speak briefly to that.

First, to the monitoring issue. I would just send you to the attachment, the last page in my testimony, which compares, in one area where we were able to get out and do some agency inspections, what companies reported to what EPA inspectors found.

In this instance, we are talking about fugitive emissions. These are volatile organics and toxic compounds that leak from equipment, sometimes at very high rates. That amounts to half of our air pollution burden. It is a very significant source of our problem.

Chairman BIDEN. Say that again. Half of the air pollution is attributable to what?

Mr. SCHAEFFER. I am talking in terms of the volume of emissions, and that is a ballpark estimate.

Chairman BIDEN. What are the emissions you are referring to again?

Mr. SCHAEFFER. I am talking about criteria pollutants, but also I think that is accurate for toxic chemicals, as well. By criteria pollutants I mean sulfur dioxide and nitrogen oxide from industrial sources, not including utilities, and volatile organic compounds, in particular, which are smog-forming.

In general, if you leak above a certain amount at a valve or a pump or a flange, you are required to fix that leak so it doesn't keep recurring. That is a critical requirement in the law. Companies, if you look at this chart, will generally report that somewhere between a half percent to one-and-a-half percent of the valves and pumps that they monitor are leaking. EPA found the true number was between 5 and 10 percent. That is a substantial difference, in some cases an order of magnitude between what the company reported and what EPA found when it went onsite.

I want to emphasize this isn't one or two data points. This is an intense evaluation of refineries by EPA's National Enforcement Investigation Center. This is data that was checked off and seconded by companies. They had to follow EPA around and approve the results.

Now, why did the problem occur? The law says you have got to take a wand to measure the emissions, and hold it at a prescribed distance above the leaking equipment for 30 seconds. You have to take a reading before you move that wand. It turns out a lot of companies had contracts for people to do this scratch-and-sniff test

and these contractors were paid by the valve. So the faster they got through the monitoring, the more they made money. So what do you think they did? Of course, they just passed the wand over the area they were supposed to monitor quickly and moved to the next valve, because that meant cash to them.

I think the companies themselves were interested in fixing this problem when we presented them with it, but it is an illustration of something we see very frequently in the air program—very poor-quality monitoring data. You can't decide whether or not the conduct is criminal if you can't establish that there is a violation in the first place.

The second problem is resources: I have also attached to the testimony a set of statistics from the agency about the number of industries and transactions that both Federal and State programs are supposed to cover. For example: there are 100 million acres of wetlands in the lower 48 States but only two States have authority to run that program. The rest of it is managed by EPA. I am talking about enforcement to keep people from illegally filling wetlands. We have about 30 people in the agency to do that job.

There are over 300,000 sources the EPA is expected to monitor to make sure fuel standards are met, for example, that the fuel is oxygenated or is low in sulfur content. Two dozen staff do that job. We are just not able to get out there. I apologize, I keep saying "we," and I've left EPA. EPA is not able to get out there with the resources they have.

I have heard the statistic about States conducting 90 percent of the enforcement actions coming from a study by ECOS. I take issue with that, and don't think it is accurate. There is no question that States do most of the inspections, but if you get into the major cases that involve substantial injunctive relief and the expenditure of millions of dollars of pollution control equipment to get companies back into compliance, I think you will find EPA is carrying more like half the load.

That is no knock on States. I think some States have excellent enforcement staff, very aggressive enforcement staff, and Delaware is certainly one of those. It is just not true everywhere, and there are a large number of programs for which EPA is the only authority, and that is something that can't be overlooked.

So whether you have a dozen or two dozen people chasing 300,000 fuel stations or 100 million acres of wetlands, your chances of finding a violation are pretty remote. The kind of statute of limitations issue that I think Senator Sessions rightly raises becomes a problem. You are not catching up with problems when you should. You are not on the case when you should be. You can't even make good regulatory decisions because we don't know what we have out there.

The last point I want to make is to speak to the flaring problem, something we have seen in refineries, but which also occurs in other industries. Sometimes in the middle of the night, sometimes during the day, it goes off with a boom. Big flares turn on and understandably upset and agitate neighboring communities.

Often, you will see hundreds of tons of sulfur dioxide come off these flares in really a short period of time, contributing to asthma, and creating other problems for the neighboring communities. I

think at the Premcor plant in the Port Arthur area, over 400 tons of sulfur dioxide in a 3-month period were released just from these so-called accidents.

One question is how can the same accident occur over and over at the same facility? At what point do we stop calling it an accident and say that this results from some kind of negligence?

The problem embedded in our regulations is that we recognize an exception for malfunctions, and that has become lodged, I think, in some industry heads as an entitlement to continue to have these flaring incidents without any enforcement or any liability. That should be challenged, and I think the agency has started challenging it.

The law says if that kind of accident is reasonably foreseeable and could have been prevented, it is not an accident, and we need to start stepping in, doing some analysis, and establishing when these kinds of problems could have been seen and avoided. If you look at some of the settlements EPA has with Motiva, as one example, I think you will see some examples of the relief that can be obtained when we do that.

I think a second problem that I think would require a statutory solution is if you spill a million barrels—or let's call it more realistically 10,000 or 100,000 barrels of oil into a bay or a river, you pay by the volume. That spill can happen in a three- or 4-hour time period, but we recognize that is a lot of oil. You pay by the volume; you pay in relation to the hazard you have created.

If you have a flaring event, it can cause an evacuation, it can require people to be sheltered in place, it can result even in injury and death. And under the law, we are limited to a single penalty for a single day's violation. That is $27,500. That just plainly seems inadequate.

Senator SESSIONS. That is the maximum?

Mr. SCHAEFFER. That is the maximum, yes, sir. It may have adjusted up slightly for inflation, but that is the maximum. So there is no relationship between the harm and the sanction at this point. Even if you get over the malfunction defense, you face that single-day limit on penalties.

Chairman BIDEN. Can a malfunction defense be offered if you end up malfunctioning 12 days out of 20?

Mr. SCHAEFFER. I think that is an excellent question. When I was at EPA, and I think this is still shared, our investigators didn't think so. Our investigators think if you have a problem that is repeated, then you are obligated to get on it and fix it.

Chairman BIDEN. Let me ask you a question. At refineries, the flaring that you are referring to which puts sulfur dioxide into the air, which seriously affects those who are asthmatic and many others—and studies done show it shortens life expectancies and the like—if you have a contract with another company that, rather than flare this, they are going to process this by-product and in effect contain it, producing a second product, and you know them to be incompetent in that they are constantly having malfunctions—in every other endeavor, if I contact with a supplier or I contract with a second party and I know them to be incompetent based upon the track record, I am able to be held liable under a contract or I am able to be held liable in other ways.

Why isn't that the case with EPA? Why isn't that the case under the law now? Isn't there some responsibility with the outfit you contract with that you, the oil refinery, have reason to believe that they are able to do the job?

Mr. SCHAEFFER. I am not sure that isn't the law today; in other words, that you cannot contract away your environmental liabilities, at least when you are dealing with such an obvious connection between the plant and the contractor, where the contractor is, say, just across the river and you are sending your waste right across the State line to that contractor and there is clearly a repeated pollutant. I would like to give you a more thoughtful answer, but I don't see that as a loophole even today.

Chairman BIDEN. Well, I don't want to turn this into a particular concern, but in the neighborhood I grew up in there is an outfit that is flaring hundreds of tons of sulfur dioxide into the air, and the fines are a cost of doing business. It is going to cost them $35 million to do this in-house and they haven't spent the money to do it. In the meantime, my old neighbors are choking.

I am very upset about it, so part of the reason for this hearing is to try to figure out how we strengthen the laws to not only go civilly, but maybe the Chairman of the board of that company or the CEO goes to jail. That is what I am looking to do. I hope they hear what I just said because I mean it.

Mr. SCHAEFFER. I understand.

Chairman BIDEN. At any rate, I interrupted your testimony.

Mr. SCHAEFFER. I think I have taken at least my 5 minutes and then some.

Chairman BIDEN. Well, in the interest of your schedule, do you have any questions for Mr. Schaeffer? He can stay as long as he wants, then, and we can let him go, maybe. He is the only one that has this very tight time constraint.

Senator SESSIONS. Mr. Schaeffer, it seems to me that the meshing of the civil enforcement team and the criminal could be better. In other words, civil is out there all the time. There are a lot of them in a lot of different places. It seems that as soon as they identify something that could be potentially criminal, it needs to be looked at by the criminal investigators, and the United States Attorneys' offices. Most U.S. Attorneys' offices are quite eager to prosecute environmental cases.

Do you think there is some way that we could move it quicker from the civil to the criminal side for a criminal evaluation?

Mr. SCHAEFFER. I think that is a really good question. I wasn't really very satisfied with it when I was there in the agency. I thought we could improve it. I think from a civil enforcement perspective, we would say if criminal is going to decline the case, we would like to get the case back before it is too stale. So it is a two-way street.

The problem we struggled with—and you might help the agency think through this—is making sure not to taint the criminal case. As you well know, you have grand jury proceedings and you have issues of confidentiality in the criminal program that to a degree you may not have in the civil. So there is always that concern about maintaining a Chinese wall, and that is something I am sure

the agency is still struggling with. Could it be better, though? Sure. I wouldn't want to argue with that.

Senator SESSIONS. I think that is a bit exaggerated, that fear. If done properly, it should not be a problem, or if it is, you should be able to anticipate it in advance, maybe, and make a call one way or the other.

How many civil enforcement people does EPA have? Do you know?

Mr. SCHAEFFER. I would say if you added up the resources in the field, around 1,200, outside of Superfund.

Senator SESSIONS. And maybe 200 are criminal.

Mr. SCHAEFFER. Right.

Senator SESSIONS. So if they worked more as a seamless web in which as soon as the civil finds something is tipping into criminal and criminal has an opportunity to review it, it might work better.

Mr. SCHAEFFER. Right. To be fair to the agency—and that question, I am sure, you will direct to them—a fair amount of that does go on. I did see civil cases move quickly to the criminal side. Could it be improved? I can't argue with that.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman BIDEN. How far off are we in terms of the monitoring capability? It seems to me there is this gigantic discrepancy? It is like having one meat inspector for the United States. In proportion, how far off are we, and how much do you then rely on the States to fill this void?

I assume you monitor and the States monitor, right?

Mr. SCHAEFFER. Right, and EPA tries to divide the work. Sometimes that works better, sometimes maybe not so well. But I think the States will tell you for the most part they are under the same kinds of pressures, have lots and lots of ground to cover, and are often forced to do inspections that are too quick. I know that was true at EPA because they have got so much territory to cover. Also, the States cover issues like septic tanks and open burning and real environmental problems that aren't under Federal law. So they have got their own workload.

It is worth some analysis. The General Accounting Office 2 years ago—actually, just last summer—said EPA really needs a work force analysis before making the kinds of cuts the administration has been proposing. They need to step back, look at the work, figure out how much States can reasonably cover, how much EPA is going to do, and match the resources against the problem. That would be well worth doing.

Chairman BIDEN. A last question and then we will get to the rest of the panel. In my experience, the fines that are levied by States, particularly in air pollution cases, are considerably less under their State laws, whether it is Pennsylvania, New Jersey, Delaware, or Maryland, than for violations of the Clean Air Act under Federal law.

For example, in my State, under the Clean Air Act violations imposed where the State moves, the maximum State fine is $10,000 a day. We have federally $27,500 a day.

Mr. SCHAEFFER. That is right.

Chairman BIDEN. Does any State ever yield to you guys? They may monitor it and find the violation. What do they have to do?

Do they have to come to you and say you take the case over? Explain how that works?

Mr. SCHAEFFER. It is not, I am sure, as smooth as it could be, but generally there is a planning cycle where EPA regional offices will sit down with States and try to shake out the workload and divide the labor. Sometimes, the States will refer cases to EPA and say, please do this.

Increasingly, EPA will find a multi-State violator, somebody that is spread across six or seven States, and then it is EPA's job to get the States to work together with the agency, and vice versa. EPA has to be sensitive to what the States need.

The problem you are referring to, the $10,000 a day penalty limit, is the minimum required in the Clean Air Act. I am doing this from memory, but I believe Title 5 of the Clean Air Act, which speaks to what enforcement authorities States have to have, says $10,000 a day. There is a disconnect between that and the Federal dollar amount, which also by law has to be indexed for inflation. So you see the Federal dollars go up, while the State numbers stay relatively low.

One important fact is—again, this is guesswork—EPA probably gets 10 to 15 cents on the dollar typically in a settlement. It may be $27,500 a day. If it were a flaring incident and you were only getting a single day, hopefully you would get the maximum. But for a major violation that may run for several years, in order to get a settlement, and in part because the agency will lack sometimes the resources to go to trial and in part because the agency is balancing litigation risk, the EPA will settle for 10, 15, 20 cents on the dollar.

So I guess you could raise the statutory authority for States, the limit. That may be a good idea. You do need the resources and the will to take that to a limit when you think you have got a good case, and that is going to vary State by State.

I have to put in one plug for Delaware because I think I have noticed penalties work best where EPA and the State team up. The company understands there is not going to be any forum-shopping, there is not going to be any bait and switch. The federal and state governments come to the table together, know what they want, and insist on an adequate penalty.

In the experience I had with one company, the State od Delaware was stronger than EPA as far as their demand for penalties. So I want to recognize that and say sometimes you will see a push from the other direction. Typically, if you look at penalties recovered, I think there is no question that Federal penalties are larger.

A little bit of a long-winded answer, but it's kind of a complicated issue.

Chairman BIDEN. No, no. It is a very important answer and I appreciate it because part of the confusion here with the public at large is whose responsibility is this, especially when you have a circumstance where it is coming across a State line or when you have one facility in one State and the polluting side of that facility in another State. I think it is very confusing to people, and occasionally to me.

Mr. SCHAEFFER. That is a classic case for EPA, again working with the States, when it crosses State lines and when you have a multi-State actor.

Chairman BIDEN. Well, again, you are welcome to stay. I know your time is tight.

Mr. SCHAEFFER. Thank you. I appreciate that.

[The prepared statement of Mr. Schaeffer appears as a submission for the record.]

Chairman BIDEN. I will now, with the permission of my colleague, ask each of the following four to stick to your statements. We will hear everyone and then we will go to questions.

Please, Mr. Starr.

STATEMENT OF JUDSON W. STARR, VENABLE, LLP, WASHINGTON, D.C.

Mr. STARR. Senator Biden, good afternoon. Thank you very much for your kind invitation to be here this afternoon and to express my perceptions and observations about the Federal environmental crimes program.

Senator Sessions, it is particularly nice to see you again. I remember fondly, when I was with the Justice Department and you were the U.S. Attorney in Birmingham, working with you. I should say that while I can't remember the particular case, I do remember the barbecue.

As you mentioned, Senator Biden, in the kind introduction, I have spent a good deal of time working in the field of environmental crimes, over a decade at the Department of Justice, first as the Director of the Environmental Crimes Unit, and then as chief of the Environmental Crimes Section.

Since I have left the Justice Department, most of my work has been in the field involved with environmental crimes, whether it is advising clients on management compliance systems or whether it is in representing individuals or corporations who are the focus of a problem by the Federal Government.

During this period of time, I have watched or participated in all the growing pains that have gotten the environmental crimes program to the point where it is today. You referred to them as the tools, Senator Biden. I have watched as Congress has upgraded each of the environmental statutes from misdemeanors to felonies, which caused attention to be given to environmental cases which up to that point hadn't been given by judges, U.S. Attorneys' offices, and investigative agencies.

I have seen the responsible corporate officer doctrine be refined as it as wound its way through the courts of appeals. And particularly in today's environment focusing on corporate responsibility, I have seen the responsible corporate officer doctrine become a very significant tool in how the Government pierces the corporate veil to determine individual officer liability.

I have seen the application of the Sentencing Guidelines since 1987. Up to that point, judges traditionally thought or expressed through their sentencing that environmental crimes were no more than mere regulatory violations. The Sentencing Guidelines have changed that by imposing strict and severe penalties on individuals who have been convicted of environmental offenses.

I have seen EPA agents get law enforcement authority, when they didn't have any and were treated as a poor stepchild within the investigative community. After a lot of hard work and a long fight they got law enforcement powers. I have seen their training at the Federal Law Enforcement Training Center and elsewhere go from none to a very sophisticated component.

I have also seen the prototypical defendant in these cases go from the mom-and-pop company to a household name company, as the investigative capabilities have been developed and prosecutions have focused less on those who were operating outside the regulatory system and more on those who were operating within in.

Last, I have seen what I would call the political baptism of environmental crimes, when over a lengthy period Congressman Dingell, through his oversight committee, held hearings on how cases were handled at the end of the Bush administration and the beginning of the Clinton administration.

However, my observations about where it is today cause me great concern. I believe it is my perception, and the perception, I think, across the country from those with whom I have been in contact, those in the business and those in the field, that the perception is that there has been a change since 9/11.

I am concerned about the direction of the environmental crimes program, particularly whether the definition of villain has changed from something that it was to something else after 9/11 and environmental crimes is not within the definition of villainous.

I understand obviously that the redeployment of resources post-9/11 had to occur. We have heard in the earlier session about the dependency on the Coast Guard and on the FBI by the EPA and the Justice Department in the development of these cases. It is very obvious to anybody that the Coast Guard and the FBI have had to reprioritize their resources, and I am wondering what effect that will have on the environmental crimes program and whether there will be a reprioritization.

But if so, I think that will be a wrong step. When I say that I am taking the perspective of those people who day-in and day-out do environmental compliance work within corporate America. Within the regulated community, that person generally is a vice president for EHS. He may be in headquarters, or she may be in any one of the facilities for any large corporation.

Environmental compliance, I think, is critically related to anti-terrorism and internal security in ways that I think Congress should examine. Most companies, when they beefed-up after 9/11 their compliance programs, did so to affect anti-terrorism and internal security issues, but they did so on the backs of the environmental compliance programs and units within the various corporate structures.

Policing pipelines or ports or terminals or hazardous waste transportation is an extension of environmental compliance; it is not a departure. The chemical industry itself has put out several publications post-9/11 which are all directed to how you can extend your environmental compliance program to ensure that you are also protecting yourself and others from anti-terrorist activity.

People who work in the field of compliance are not a profit center themselves. They do not derive their powers within the corporate

structure by virtue of anything other than the power that they have because of the threat of criminal enforcement. It is the threat that if they don't do their jobs well, their bosses may be charged with a crime. So it is the importance that I place on the power and effect of a good environmental crimes program that also empowers those individuals.

Case selection is my last point, and then I want to turn it over to my colleague, and also former chief of the Environmental Crime Section, Ron Sarachan, who will speak more about the selection of cases.

I think all the resources in the world—no matter how many investigators you have, no matter what kind of system you have for developing cases or prosecuting cases, if you are not selecting cases that pin-point and have a point and have a message, then all else fails.

The Department of Justice has been criticized, sometimes with justification, sometimes while I was there, and sometimes by me for its case selection process. The wide discretion that prosecutors have in the field of environmental crimes is just that, wide and deep, probably wider and deeper than any other field of criminal enforcement.

If the goal is to get better compliance and if it is not just to get more pelts, more fines and more jail time with individuals, then case selection is the key. And I know my colleague, Ron Sarachan, is going to talk more about case selection.

Thank you very much and I would be glad to answer any questions.

[The prepared statement of Mr. Starr appears as a submission for the record.]

Chairman BIDEN. I might add when they put two family members in Philadelphia in handcuffs and took them out, I promise you in every board room in America people paid attention. It was instantaneous. It was case selection, but it was instantaneous. Had that same company been fined $4 million, it would have been a yawn in every board room in America.

Mr. Sarachan, please.

STATEMENT OF RONALD A. SARACHAN, BALLARD SPAHR ANDREWS AND INGERSOLL, LLP, PHILADELPHIA, PENNSYLVANIA

Mr. SARACHAN. Good afternoon, Mr. Chairman. Thank you for this opportunity to speak on this very important issue today.

I would like to keep my remarks brief and talk on two issues. One is the one that Senator Sessions brought up about meshing criminal and civil. There were questions about whether resources are sufficient. I think it is also important to talk about the use of the resources that there are, and case selection is at the heart of that. Then I would also like to address the "attempts" provision that there have been questions about.

I have written testimony, and also I have brought an article on the criminal negligence prosecutions under the Federal Clean Water Act, and I would ask if those might be made part of the record.

Chairman BIDEN. They will be placed in the record.

[The article referred to appears as a submission for the record.]

Mr. SARACHAN. Case selection is obviously very important in this area because there aren't a great number of criminal environmental cases being brought every year. The way the case selection process should work is part of a coordinated, integrated enforcement process, and there are two reasons for that.

One, obviously EPA has a broad range of enforcement tools, everything from education and compliance assistance, to administrative enforcement, civil, and then ultimately criminal. When there is a violation, the agency should be looking at that full array and deciding which of those tools are the right ones to bring. And when there is an enforcement initiative, like a Clean Air Act initiative, the planners should be getting together and be deciding what is the best way to use each of those tools to maximize the impact and to get the greatest compliance.

It is especially important to have an integrated, coordinated system in the environmental area because of the nature of environmental regulation. The environmental regulatory program is based in significant part on self-monitoring and self-reporting. It depends on the honesty of the regulated community.

The agency and the State agencies cannot have inspectors at every facility everyday watching what is going on. They have to depend on the honesty of the regulated facilities, and when there is dishonesty, when there are intentional violations and falsehoods to hide them, that undermines the entire system and that is when the criminal program comes in. It is their job to go after those intentional violations and to police the integrity of the system.

There was a former U.S. Attorney who used to refer to it as, the criminal program in the environmental area goes after lying, cheating, and stealing, just like in other white collar crime. For that to work, you need an integrated system. The regulatory program people need to identify the weaknesses in their program and they need to provide that information to the criminal program. They need to make those referrals so the criminal people can put resources in those areas.

Unfortunately, in large part that is not the way the system has worked. Most of the criminal cases that have been brought through the years have not come from within EPA. One of the most common sources of criminal cases is a disgruntled former employee. That employee calls EPA-CID or the FBI to complain about the company. He has been fired. He may have been denied benefits. He has got a grudge. It may not really reflect the seriousness of the environmental conduct of the company.

There have been a lot of good cases that have come from that, but we don't have confidence that those were the best cases for the maximum impact. One of the experiences when I was prosecuting these cases that we would commonly have is we would go and talk to the field inspectors while we were building the case, and it would be a case against company x. The inspector would say, why are you prosecuting company x? Company y down the street is far worse.

Well, the simple answer was the call we got from the disgruntled employee was from company x. Because there wasn't an integrated system, we didn't know about company y.

Chairman BIDEN. When you say integrated system, so it doesn't sound like Washington-speak——

Mr. SARACHAN. Sorry.

Chairman BIDEN. No, I am not being critical. I mean that sincerely. But to someone listening to this hearing, do you mean why didn't the inspector in the field pick up the phone and call the Criminal Division?

Mr. SARACHAN. No.

Chairman BIDEN. What do you mean?

Mr. SARACHAN. There is that that goes on, and that is what happens in task forces and it is a good thing, a good channel between usually State and local inspectors and Federal special agents and Federal prosecutors.

What I am really talking about is not that system, but within EPA itself, the program people, the regulators, the managers who run those systems making it a point to sit down with the criminal managers to screen cases, to screen them early to make joint decisions about how to use the different enforcement tools, to coordinate the civil enforcement, the administrative, and the criminal. That is what has not been happening enough.

There have been steps, a lot of hard work to go in that direction. For example, at DOJ there was an integrated enforcement policy passed in 1999 to avoid the Chinese wall problems that Mr. Schaeffer and Senator Sessions were referring to a moment ago. In EPA, there have been attempts to do this kind of screening, but it has varied a lot individual by individual, from region to region.

Today, generally it is still true, I believe, that if a case begins on the civil side, if it happens to enter the agency on that side, it will stay civil, and the criminal cases are cases that began on the criminal side. So you don't have enough communication.

I would also like to address the "attempt" provision for a moment. This was an area that we discussed when I was chief of the Environmental Crimes Section and it grew out of a specific experience. There were two EPA agents who were conducting surveillance of a truck that had a bunch of friable asbestos in it, and the driver of the truck took that to a wooded area, a forested area—there are a lot of those in Pennsylvania—and was about to dump it. And if he had succeeded in dumping it on the ground, there would have been a crime, but the agents couldn't let that happen and so they stopped him right before he dumped.

It was an attempt, but it wasn't a completed crime, and under the statutes as they exist there was no prosecution that could be brought. Because of that specific experience, those sorts of experiences, we talked a lot about an "attempt" provision.

Reflecting on it, it seems to me that that sort of situation where you have a clear attempt and where it is halted by law enforcement officers, that is a clear case where, had they not interceded, that attempt would have been completed. It is one where I think everyone is frustrated that the criminal case could not be brought.

I also had experience when I was prosecuting as chief of major crimes, not only environmental crimes, but bank robberies. We had a lot of bank robberies in Philadelphia at the time. We prided ourselves on our very high conviction rate, but the one set of cases

that we consistently had problems with was attempted bank robberies.

Even though from a prosecutor's point of view it seemed clear to me that this bank robbery was a clear attempt and there should have been a conviction, juries had problems with those cases. What I took from that is they were telling us that when you don't have the completed crime, it is open to interpretation; it is open to different interpretations. There are a lot of ambiguities. It interjects a lot of subjectivity.

So a broad "attempt" provision is something that I think should be looked at, but looked at with a good deal of caution. A narrower provision that is tailored around the law enforcement officer interceding, to me, makes a lot more sense.

Thank you, Mr. Chairman, and I am prepared to answer any questions.

[The prepared statement of Mr. Sarachan appears as a submission for the record.]

Chairman BIDEN. Thank you.

Mr. Penders?

STATEMENT OF MICHAEL J. PENDERS, PRESIDENT, ENVIRONMENTAL PROTECTION INTERNATIONAL, WASHINGTON, D.C.

Mr. PENDERS. Mr. Chairman, thank you for this opportunity to testify on the subject of environmental law enforcement at this critical time of the Congress considering the accountability of individuals and corporations under the law and reassessing the Federal Government's role in fostering environmental protection and security.

I am the President of Environmental Protection International, a consulting firm which conducts internal environmental investigations, audits, and vulnerability assessments, and designs environmental management and security systems.

About a year-and-a-half ago, I was the Director of Legal Counsel of the EPA's Office of Criminal Enforcement. I was at EPA from a time when there were 45 agents, in 1992, to 200 nationally in fulfillment of the Pollution Prosecution Act of 1990, signed by President Bush that same year.

If you look at the legislative history of the Pollution Prosecution Act, they drew on the DEA example of having Federal expert agents facilitate State and local cooperation and investigating cooperatively environmental crimes in a task force setting. It was a recognition that with the limited resources on the State and local level, and even with 200 agents, it was critically important to work together to make these cases, particularly the big cases against big companies under complex statutes like the Clean Air Act, where one or two agents won't be able to get at the culpable individuals behind the corporate structures.

The deterrent of criminal sanctions imposed in practice is well-known to this committee. The Senate recently voted unanimously to enhance the criminal sanctions for corporate fraud in a bill signed into law by the President today. I don't think it was mere coincidence, as the Chairman has noted, that the stock market turned around the same day that Adelphia officials were led away in handcuffs.

In recent years, standards for auditing, reporting, and managing environmental compliance, environmental risk and liabilities, have been subject to similar concerns as auditing in a financial context, including concerns about how these environmental liabilities are reported as part of SEC filing.

Just last week, Assistant Attorney General Sansonetti announced that Tanknology, the Nation's largest tester of underground storage tanks, pled guilty to ten felony counts of falsifying test results in several different States. This is an example of the Federal case selection that is important for EPA and the Department of Justice to be able to bring.

The integrity of the environmental laws themselves depends upon the capacity to detect and investigate false reporting, and there needs to be a credible national presence and scope that proceeds fully in partnership with State and local officials. Without adequate capacity and agents, you cannot make the bigger cases which are more appropriate for Federal prosecution of environmental laws.

Criminal enforcement has had a powerful impact in achieving compliance with environmental laws over the last 20 years in the United States. The real prospect of criminal prosecution of individuals and corporations has been a principal driver of safer and more secure environmental management practices, including the current generation of environmental management systems which reduce or prevent pollution at the source.

As this committee considers changes to the criminal law and other committees consider next-generation environmental legislation, it is critical to preserve direct accountability for individuals and entities that knowingly violate environmental laws, particularly where there is risk of harm and economic benefit to violators.

This requires the capacity to detect violations, investigate complex technical requirements, and enforce these laws fairly and consistently across the Nation. Otherwise, those who pay costs associated with environmental compliance in one area will be put at a competitive disadvantage to violators.

At the same time, in order for the criminal enforcement deterrent to have maximum impact, it must be made as clear as possible what an individual or organization must do to avoid criminal liability after discovering a compliance issue, other environmental risks, or historical contamination through a voluntary audit, assessment, or other means.

I would note a couple of points in closing that have been addressed previously; for example, the "attempt" provision. In 1996, the Environmental Crimes Act which Mr. Sarachan alluded to was the considered work of dozens of career professionals in environmental law enforcement. The "attempt" provision was included with a couple of clear examples in mind, one of which now has resonance in the homeland security context; that is, hazardous waste or chemicals crossing national borders illegally as precursors to acts of terrorism or environmental crimes. If a shipment is stopped at the border, it would not constitute a crime until it was illegally disposed of or used as a weapon of destruction. The "attempt" provision will be important to be able to stop and prosecute such shipments before the harm occors so long as there was a specific intent

to use them illegally. Importantly, that bill also provided a mechanism for funding State and local law enforcement, who are often the first responders, as part of settlements and fines.

Mr. Chairman, thank you. I just remain available for questions and submit the testimony into the record at this point.

[The prepared statement of Mr. Penders appears as a submission for the record.]

Chairman BIDEN. Mr. DiPasquale?

STATEMENT OF NICHOLAS A. DIPASQUALE, SECRETARY, DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, DOVER, DELAWARE

Mr. DIPASQUALE. Mr. Chairman, thank you very much, and thank you for the generous comments in your introductory remarks earlier.

I would like to share some experiences as a practitioner. I am not an attorney. I have been responsible for environmental enforcement for the past 15 years in a variety of capacities and I kind of fancy myself as a street cop that is out there bringing the cases in and having the attorneys prosecute them.

I also would like to clarify a comment earlier about 90 percent of the enforcement actions being taken by States. To clarify, that included everything from notices of violation to administrative actions, civil complaints, as well as criminal cases, and it is a number count. I think Eric Schaeffer made the point that EPA and DOJ typically get more involved directly in criminal cases or high-profile cases, and sometimes do so cooperatively with the States, but just to put that number in perspective.

As was mentioned earlier, some of the financial scandals of recent months have raised questions about corporate integrity and responsibility in accounting and reporting practices. I think similar questions can be raised about corporate responsibility for environmental compliance. In the first instance, such practices put shareholders' financial health at risk. In the latter, the public's physical health is placed in jeopardy.

Fortunately, this type of behavior involves only a small percentage of the corporations that do business in the United States. There is a myth, however, that compliance among large corporations is inherently better than that of small and medium-size corporations that may lack adequate resources, expertise, or the will to comply with the country's complex environmental requirements.

It has been my experience in administering these programs over the last one-and-a-half decades that large corporations, with more than sufficient resources and expertise, routinely are found to be in violation of our environmental laws. There are a number of reasons for this.

Corporate mergers and acquisitions can create incentives to delay maintenance and repairs and making other needed capital investments. In the petroleum refinery business that we have talked about several times today, industry competition and the need to keep national refineries operating at near full capacity often creates a situation where it is easier and cheaper for the company to pay a fine than it is to limit or interrupt production to comply with environmental requirements.

The fines that are levied against these companies are considered a cost of doing business. You have heard that several times today and it is a fact. Fines alone are not sufficient to get the attention of plant managers and corporate executives who are focused almost exclusively on the bottom line. Other mechanisms to hold these managers and executives directly accountable and responsible for their actions, or for their failure to act in many cases, need to be considered, and I appreciate the fact that you are holding these hearings to explore some of those possibilities.

Another observation I would like to share with you is that the Nation's environmental laws do not reach into the industrial processes themselves. Typically, we regulate at the end of a pipe or at the top of a smoke stack. We impose emission or discharge limitations that have to be exceeded in order for us to take action. That point was made earlier.

By and large, these laws and requirements do not impose standards for inspection, maintenance, or repair of the industrial process equipment itself, and I am talking about things that are integral to the manufacturing process—pumps and valves and motors and those sorts of things. We do have a leak detection and repair program that attempts to identify emission sources, but we don't have a program that goes to the maintenance and repair of equipment that is absolutely vital and when it breaks down results in a release and an environmental violation.

In Delaware, for example, an accident that you are very familiar with at a petroleum refinery that resulted from an explosion and a catastrophic collapse of a tank and the release of sulfuric acid was not covered under any State or environmental program. The tank itself, an above-ground storage tank, contained material that was not a regulated substance until after it was released. So we couldn't regulate the tank. We have moved forward in Delaware to pass an above-ground storage tank regulation that will give us the authority to do that, but by and large our environmental laws don't reach into the industrial processes themselves.

In this particular case, the company admitted that the tank had a history of corrosion problems. Work orders for repairs had been submitted and the work simply had not been initiated. The tank collapse and release, as you aware, killed one worker and injured eight others, and caused widespread contamination at the facility.

We went back and looked at the compliance history of this facility and we determined that approximately 70 percent of the environmental violations and releases that this company had had over the last 6 or 7 years could be directly attributed to the lack of an effective maintenance and repair program for the industrial process equipment. We were essentially powerless to do anything about it.

The Governor did, however, say as a condition for continuing to do business in the State of Delaware that that company had to undertake a mechanical integrity audit of its complete facility, and also pay for a refinery expert, a consultant who is an expert in refinery systems and operations, to work for the State to review their programs and determine where those deficiencies occur. But we didn't have the ability to require that directly under any of our statutes.

[The prepared statement of Mr. DiPasquale appears as a submission for the record.]

Chairman BIDEN. You know, that confuses me. You can walk in and shut down an automobile dealership if they have overhead doors that aren't functioning right. You can walk in and shut down a grocery store if it has a circumstance that is unsafe for the customers.

When it is clear that some companies, because of their financial circumstance, are not maintaining the facilities, why can't you go in and say this is an unsafe circumstance, that this tank is corroded? I thought that was covered, that you guys on the prosecutorial side of the equation for EPA or Justice could go in and enforce basic standards. Is that not the case?

Mr. SARACHAN. What you are addressing is occupational safety and health as much as environmental problems, and I am not an expert in that area and I don't know. It may be that OSHA inspectors do have some of those powers.

Chairman BIDEN. But from an environmental standpoint, you don't? You know there is a pipeline coming from the Delaware River for crude oil into a refinery in Marcus Hook, Pennsylvania—I mention that because you are in Philadelphia—or at the port of Philadelphia. You know, because you have checked it out, that the pipe is corroded; it could burst at any time, it could leak any time and you could have significant environmental damage, with thousands of gallons of oil seeping into the Delaware, into the marshland.

EPA couldn't do anything about that, Justice couldn't do anything about that, or is that OSHA?

Mr. SARACHAN. There is also the Office of Pipeline Safety. The criminal program on the environmental side is dealing with those catastrophes after the fact. In that particular case, it wouldn't be an intentional violation. It would be an issue of, if that accident did occur, was it a criminal negligence case under the Clean Water Act? There have been not a lot, but a few of those cases brought, typically I think tanks that have been extremely corroded, that there was information that they were about to fail, and nothing was done.

Chairman BIDEN. That would constitute criminal negligence, wouldn't it, if you could prove that?

Mr. SARACHAN. You would have to look at the particular facts of that case. You would have to look at what information did the people have, what was the standard of care, what were they told by engineers. You would have to look at all the evidence case by case.

Chairman BIDEN. I find our lack of resolve kind of incredible. I used to be a criminal defense lawyer. If a guy is driving a tractor trailer carrying "x" thousand gallons of some contaminated substance legally and he has no brakes and he knew he had no brakes—he knew he hadn't had his truck inspected or falsified the records for the inspection—and he has an accident and that stuff is released, he is in real trouble.

Yet, you can have a tank on your property that you own, knowing you didn't maintain it, having been given warnings, just like you can by the State trooper. You are given warnings that you didn't get your brakes inspected on your tractor trailer.

Am I missing something here?

Mr. STARR. Senator, there is a process is in place, and as was referred to earlier about the tension between civil and criminal enforcement and the Chinese wall or the wall that has to be erected between them, I think that has been lowered to a certain degree over the years and I think that is appropriate.

One of the things that occurred at the Justice Department when I was there, and I am sure is still in effect, is the first action is to, if there is harm likely or certain to occur, stop it. Don't wait on the nicety of making a criminal case if that is going to take place, but stop the harm from occurring.

There is a system in place for that, and while I am not an expert on civil environmental enforcement, they are in court day in and day out seeking injunctive relief on likely harm reasonably certain to occur. So I do think that it may be a question addressed to the wrong people.

Chairman BIDEN. I misspoke. Assuming that there is a circumstance where there has been negligence in maintaining a part of the process, part of your facility, whether it is a storage tank, a pipeline, a holding basin, whatever, and then an accident occurs, how often would you guess is that turned into a criminal violation? My experience of observing it is seldom is it turned into a criminal prosecution. It is viewed as an accident and there is a civil case brought and there is a fine imposed.

Mr. SARACHAN. In the environmental area—this is actually what this article is about—the number of environmental criminal negligence cases that have been brought is extremely small. We are talking about a number between 100 and 150 throughout the history of the Clean Water Act, since 1987.

Chairman BIDEN. Yes.

Mr. SARACHAN. I think there are a number of reasons for that.

Chairman BIDEN. Well, I would like to know what they are.

Mr. SARACHAN. Part of it is that, again, the focus of the criminal statutes is to go after the intentional violators, the people who are falsifying things, the people who are deliberately violating the law.

In the case of an accident—and you gave us the given that there is negligence here. Well, when you are talking about a corporation, it gets complicated quickly. What did they really know? In hindsight, after an accident, it is very easy to come in and say this was going to happen and somebody should have done something about it.

In fact, when you come into a facility, particularly an old facility, there are levels of risk with almost everything going on at that facility, especially if it is a refinery or something where danger is inherent. So you have to look at the individuals involved, and there may be cases where you have a facility that has problems. You may have individuals who come to that facility new and they are trying to repair it.

You may have situations where they are trying to fix things according to a schedule. You may have situations where they sit down with the government agencies and say, look, we have a problem that we need to be fixing, we need to improve our maintenance, we need a year, we need 2 years to get back up to speed.

Chairman BIDEN. I got that part, but I tell you what, you go up a 12-story building and the elevator hasn't been expected 15 times and it is clear it hasn't been inspected and the elevator collapses and there was reason to believe that the elevator hadn't been expected. I tell you what, we go after that person criminally, the guy who owns the building. That is the record in most States. Why don't we do that with a refinery?

I am not being critical of you guys, in particular, but I am concerned. Why don't we do that more often? This gets down to the cost of doing business. The part that bothers me about this—and I am having trouble getting my hands around it. I don't want to, one the one hand, start making a populist argument here. I want to be reasonable and rational and very, very thorough about this. But the flip side of this is what I am observing is these repeated, chronic violations that are always chalked off as, hey, we had a malfunction. One of the reasons you had a malfunction is you wouldn't spend the money.

Let me give you my observation and ask you to comment. And this is not directed at you. I am expressing my frustration here. Finally, when things collapsed with Enron and WorldCom, we said, you know what? There is a systemic problem here. The systemic problem is that—and I am going to overstate it in the interest of time—CEOs get summoned up to Wall Street and they sit down with a group of four or five young analysts who say, what does the next quarter look like? And they say, well, it is going to be as good as last quarter. They say that is not good enough; if you don't do better, then we are going to downgrade your stock.

So what does the CEO do? He or she either goes back and says we have got a new product on the shelf that is going to bring in more revenue, we go back and we cut costs, or we expense this stuff.

So as I said earlier in a different context, the nuns used to say avoid the occasions of sin. They usually were talking about girls when you are in grade school. What you are talking about here is we provide these, as the nuns would say, the occasions of sin. The system builds it in so that what happens is the CEO goes back and says, hey, look, I need a pay raise, but, God, if I do a pay raise directly and expense it, it is going to make the bottom line look smaller again. So what we will do is we will give me a stock option and I don't have to expense it.

Why do you think there is a ballooning in these stock options? It is estimated that 20 percent of the bottom line, and as much as 40 percent of the bottom line of the top 100 corporations in America would be reduced if stock options were expensed. I mean, this isn't rocket science. The same thing is happening with these companies who are having pressure put on them.

Let's take Amtrak. I am trying to get money for Amtrak to keep them running. Guess what? We nickel and dime them to death, so they don't maintain the tracks. They are $5 billion behind in maintenance, because it is so heavily toward maintenance costs because it is such a heavy industry. So they put the money into operating costs.

Well, what happens to the corporation that is sitting there and they look? What do they do? They say, look, the maintenance of

this facility is going to cost us another $2, 7, 20, 50, 100, 200 million. Oh, let it go, Charlie; don't inspect the elevator this week. Let it go.

I respectfully suggest, until we start to put somebody in jail for that, you are going to find out that there is no incentive. What is the incentive to spend the big bucks? For example, I will be very blunt with you. There is a company called Motiva in Delaware. These guys come along and the people who ended up purchasing this facility are saying to me, hey, look, we came along as good guys, we tried to do the right thing, we inherited this mess.

I take it for granted. Let's assume that is the case, but how many cases are there where there isn't any of that, where there isn't any change of hands? Same outfit, same proprietor, same corporation continues to milk every single ounce out of that facility instead of maintaining it and there is ample evidence that, in fact, that they have not maintained the facility, and then a catastrophic accident occurs.

Do you think it bothers a CEO—it probably bothers them; I shouldn't be so callous—if the bottom line is the corporation pays a fine? It is the stockholders that get nailed. Put him jail and that gets his attention. Why is it we don't do more of that?

You guys prosecuted these cases. It is like complicated white collar crime that prosecutors don't want to do. Hear me: You all don't want to do it. I have been doing this for 30 years. They don't want to do it. It is really hard. It really is difficult. It really is a hard case to make. Is that the reason why this doesn't happen, or is it because there is a mindset that this is civil, this is business, these aren't bad guys like drug dealers, these aren't bad guys like bank robbers? What is it?

Mr. STARR. Senator, you anticipated my answer to your question and your frustration, which I can understand, by saying is it a mindset? There is an expression that has often been used in this case. Where the case first starts is where it is going to end up, and if it happens to catch up on the criminal, if it happens to land on the criminal investigator's desk, it generally stays in that channel.

However, in those so-called accident situations, which in the fact pattern that you have given a criminal investigator would love to have and would love to put in the grand jury—who knew what, when, about that facility and those particular problems? And you are right, it is very difficult and it takes a great deal of tenacity.

I have always seen the unfettered approach at the Department of Justice where pressure is not put on people just to close cases if it takes time to do that. I think it is one of the proud attributes of that institution to not monkey with that if something is going to take a long period of time.

I think the problem is in the mix. You have State and Federal entities, both EPA and the State and local levels, and at the Federal level you have the criminal and you have the civil side. And there is no time, no place, where one sits down and says how is this case on these facts best handled? If it is a good case, everybody is going to want it and the information may not be shared. If it is not a good case, or a tough case, I should say, then they are going to take the easiest route to get there.

Chairman BIDEN. Well, again, I am not only revealing my frustration, but my ignorance here as well. I have almost spent half my life sitting in this seat. I will be 60 years old. I got elected when I was 29 years old. I have spent 95 percent of the time I have been here dealing with the criminal justice system.

The one place I have not gained any expertise or spent a whole lot of time—it has mostly been on the violent crime side of things and it has mostly been in the white collar crime relating to organized crime connections and the banking industry. It has not been here on the environmental side of the equation.

So part of what you are observing is also my lack of knowledge about practically how this works. I know practically how drug cases work. I know practically how major conspiracy cases work. And I am having difficulty getting my hands around dealing with this.

I will end with this and invite any comment. If I were sitting here today wanting to have the single most significant impact I could have on making sure that corporate America understood that—and they are not bad guys, by the way. They have got a lot of pressure on them. There is overwhelming pressure on a lot of these folks.

But if, in fact, I could find—just as what this administration did, by the way; the reason they went for Adelphia quickly is to make a point. You have been prosecuting and you know why they went to Adelphia. And guess what? It is a useful thing to do.

I would be looking for the biggest case I could make to find the biggest guy I could find, representing the most significant environmental violation I could find, and put someone in jail, were I the Attorney General of the United States. So you had better hope we don't have a Democratic administration and I become Attorney General. Well, I wouldn't accept the job.

But all kidding aside, I wonder why it has not been—and by the way, this is Democrat and Republican. I am not making a comment about the Bush administration or the Clinton administration. I mean, when was the last truly high-profile criminal case relating to an environmental crime that has occurred, other than what happened with the Valdez?

You don't have to be a detective to figure if you are cutting corners on making sure you don't expense your stock option, you sure in the devil are likely cutting corners in dealing with the maintenance of facilities that are complicated, expensive, and hard to detect and prove.

Mr. SARACHAN. Senator, I think you have put your finger on a number of points when you asked the question about whether the legal tools are there to prosecute executives. In fact, as the law exists right now, executives who have knowledge of violations and simply fail to act when they have the power to act are liable under the statute. So the legal standards are extremely strong for the prosecution.

Part of the problem, and I think you also put your finger on it, is these are hard cases. Part of the problem, as I mentioned earlier, is the lack of integrated enforcement. If you have all the parties in the agencies looking at things, they can graduate the responses up as violations continue.

You are frustrated by repeated violations. You begin with administrative, then civil and you work your way up. That is fairer to the defendant. It saves resources because most people will respond before you get up those steps, and it is a good use of criminal because you are using it when you know you need it because you are using it against people who are recalcitrant.

Chairman BIDEN. If you are sitting in my chair and we switch roles here, what do you do? What do you propose? Is there anything you can do from the congressional side or is this purely an executive judgment to be made by the executive department as to how to go about doing this and there is nothing we can do to prompt it?

Mr. SARACHAN. I think there is one other factor here, and I should disclose, by the way, that I represent one of the managers at the Motiva facility. The question you ask, shouldn't people be held responsible, which is a natural reaction when there is a horrible accident like that and someone is killed—but when you look at the individuals, then you have to ask, who is it?

It is not somebody who didn't have knowledge of the specific problems. It is not somebody who came to that facility trying to fix things and make them better and work with the agencies. Part of the reason why I think there is not as much of the prosecutions as you would like to see and it seems frustrating is because of these problems in the system and people's reluctance, but part of it is that prosecutors are exercising discretion.

When they look at the detailed facts, they see that sometimes responsibility gets dispersed and you can't identify a single individual or group of individuals who are responsible, even if it is a terrible accident.

Chairman BIDEN. I wasn't talking about Motiva at all in this. I don't know enough about who is responsible or what. I am not talking about Motiva, in particular.

If, in fact, I walk in and I take over a facility—I purchase a bar, a nightclub, a liquor store, a casino, and I get in there and find out that it is corrupt and I say, look, we are going to try and work this thing out. I inherited this thing and I am going to try to work it out. Look, I want you selling less cocaine here now; slow this process down. You will put my rear end in jail.

I walk in and buy a company and I find out that this tanker, this ship I just bought—my God, it has holes rusted through it and if I carry one more load of crude oil in this thing, it may burst. I will try to fix it. I am going to try to fix it, but in the meantime we are going to do one more shipment. You say, well, that guy was trying to do the right thing.

If it was carrying cocaine and I didn't know it, but I find out and I go, well, wait a minute, we will just get this one more load and we will take this in, we will be OK and then I am going to clear the house here—we just seem to think differently about these things.

With your permission, I have a very quick call I have to answer here that is an emergency. I am going to recess for 2 minutes. I am just going right to this room.

[The Subcommittee stood in recess from 5 p.m. to 5:03 p.m.]

Chairman BIDEN. I appreciate you all giving me this much time.

Let me phrase it a different way here because I am trying to get a sense of how we seem to as a Government and Government agencies view environmental damage differently than we view other things. Let me give you an example.

I as a businessman purchase a trucking company and I have 40 trucks. It is an ongoing business. I get in there and because I didn't do due diligence, I find I own a company that, out of my 40 trucks, 28 of them have serious maintenance violations. They have the records; they are sitting on my desk. They are such serious maintenance problems that they could cause a serious accident on the road—brakes, lights, undercarriage, whatever they happen to be.

But I have a business. I have "x" number of loads I have to pick up. I have got customers relying on me. I am going to cost people jobs if, in fact, I shut this thing down, and I don't have the resources immediately and I don't have the time.

But guess what? If, in fact, in my State one trooper pulls over one of my trucks and pulls the records and they find out that there is a problem, then they go look at my whole company and they shut the company—they don't say, look, that is OK, we got it, we know you have problems, run all 40 trucks until you get time and enough money to fix it.

I am oversimplifying it, but that seems to me what we do with the Clean Air and Clean Water Act. We seem to say, you know, I realize you bought this outfit and it is in bad shape. You didn't know it at the time. We have a problem here.

It is like Metachem. You have a problem here. I misspoke when I said Motiva. I meant to say Metachem, in Delaware. You have a problem here, but you know what? If you shut us down until we fix it, we don't have the money to fix it all right now. All these people are going to lose their jobs. Granted, something bad can happen here. Granted, we are going to do environmental damage while we continue to work, but it is OK, let us keep going.

Or there is no disclosure, no consent decree entered into. They just keep going, and in good faith try to fix it while they are going. They are trying to be good guys, but they keep it going, so you have dioxin leaching into the ground. So you have an unsafe condition where you are putting the stuff into the air and you are not reporting it in a timely way, or you are reporting it after the fact.

I sit there and I say, you know, it is a lot cheaper for me to pay this fine than it is for me to shut down. I lose my whole investment here. And we seem to say, well, you know, you are right, we sure don't want to move on this guy criminally. He is a good guy. He didn't do this. He didn't fail to maintain it. It is beyond his control now.

Am I missing something?

Mr. PENDERS. Senator, one of the obstacles you identified is the environmental laws themselves were not integrated. The Clean Water Act, the Clean Air Act, and the waste laws developed separately in separate programs to regulate discreet problems without addressing the relative risks involved in the management of chemicals or allowing an integrated approach to analyze risk, much less legislate on that basis and require that.

In recent years, advances in environmental management, a holistic, risk-based approach of the facility, have found emissions and

risks that are not regulated at all. There has been a bill introduced, the Chemical Security Act, and other measures that have been mandated by the executive branch.

Now, to do vulnerability assessments to look at all of the statutes, but actually prioritize and measure the relative risks from regulated and unregulated aspects that are important from a security perspective and develop a plan for implementing measures to reduce that risk—that is something that can be addressed legislatively. There have been bills introduced.

It has been part of the new focus on vulnerability assessments to look at the risk in a holistic way and begin to take measures, and perhaps require measures, as some of the bills introduced have done, to address the risks in a measured way.

Mr. SARACHAN. Senator, I think the facts that you posit, an owner who knows that a facility is continually violating the environmental laws——

Chairman BIDEN. Only after he buys it. I mean, he didn't know it beforehand.

Mr. SARACHAN. But he knows now.

Chairman BIDEN. He knows now.

Mr. SARACHAN. And he knows that day after day it is polluting the environment, that he is in violation of the law, whether it is a permit or a regulation, and he knows that.

Chairman BIDEN. Or he knows that there is a disaster about to happen. Nothing has happened yet, but he knows that the pipeline is seriously corroded. He knows that some other aspect of the operation could never pass inspection and is about to blow up. He doesn't have the money to fix it. He keeps going, in the hope that he gets it done. And it goes, and we say, OK, there is a fine, it caused all this environmental damage, instead of saying, hey, you are criminally negligent. You knew this. Even though you tried your best, it still blew up. You should have shut the sucker down. You should have taken your loss. You should have gone bankrupt. We do that in every other business.

Mr. DIPASQUALE. Mr. Chairman, again, I am not a practicing attorney. I am not an attorney by training, but there is this growing body of Federal case law that is helping to define what is referred to as the responsible corporate official doctrine where an individual who, by virtue of his or her position, should have known that these situations needed to be corrected could be found criminally liable, and that would include fines and imprisonment.

I think in this case, what I would suggest is that we look at that standard of proof and that it be reduced to simple negligence and that the fines be increased, the penalties be increased. I think if the managers and the corporate executives know that they are going to be held liable for these failures, they are going to pay a lot more attention to what is going on and not making decisions based on, well, we have to put off this capital investment, we can't make these repairs right now, we will run the risk and we will see what happens, and then only having to pay fines if there is some kind of a release.

I think they need to understand that they face criminal prosecution if they fail to address problems. Whether or not they knew it, by virtue of their position in the corporation they should have

made it their business to know and they should have made it their business to get it corrected.

Chairman BIDEN. I am going to sound counterintuitive here. I am very reluctant to do that. Maybe I did too much defense work, but I think there has to be not a negligence standard to find someone criminally liable, but criminal negligence is a term of art and that is different.

My question really is why do you not have more prosecutors deposing, seeking records, going in with truckloads, pulling out all the records and uncovering whether or not the CEO had reason to know. I am not looking for a negligence standard. I am wondering why we don't go at this more.

I think one of the reasons we don't is it is just a lot easier to fine them. It doesn't take nearly as much work. But to go in and indict them, padlock their offices, confiscate the books, and look at all the records, just like we do in other major white collar crime areas—we don't seem to do that on the environmental side, is I guess my only point. Maybe we do and I just don't know about the cases.

Mr. STARR. A couple of points, if I may, Mr. Chairman. One is that in environmental prosecutions, criminal negligence is simple negligence, and so the standards can't get any lower. So the tool is there, in keeping with our theme.

The second thing is I think those cases are prosecuted. Putting the padlock on the door is always a harsh remedy, I think, in part because you are not busting a cocaine lab when you are doing this. You have an ongoing organization that may be producing something that is of great benefit, and oftentimes in the government contracting field that is the case.

Second, you have that tension that you always have in these cases of where and what and who did the particular act and when did they do it. But I am confident that the Justice Department hasn't changed, Ron, since you were there or since I was there and they are looking and would take that case.

Without sounding at all like I am patronizing, one of the ways to get that done, Senator, is to do just what you have done here in holding this hearing and focusing on environmental criminal enforcement. I know from my experience over a decade in the Justice Department that it does listen to these kinds of issues and these kinds of questions that you ask, and I wouldn't be at all surprised to see within the next 6 months to a year your question being answered by a case just like you describe.

Chairman BIDEN. Well, I am just getting started. I have got a lot to learn. I am just getting started in this area. I have not drawn many conclusions yet, but I am just getting started.

I used to say to my mother, can I go down and hang out at Buffington's, hang out on the corner with the guys? And she would say, you know those guys down there; everybody knows they are trouble. And I say, I am not like them, mom, I am not going to do anything. And she would say, you know, if it looks like a duck and walks like a duck and quacks like a duck, it is a duck. You go down there and you are duck.

Well, let me tell you I just can't imagine that in the environment we are in today—no pun intended—in the environment we are in

today, with all of the difficulties that are being faced, there isn't a lot more that we can and should be doing because of the extent of the damage being done to the environment that right now is thought of as basically a cost of doing business; that we could not begin to change the environment, literally, if we were more aggressive.

My only question is do we need any more laws, or do we just need more resources or a change of attitude, or all of the above in order to begin to change the way in which we are approaching. White collar crime prosecutions and criminal referrals are way down, by the way. Is anybody telling me white collar crime is way down? Is anybody telling me that the damage done by white collar crime to the economy is way down?

All the other indicia out there you would look at would suggest it is probably up, not down, and yet prosecutions are down. It either means they have gotten a lot smarter and more sophisticated, it isn't happening, we are not pursuing it, or the standard that has to be met is so high, it is too difficult. That is the part I haven't figured out yet, but it is a duck. I figured that part out. I just don't know how to go about it yet. I am just not sure where the weakness is.

It is a little bit like we used to do when I first got involved in this business with organized crime. I am not compared corporations to organized crime. At the FBI, we had a guy named J. Edgar Hoover when I got here. That is how long I have been here. J. Edgar Hoover was in charge when I got here as a United States Senator.

He didn't like to fool with organized crime. Remember why? You guys are prosecutors.

Mr. STARR. It was too hard.

Chairman BIDEN. Too hard, and it would corrupt his agents, so he didn't want them involved. So it took me 8 years, but I started; not just me alone, but just speaking for myself, I started. The attitude changed. We started to break up some of the organized crime families. We have new organized crime families now, but it was an attitude. It wasn't that they were bad guys. There weren't dishonest people at the FBI. It wasn't that enforcers were afraid of the Mafia, but it was hard and it was dangerous. That is the systemic kind of thing I am talking about.

I just, for the life of me, have not put this little Rubic's cube together here about why we are not doing a whole lot more in an increasingly fragile environment, with increasingly devastating results to the environment, with knowledge on the part of operators of those facilities, and the cost clearly being less than the cost it would take to fix it.

Without getting into specifics, one of the outfits out our way can pay that fine for a lot longer before it equals the amount of money they have to spend to see to it that they don't have to engage in the action that pollutes the air.

You are sitting there and what are you going to do? We hope they are all moral. One of the things I have found out is they are just like politicians, priests, doctors, rabbis, housewives. They are like everybody else. I don't ask a lot of human nature. I don't ask a lot of people who have a fiduciary responsibility to produce one thing for their stockholders and themselves, and maybe that might

be at odds with what is in the interest of the community at large. I don't want to make it hard for them to make the right decisions.

You have all been kind with your time. My staff is perplexed because they had at least three or four very good, pointed questions for each of you. But very bluntly, I am going to submit the questions to you in writing. It will not take much time.

Until you get by the first layer here of how do we better coordinate and organize this—unless, as I said, someone can come along and tell me don't worry, Joe, the environment is getting better, people aren't polluting as much, the problems we face with degrading infrastructure are not a problem, people are going to take care of that, that is going to be their first priority—convince me of that and I will feel a lot better.

That is not your obligation, but if I am convinced of that, that is one thing. But I don't get that sense at all. There are a lot of disasters waiting to happen here, and the incentives are not sufficient, it seems to me, to promote the kind of vigilance that is needed in order to make sure that I can breathe cleaner air and drink cleaner water.

Would anyone like to make a closing comment on anything at all you would like to speak to?

Mr. PENDERS. Just one thing, Senator. There have been big cases against companies like BP in Alaska, where there were very real limitations on what one EPA agent or other agencies could do in managing hundreds of thousands of documents between them, trying to make the case against individuals and other organizations. So resources are certainly a part of the equation and a practical aspect.

Chairman BIDEN. It seems to me they are a big part. It seems to me there is resources, will, commitment, coordination. Just the ability to monitor what is going on is staggering. So in every other area where that occurs on the criminal side, what do people do? They pick out, they pick out.

There are a couple of ways to do this. One is have the resources to be able to monitor all these facilities, which means we are not doubling or tripling or quadrupling, but we are increasing by a factor of 100, 150, 500. It is like meat inspectors. There aren't a whole lot of them and you can't possibly inspect them all. So what do they do? They pick facilities and they go in and they just pick them.

Mr. STARR. Case selection.

Chairman BIDEN. It is case selection.

Well, you have all been very, very helpful. Again, I am not being solicitous when I say this: I want the record to show I have made no judgment and have no opinion at this moment about any company that has been mentioned here or about any culpability on the part of any individual or any single company. I am speaking in generic terms.

At any rate, I thank you all very much for your participation. I have, as I said, several questions in writing for each of you, if you wouldn't mind submitting them for the record.

Senator Hatch would like his statement inserted in the record at this point.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Chairman BIDEN. With your permission, I may come back to you and ask you for some more input before this is over while I try to digest where this is going. Thank you all very much.

We are adjourned.

[Whereupon, at 5:23 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Questions for Assistant Attorney General Thomas L. Sansonetti and for Leo D'Amico from Senator Joseph R. Biden, Jr.

Hearing Before the Senate Judiciary Committee's Subcommittee on Crime and Drugs "Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?" Tuesday, July 30, 2002

Because certain questions implicate issues within the purview of both DOJ and the EPA, these questions are being submitted jointly to Mr. Sansonetti and Mr. D'Amico, in the hopes that the two agencies will coordinate their responses where appropriate.

1. At the end of July, EPA was supposed to launch a public web site called Enforcement and Compliance History Online (ECHO), providing compliance history for over 800,000 facilities. This data would allow the public to access information on compliance status, enforcement actions, and penalties assessed to individual facilities. Information of this kind is essential to the public's right to know about what is going on in their community, especially as it directly relates to their health and the health of their families.

It is my understanding that ECHO was not launched at the end of July as planned. Why was the scheduled launch stopped? Who made the decision not to launch ECHO? What role did the Regional Administrators play in the decision to delay the launch? What role did the Council on Environmental Quality play in the delay? Was there any other agency or Executive Branch Office involved in the decision to delay? When will ECHO be launched and what are the reasons for choosing that date? Please provide my office with any documents, memos, e-mails or notes relating to the preceding questions.

The scheduled launch was postponed to: 1) allow state environmental agencies more time to review and correct data; 2) allow EPA Regional Administrators to hold conference calls with state environmental commissioners about ECHO data; and 3) allow EPA staff developing ECHO to produce additional communication and explanatory material prior to the launch of ECHO. Discussions with the Regional Administrators and the Council on Environmental Quality generally contributed to the conclusion that more time was needed to carry out the steps mentioned above. No other Executive Branch office or agency was involved in the decision. Current plans call for ECHO to be launched the week of November 18, 2002. This will allow sufficient time for the above steps, as well as other preparations, to be completed. Attachment 1 to this document is an August 22, 2002, note from John P. Suarez, Assistant Administrator, Office of Enforcement and Compliance Assurance, to EPA Regional Administrators and Deputy Regional Administrators (with two internal attachments) providing background materials in preparation for the launch of ECHO.

2. Please provide a list of every federal criminal prosecution brought over the past five years, grouped by the statute(s) under which the defendant was indicted. Please include in this list

the resolution of each case and the sentence, if any. Furthermore, please flag any cases that involved Fortune 500 companies.

Enclosed please find two tables, one entitled "Environmental Crimes Section FY 1998-FY 2002 Indictments" and the other entitled "Environmental Crimes Section FY 1998-FY 2002 Indictments -- Finance Information." Please note that these tables include cases that were referred prior to FY 1998 but indicted in FY 1998 or thereafter. The Fortune 500 companies that are included are Ashland Oil, American Airlines, and TRW, Inc.

3. Please compile a summary table of the disposition of all referrals to the Environmental Crimes Section. For each type of environmental crime, please provide the following statistics: matters received, suspects in matters received, cases filed, defendants in cases filed, cases terminated, defendants in cases terminated, total defendants guilty, conviction rate, defendants who were found guilty, defendants who pled guilty, defendants acquitted, defendants dismissed, defendants terminated otherwise (e.g. transfers, dismissals other than by the court, pretrial diversions, and proceedings suspended indefinitely by the court), number of guilty defendants sentenced to prison, and percent of guilty defendants sentenced to prison.

Enclosed please find a table entitled "Summary of Environmental Crimes Dispositions Resulting from Filing Criminal Charges Over 5 Fiscal Years." Please note that this table includes all matters opened (as distinct from the subset of all cases indicted) in the last five years, and includes still-pending matters.

4. Please compile statistics regarding the total number of referrals to the Environmental Crimes section from the EPA, the FBI, the Coast Guard, and any other referring agency over the past five years. Please provide statistics regarding the number of referrals for each type of crime.

Enclosed please find a table entitled "Environmental Crimes Cases Opened by Environmental Crimes Section Over 5 Fiscal Years by Lead Agency." Please note that this table breaks down the matters opened (as opposed to cases indicted) by lead agency and does not reflect the fact that many cases have joint involvement by two or more investigative agencies. Also, please refer to the table entitled "Summary of Environmental Crimes Dispositions Resulting from Filing Criminal Charges Over 5 Fiscal Years" regarding the second part of the request.

5. Table 11 of the Fiscal Year 2000 Annual Report of the U.S. Sentencing Commission contains information regarding "guilty pleas and trials in each primary offense category." According to this table, a total of 59,477 federal offenses were successfully prosecuted -- either by guilty plea or by conviction following trial -- during FY 2000. Of that number, criminal environmental prosecutions comprised only a tiny fraction. Specifically, only 210 prosecutions were successfully brought for "environmental/wildlife" cases, representing only

0.35 % of the total number of federal criminal prosecutions. Given the high federal importance of environmental prosecutions, please explain why there were fewer successful prosecutions for environmental crimes than for other offenses which, arguably, appear to have less federal import -- e.g., 470 assault prosecutions; 538 simple drug possession prosecutions, and 221 auto theft prosecutions.

We agree that federal prosecution of environmental crime is important. However, we believe that Table 11 does not tell the complete story of the federal prosecution program in this area. For example, Table 51 of the FY 2000 Sourcebook, which provides information regarding organizations receiving fines or restitutions by primary offense category, states that 296 organizations were ordered to pay fines or restitution in FY 2000. The primary offense category of 73 of those organizations, was environmental. In another words, approximately 23% of the organizational defendants sentenced to pay fines or restitution during FY 2000 were sentenced in connection with environmental crimes.

It is also important to understand what exactly the numbers in Table 11 are portraying. For example, closer examination of Appendix A, which gives a more in-depth description of the categories identified in Table 11, reveals that the figure of 210 total guilty pleas and trials given for the category of "Environmental/Wildlife" does not capture all of our criminal prosecutions. For example, it does not include "endangerment from hazardous/toxic substances," an important offense category in our cases. Instead, such offenses are included in the "Other Miscellaneous Offenses" category. The "Other Miscellaneous Offenses" category also includes false statement offenses and conspiracy offenses, such as conspiracy to commit murder, even though Table 11 includes "Murder" as a separate offense category. It is not uncommon for us to enter into plea agreements in which defendant pleads to a false statement charge or conspiracy charge, rather than pleading to violation of the Clean Air Act, for example. Accordingly, it appears that such pleas may not be reflected in the "Environmental/Wildlife" category either.

We also note that environmental crimes are more complex than many other types of federal crimes, and require a greater investment of time and money than the average simple drug possession case. The people necessary to develop a case almost invariably include technical field personnel and laboratory scientists, as well as prosecutors and investigators. Those human resources all require specialized training, and much of that training must be at state and local levels since so many federal cases begin with state or local people administering delegated or authorized regulatory programs. Because environmental crime is a complex area that requires more time and specialized resources, it cannot be fairly compared with other simpler areas of criminal law where the same resource levels would yield substantially higher case totals. In this connection, we note the number of "Environmental/Wildlife" prosecutions identified in Table 11 compare favorably with those identified for other areas of obvious federal import, such as civil rights, antitrust, and national defense.

6. How has the effect of 9/11 affected the ability of the FBI, EPA and other investigative agencies to prosecute environmental crime? Has the role of the FBI diminished? If so, how

do you plan to compensate? Please include in your response statistics regarding the total number of agents, or agent-hours, devoted to environmental crime by each relevant investigative agency both pre- 9/11 and currently. Is there anything that Congress can do to improve our effectiveness at combating environmental crime in the wake of the post-9/11 reallocation of investigative resources?

EPA's Criminal Investigation Division (EPA-CID), part of the Office of Criminal Enforcement, Forensics and Training (OCEFT), investigates environmental crime, which it refers for prosecution to the Department of Justice. EPA-CID had 186 Special Agents on board as of September 30, 2001; as of September 27, 2002, there were 220 Special Agents on board. Although EPA-CID has hired additional agents since September 11, 2001, CID agents have been assigned to Homeland Security and protective services, as well as to their core environmental crimes investigation responsibilities.

In FY 2002, EPA-CID initiated 484 environmental crime cases, 192 counter-terrorism assist cases, and numerous protective assignments. Immediately after the September 11, 2001, attacks, OCEFT criminal enforcement staff responded to the three sites: the World Trade Center, Pentagon and Pennsylvania, providing a total of 39 agents and technical support personnel. Subsequently, 52 agents and technical staff were called upon to respond to the anthrax threat on Capitol Hill. In addition to direct support at the attack sites, field agents assisted the FBI in following up leads, provided support at designated National Security Special Events and continue to participate in the Attorney General's and U. S. Attorneys' terrorism task forces.

In FY 2002, OCEFT received an additional 50 FTE in a supplemental appropriation for Homeland Security, and has been aggressively hiring to fill those positions. However, in the near-term, special agents with more seniority and experience will continue to be assigned to Homeland Security while newly hired staff receive necessary training. Junior agents must gain several years of field experience before they are capable of carrying the full case load of a senior agent. The program will work to fully meet the requirements of our Homeland Security responsibility while also performing our mission in environmental crimes enforcement. The need to fully develop newly hired staff will impact our ability to maintain prior levels of cases initiated, judicial action and, ultimately, jail time and fines collected.

The FBI figures for comparable periods before and after September 11, 2001, understandably reflect a decline in the number of agent work years spent working on environmental crimes. From October 1, 2000, through June 30, 2001, 38.5 agent work years were devoted to environmental crimes, while during the same period for fiscal year 2002 the figure was down to 17.1 agent work years. However, as we noted in our testimony, the FBI remains committed to the fight against environmental crime.

As indicated during the hearing, we believe we have the tools and resources needed to continue our important work in enforcing environmental laws. Should the Congress consider any new proposals,

we would be pleased to have the opportunity to provide information or technical assistance.

7. Dumping pollution into international waters is a problem that, according to some, is inadequately addressed by our environmental criminal laws. For example, certain cruise ships have been known to illegally bypass their required pollution control devices and dump their waste oil into the sea. U.S. authorities are unable to prosecute these dumpers unless either the pollution takes place in U.S. territorial waters or the ship is registered in the U.S. Accordingly, most companies register their ships abroad in countries with lax environmental laws. We can prosecute these companies only for falsifying their records – we can't punish them for the environmental crime itself, even though their cruises often originate and terminate in the U.S.

Do you believe that our laws should be amended to combat such polluters? Do you believe that an assumption of jurisdiction over such polluters would comport with international law?

Under existing federal laws, such as the Act to Prevent Pollution From Ships and the Clean Water Act, as amended by the Oil Pollution Act of 1990, U.S. jurisdiction over discharges of harmful quantities of oil and hazardous substances from foreign-flag cruise ships and other vessels extends at least out to 12 nautical miles from shore. (The dumping of material into the ocean, as distinguished from discharge of pollutants into the ocean, is governed by the ocean dumping provisions of the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401 to 1445.) Under certain circumstances, U.S. jurisdiction over such discharges may extend out to the limit of our Exclusive Economic Zone, which is 200 nautical miles from shore.

The law of the sea gives primacy to the vessel's flag state for enforcement actions arising from violations of law that occur on the high seas. This principle is embodied in customary international law and in several maritime treaties to which the United States is a party. Nevertheless, we have successfully prosecuted ship owners, operators, foreign shore personnel and crew members for the falsification of records relating to pollution prevention under 18 U.S.C. Section 1001 and under 18 U.S.C. Section 1505 for obstructing Coast Guard proceedings, even where the unlawful discharge may have occurred on the high seas. We believe that these prosecutions are substantive in nature and an effective deterrent, since the purpose of the crime is both to conceal environmental pollution as well as to mislead U.S. authorities as to the condition of the ship.

We are considering whether any amendments to existing law are necessary or desirable. We would not favor assertions of jurisdiction over foreign flag vessels that did not comport with our obligations under international law.

8. Historically, DOJ has fought vigorously to protect the federal government's right to overfile. The federal government suffered a rare defeat in the courts, however, in 1999, when the Eighth Circuit held, in Harmon Industries v. Browner, that the federal government may

not overfile in a RCRA case. In that case, the court held that because Missouri had already filed an action against Harmon Industries, the federal government was powerless to bring its own enforcement action.

Do you believe that Harmon Industries was wrongly decided? Do you believe that the federal government has the legal authority to overfile under RCRA and other environmental statutes? Do you think that it is appropriate to overfile in certain cases? In what types of situations do you feel overfiling would be appropriate?

We believe that Harmon was wrongly decided. We note that a recent decision from the Tenth Circuit Court of Appeals, United States v. Power Engineering Company, 303 F.3d 1232 (10th Cir. 2002), agrees with our position on this issue and joins a unanimous line of federal court rulings that have declined to bar federal environmental enforcement based on Harmon. Although the federal government has the legal authority to overfile under RCRA and other environmental statutes, we do not treat overfiling as a routine matter. In fact, as a matter of longstanding policy, we rarely overfile, instead preferring to work with the states to determine who should take the necessary enforcement action. Moreover, EPA's national policy is designed to give states the first opportunity to enforce under their authorized or approved programs. In the rare circumstances where EPA and DOJ overfile, we do so because it is necessary to protect human health and the environment, to appropriately address a major repeat violator, and/or to recover a significant economic benefit accruing to a violator from noncompliance. These principles ensure that the enforcement action is sufficiently protective, deters recalcitrant behavior, and preserves a level economic playing field for law-abiding competitors. These principles also protect states that enforce the requirements of federal law from being undercut by states that do not.

9. It is said that the Environmental Crimes Section is the same size now as it was during the first Bush Administration, a decade ago. Do we need to expand the resources of the Environmental Crimes section and hire more lawyers?

Although the Environmental Crimes Section per se is the same size, focus on this fact discounts the key role that the Section has played as a force multiplier nationwide in the fight against environmental crime. Through the Section's training and outreach efforts with the U.S. Attorneys' Offices and with state and local criminal enforcement agencies, the Section has effectively expanded the resources and number of lawyers available to investigate and prosecute environmental crime wherever it may occur. These efforts include working with EPA to develop the state and local environmental crimes training program at the Federal Law Enforcement Training Center in Glynco, Georgia, and working with the four regional enforcement organizations (Northeast Environmental Enforcement Project, Southern Environmental Enforcement Network, Midwest Environmental Enforcement Association, and the Western States Project), as well as the criminal enforcement coordinators with the National Association of Attorneys General, by providing faculty, materials, and ideas to their training efforts and by regularly furnishing material on environmental crimes that may be distributed to

prosecutors throughout the country. From FY 1998 to date, Section attorneys have participated in 90 training programs for state and local environmental crimes personnel. ECS also has encouraged the formation of task forces comprised of federal, state, and local enforcement personnel around the country and participated directly in some of those task forces. That encouragement has included training of federal prosecutors in both the value of task forces and the means by which they can be created. We will continue to work through the established budget process to ensure that we have sufficient resources and lawyers to carry on this work as well as our direct prosecution of environmental crimes.

10. Will cuts to the EPA's enforcement budget affect our ability to bring to justice violators of federal environmental criminal statutes? Why or why not?

The President's FY 2003 budget proposes a nominal reduction in EPA's criminal enforcement program of 3 FTEs (out of a total of 298 FTEs) relative to the enacted FY 2002 budget. While any reduction may affect the rate of investigations and prosecutions, EPA intends to continue to vigorously investigate and prosecute environmental crimes with the resources available.

11. In deciding whether to bring an environmental crimes prosecution, to what extent do you consider available resources? In other words, are there any such prosecutions that DOJ would like to bring but cannot due to resource constraints?

Ensuring that we have sufficient resources to properly prosecute a case is of course one important consideration in deciding to pursue a prosecution, but so far we have been able to bring the prosecutions that we have felt it appropriate to bring within our resource considerations.

12. **In a meeting with my staffers, DOJ lawyers mentioned that the existence of the Hyde Amendment – which enables an acquitted defendant to recover reasonable defense costs if the defendant can show that a federal case was "vexatious, frivolous, or in bad faith" – is a consideration when determining whether to prosecute environmental crimes cases. To what extent does the Hyde Amendment deter the government from bringing such cases?**

The Hyde Amendment does not deter us from pursuing meritorious enforcement cases – we continue to weigh potential cases against the standards set out in the Principles of Federal Prosecution and other pertinent departmental policies, just as we did before the Hyde Amendment, in order to make judgments as to the exercise of our discretion. There has been no drop-off of environmental crimes prosecutions attributable to the Hyde Amendment.

13. Most federal environmental crimes statutes do not criminalize attempts. Do you believe that we should change federal law to criminalize attempts to violate environmental criminal laws?

We believe that such a change merits serious consideration and would be happy to work with you on this issue.

14. In general, immediate restitution is not available for victims in environmental crimes cases. Do you believe that we should make such restitution available for environmental crimes, just as we make it available for most other crimes?

We believe such a proposal merits serious consideration and would be happy to work with you in this regard.

15. Do you believe that we should change the law to allow a sentencing judge to order that someone convicted of a federal environmental crime must pay any expenses incurred by state and local governments for assisting in the investigation and prosecution of the case? Can you think of other ways in which we can help state and local governments serve as partners with the federal government in fighting environmental crime?

We believe that such a change merits serious consideration and would be happy to work with you on this issue. As we noted in response to question 9, a significant part of the Environmental Crimes Section's work is focused on helping state and local governments serve as partners in this fight. This commitment by ECS to support state and local efforts has paid off in at least two ways. First, by working together, the various levels of government can increase the impact of their resources, reducing redundancy and increasing efficiency. Second, state technical and law enforcement personnel are already serving as partners in many environmental crimes cases that are prosecuted federally, so our investment in those personnel can pay off in better cases. We are continuing to think of ways to improve this partnership and would be happy to discuss any proposals that you may have in this regard.

16. Criminal penalties under the Federal Insecticide, Fungicide, and Rodenticide Act are currently limited to one year in prison. Do you believe that the maximum FIFRA penalty should be raised, perhaps to five years in prison?

We believe that such a change merits consideration and would be happy to work with you on this issue.

17. In certain areas of the criminal law – financial frauds, for example – the statute of limitations is tolled until the victim learns of the offense. Do you believe that the statute of limitations for environmental crimes should be extended in cases where the polluter takes affirmative acts to conceal his crime?

We believe that such a change merits serious consideration and would be happy to work with you on this issue.

18. In some cases, environmental defendants have taken steps to transfer or shield their assets to avoid judgments, restitution and the like. Do you believe that – following the issuance of a grand jury indictment in an environmental crimes case – a judge should be allowed to order the defendant not to dispose of property if that would make him unable to pay restitution?

We believe that proposal merits serious consideration and would be happy to work with you on this issue.

19. Are there any other areas of environmental crimes law which you believe should be tweaked, or any new laws which you believe should be added, in order to better deter damage to our air, water and land?

We believe that the changes and proposals suggested in the previous questions are good starting points for improving our ability to protect our air, water, and land, and would be happy to work with you on them as well as other possible improvements that we may identify during the course of that process.

Senator Maria Cantwell
Questions for Assistant Attorney General Thomas Sansonetti
"Criminal and Civil Enforcement of Environmental Laws"

1. **As you know, in January 2001, the roadless rule, a major rulemaking that limited road building and timber harvesting in 58.5 million acres of national forest, was published in the Federal Register and became final. At Attorney General Ashcroft's confirmation hearing that month, I asked the Attorney General if he would enforce this rule. He responded by saying that he would "enforce and defend any rule that has the force and effect of law."**

   Shortly thereafter and several months before you were nominated or confirmed to your current position, a number of lawsuits were filed challenging the roadless rule. These included a case filed in the Idaho District Court where Judge Lodge granted an injunction on the ground that the Department of Agriculture had not completed a sufficiently in depth analysis of the environmental consequences of protecting the forest.

   In that case, the Department of Justice never filed a brief on the merits in the District Court prior to the issuance of the injunction. When an expedited hearing on appeal of the inunction was granted by the Circuit Court of Appeals, the Department again did not file a brief and did not enter an appearance at oral argument.

   Next month, for the first time since you were confirmed, the Department will once again be placed in the position of defending the rule in a legal challenge brought in the North Dakota District Court in the case of Billings v. Veneman.

   Will the Department file substantive briefs on the merits in defense of the roadless rule and will the attorneys appear and argue in defense of the rule in upcoming hearings?

   We filed a substantive brief on the merits in defense of the roadless rule in *Billings County v, Veneman*, Civ. No. A1-01-045 (D.N.D.), on August 12, which is enclosed for your convenience. If a hearing is scheduled on the summary judgment motions in that case, we plan to appear and argue in defense of the rule.

2. **The mining company Asarco is currently responsible for cleanup of numerous environmental sites around the country. Asarco was acquired several years ago by Grupo Mexico, a Mexican corporation, and Grupo Mexico appears to be in the process of liquidating all the United States assets of Asarco. Please provide a detailed explanation of the legal options the Department of Justice is exploring to hold Asarco and Grupo Mexico responsible for their environmental cleanup obligations, and please provide a time line, whereby action will be taken to ensure that Asarco and Grupo Mexico's clean-up obligations in this country will be met.**

We share your concern about ensuring that ASARCO's clean-up obligations in this country will be met. As your office was advised, on August 9, DOJ filed an action under the Federal Debt Collection Procedures Act and Federal Priority Statute seeking to enjoin the transfer of ASARCO's most valuable asset, a majority interest in a Peruvian copper mining corporation, to ASARCO's immediate parent company, Americas Mining Corporation. AMC is, in turn, a holding company that is a direct subsidiary of ASARCO's ultimate parent company Grupo Mexico. The States of Washington, Idaho, and Colorado filed supporting affidavits. A copy of the complaint has been provided to your office. On August 13, the United States and ASARCO filed a stipulation with the Court whereby ASARCO agreed not to transfer its share in the Peruvian mining company before the Court resolves the United States' motion for a preliminary injunction. If, however, such a ruling has not been made by September 30, 2002, the parties will confer with the Court with regard to an appropriate termination date for the stipulation.

SUBMISSIONS FOR THE RECORD

STATEMENT OF CITIZENS FOR PENNSYLVANIA'S FUTURE
BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
HON. JOSEPH R. BIDEN, JR., PRESIDING
JULY 30, 2002

Citizens for Pennsylvania's Future (PennFuture) is a statewide public interest membership organization that works to create a just future where nature, communities and the economy thrive. PennFuture's activities include litigating cases before regulatory bodies and in local, state and federal courts, advocating and advancing legislative action on a state and federal level, public education and assisting citizens in public advocacy. We are especially concerned about the enforcement of environmental laws, and thank Senator Biden and the Committee for the opportunity to offer this testimony.

Pennsylvania faces serious environmental challenges. Our air is fouled by coal-burning power plants, which produce the highest mercury emissions and second-highest sulfur dioxide emissions in the country. Emissions from these plants lead to 2,250 premature deaths each year in Pennsylvania. Ozone smog results in 370,000 asthma attacks in Pennsylvania each summer. Pennsylvania is by far the number one importer of trash in the country. Drainage from abandoned mines kills our streams, even as the second-worst acid rain in the country falls from the sky.

In these difficult circumstances, we need strong environmental enforcement, including meaningful penalties that will actually stop polluters from violating the law. Enforcement and strong penalties are critical:

- to bring violators of environmental laws into compliance;
- to deter future violations of environmental laws: true deterrence depends on penalties being strong enough that they are not viewed as merely a cost of doing business;

- to communicate to the regulated community that industry must take environmental protection seriously;
- to give the public confidence that the environmental cop is on the beat; and
- most importantly, to promote long-term compliance and improvements by industry leading to better environmental and public health protection.

For these reasons, we believe that enforcement is an indispensable element of an effective program to protect and improve our environment.

However, federal and state enforcement have not always lived up to this promise. Here are a few examples from our region:

1. Through the 1990s, the notorious Motiva refinery in Delaware City, Delaware committed a series of violations of air, water, and waste laws. In March of 2001, Motiva concluded a wide-ranging settlement with the EPA and the State of Delaware calling for $116 million in spending to cut pollution and $4 million in state fines. Just four months later, a tank collapse at the refinery killed one worker and injured several others, leading to a new round of government enforcement.

This history has led *Delaware Today* magazine to name Motiva one of Delaware's ten worst environmental problems, a distinction it has achieved all by itself on a list that mostly includes categories like endangered species and sewer overflows. It's not clear that recent civil enforcement efforts by EPA and Delaware will turn the company's behavior around. In the words of the Wilmington News Journal: "Motiva will end up paying. But as many industry analysts note, that's peanuts to a company that rakes in billions in profits. It's the cost of doing business."

2. The Pennsylvania Department of Environmental Protection charges fines for some air pollution that treat polluters like mere jaywalkers. Under one DEP policy, refineries simply write checks once each calendar quarter for air violations from their catalytic cracking units. The refineries pollute, DEP cashes their checks, and nothing changes. What's wrong with this picture?

3. For years, polluters dumped waste near the town of Petrolia in Butler County, Pennsylvania. Despite knowing about the waste disposal and violations of water protection laws since 1980, Pennsylvania DEP and the United States EPA took no action to protect the environment and local residents. Even as the waste contaminated drinking water wells, DEP did not require the polluter to provide bottled drinking water to neighbors.

PennFuture recently filed a notice of intent to sue under state and federal law on behalf of its own members and Small Towns Opposed to Polluted Sites, a group of citizens directly impacted by the waste disposal. Clearly, our environmental agencies shouldn't wait twenty years to take action to protect our public health, and it shouldn't take the prodding of a citizens' group to respond to such a serious problem. Delays by the government in Petrolia have not only put the health of our citizenry in jeopardy—especially children and the elderly who are most at risk—but may wind up costing the taxpayers millions in clean-up costs that could have been avoided by a prompt response.

4. The Sunoco refinery in Philadelphia, identified by the Environmental Defense Scorecard as the city's worst toxic air polluter, paid seven-figure penalties for air and water violations in the 1990s. In December of 2001, EPA notified Sunoco of additional violations of the New Source Review provision of the Clean Air Act at one of

Philadelphia refinery's catalytic cracking units. Since then, however, EPA has failed to file suit to stop the excess emissions it alleged in the notice; each day EPA fails to act, more pollution is added to our air.

5. For many years, the incinerator in Harrisburg, Pennsylvania has been a source of sky-high emissions of dioxin, cadmium, lead, and mercury. For almost as many years, the United States EPA and Pennsylvania DEP stood idly by, even creating a super-lenient emissions limit for dioxin that applied only in Harrisburg.

With a compliance deadline approaching in 2000, PennFuture and other groups demanded that EPA and DEP finally bring the incinerator's toxic emissions within federal guidelines. While controls are being added to reduce dioxin, their effect on cadmium, lead and mercury pollution is uncertain. We need our federal and state agencies to bring their authority and resources to bear on such a public health threat without being forced to do their job by an outraged citizenry.

6. The Marcus Hook refinery, owned by Sunoco, straddles the Pennsylvania-Delaware border. This year, the refinery has been emitting waste gases laden with sulfur dioxide through a flare on the Delaware side of the line, even though the State of Delaware prohibited the practice last December. EPA has called sulfur dioxide emissions from this type of flaring "unacceptably high"; at Marcus Hook, the practice emits up to 55,000 pounds per day of the pollutant.

After two citizens groups announced their intention to sue over the flaring practice, the State of Delaware imposed a $390,000 fine on Sunoco. However, Delaware also allowed the company until the end of the year to develop a compliance plan and four

years to implement it. Given Sunoco's repeated and flagrant violations, this hardly constitutes effective enforcement.

These examples show an unfortunate pattern: federal and state agencies that enforce the law at a leisurely pace, assess small penalties that fail to inspire compliance by polluters, and fail to achieve the fast compliance needed to protect our public health and environment.

We need better enforcement, and we need it right away. We call on Congress to make sure our environmental agencies do a better job, by:

- providing adequate enforcement resources to federal environmental agencies;
- prodding federal environmental agencies to aggressively enforce the law, and also to do a better job of monitoring the enforcement activities of state agencies to ensure they also protect our environment; and
- providing additional penalty and enforcement authority, as needed, to accomplish the goals of our major environmental statutes.

In our region, we call for vigorous enforcement action by federal and state authorities that will respond to the environmental and public health threats we have described above.

We thank Senator Biden and the Judiciary Committee for addressing this important issue, and for providing PennFuture with the opportunity to offer this testimony.

Testimony

of

Nicholas A. DiPasquale, Secretary

Delaware Department of Natural Resources

& Environmental Control

before the

Senate Judiciary Committee

Subcommittee on Crime and Drugs

United States Senate

§

"Criminal and Civil Enforcement of Environmental Laws:

Do We Have All the Tools We Need?"

§

Room 226 Dirksen Office Building

Tuesday, July 30, 2002

2:00 p.m.

INTRODUCTION

Good morning Mr. Chairman and members of the Subcommittee on Crime and Drugs. My name is Nicholas A. DiPasquale. I am the Secretary of the Delaware Department of Natural Resources and Environmental Control. I have been serving as Secretary since April 1999 having been appointed by former Governor and current junior U.S. Senator from Delaware, Thomas R. Carper. I was reappointed by his successor, Governor Ruth Ann Minner. I have served for the past 15 years in middle and senior level management positions with responsibility for the administration of federally delegated environmental programs dealing with the regulation of air and water pollution, waste management and hazardous substances cleanup both in Delaware and Missouri. I also served as committee staff to the Missouri House of Representatives Committees on Energy and Environment; State Parks, Recreation and Natural Resources; Mines and Mining; and, Labor in the early 1980s. I appreciate the opportunity to share my thoughts and experiences with you today on the adequacy of the tools available to state and federal environmental agencies to conduct civil and criminal environmental enforcement.

BACKGROUND

First, let me point out to the Committee that I am not an attorney by training, although I have been accused more than once of practicing law without a license. Secondly, by way of background, I would like to provide some context for my remarks by sharing with you some comparisons of state and federal environmental activities. According to a Report to Congress issued

in April, 2001 by the Environmental Council of the States (ECOS), between 1995 and 1999, states conducted over 90 percent of the environmental enforcement actions taken by the states and EPA combined. In 1999, states collected about $92 million in penalties. In 2000, states spent $13.5 billion on environmental protection and natural resource management activities. Between 1986 and 2000, EPA funding for state environmental programs actually declined by over 4 percent. Conversely, State funding for the environment increased by 65 percent over this same period. States now spend almost twice as much as EPA on the environment. Clearly, the states play a major role in administering and enforcing the nation's environmental laws.

CORPORATE RESPONSIBILITY

The financial scandals of recent months have raised questions about corporate integrity and responsibility regarding accounting and reporting practices. Similar questions can be raised about corporate responsibility for environmental compliance. In the first instance, such practices put shareholders' financial health at risk; in the latter, the public's physical health. Fortunately, this behavior involves only a small fraction of the corporate community. There is a myth, however, that compliance among large corporations is inherently better than that of small or medium-sized companies that lack adequate resources, expertise or the will to comply with the country's complex environmental requirements. It has been my experience in administering these programs over the past 20 years that large corporations with more than sufficient resources and expertise routinely are found to be in violation with our environmental laws. Sometimes this results

from the economic dynamics within a particular industry sector, sometimes due to a lack of attention and responsiveness from a huge corporate bureaucracy, and for a variety of other reasons. We have found that corporate mergers and acquisitions can create incentives to delay maintenance and repairs or other needed capital investments. In the petroleum refining business, industry competition and the need to keep national refineries operating at near-full capacity often create a situation where it is easier and cheaper for the company to pay a fine than to interrupt production or comply with the law. The fines that are levied against these companies are considered "a cost of doing business." Fines alone are not sufficient to get the attention of plant managers and corporate executives who are focused almost exclusively on "the bottom line." Other mechanisms to hold these managers and executives directly accountable and responsible for their actions, or for their failure to act, need to be considered.

LIMITATION OF ENVIRONMENTAL LAWS

With a few important exceptions, the nation's environmental laws do not "reach into" industrial processes. They set standards for air emissions or water discharges – at end of the pipe or top of the stack. Two very notable exceptions are the Resource Conservation and Recovery Act (RCRA), whose provisions are considered preventative in nature, and the Risk Management Program, Section 112(r) of the federal Clean Air Act Amendments of 1990, which requires risk management planning, hazards assessments, emergency response planning and a prevention program for extremely hazardous substances. The scope of these laws, however, is relatively limited. RCRA only applies to

hazardous wastes, so tanks and containers holding chemical products or intermediates are not covered. In the later instance, extremely hazardous substances are only a small subset of chemicals in use, albeit the ones that represent the greatest potential risk of catastrophic accidents or release. By and large, the other laws do not impose requirements or standards for inspection, maintenance or repair of industrial process equipment. Their jurisdiction is limited to requirements for the use of pollution control equipment. A release or exceedance has to occur before an enforcement action can be taken. In Delaware, for example, an accident at a petroleum refinery that resulted from an explosion and the catastrophic collapse of a tank and the release of both spent and fresh sulfuric acid was not covered under any state or federal environmental program. The company admitted the tank had a history of corrosion problems. Work orders for repairs had been submitted but the work had not been initiated. The tank collapse and release killed one worker and injured eight others, caused widespread contamination at the facility, released over a million gallons of sulfuric acid contaminated with hydrocarbons to the land and water and resulted in a fish kill and other environmental damage. The spent acid is not considered a hazardous waste because it is reclaimed and reused, nor is it considered an extremely hazardous substance. The state subsequently enacted an aboveground storage tank (AST) law that will require companies to meet specific industry standards for construction, inspection, maintenance, repair and replacement of tanks containing hazardous substances. There is no federal aboveground storage tank law and only about half the states have some kind of AST requirements in place. In reviewing the

compliance history of this facility, we found that approximately 70 percent of the environmental violations and releases that had occurred over the past 6 to 7 years were directly attributable to the lack of an effective maintenance and repair program for industrial process equipment. In response to this situation, the Governor took the unprecedented step of demanding that the company pay for a consultant with expertise in refinery systems and operation that would work at the direction of the department to evaluate the effectiveness of programs to assess the mechanical integrity of the facility's systems and to recommend improvements in those programs in exchange for allowing the company to continue operating. The refinery also is required to make improvements and repairs on an approved schedule or face stipulated penalties as part of a legally enforceable agreement. There are no environmental laws or programs under which such requirements can be imposed.

RESPONSIBLE CORPORATE OFFICIAL DOCTRINE

There is a growing body of federal case law that is helping to define the Responsible Corporate Official Doctrine. In certain cases, plant managers, corporate officers or other supervisory personnel have been held personally liable for environmental violations even though they were not directly involved in making decisions that led to the violations. In *United States v. Park*, 421 U.S. 658 (1975), the Supreme Court held that persons who failed "to exercise the authority and supervisory responsibility reposed in them by the business organization can be held criminally accountable. . . even without proof of actual knowledge or intent, or of personal participation in the criminal act, . . ." This case law

doctrine should be clarified, defined and incorporated into the nation's environmental statutes. Surely, one way to get the attention of plant managers and corporate officials is to clearly assign responsibility to them and hold them accountable for environmental violations that result from negligence. The threshold of proof should be established so that the individual would be considered negligent if they "knew or should have known" that conditions existed that could have resulted in a release or violation. Lowering the threshold of proof should be coupled with increased sanctions, including higher fines and imprisonment. A plant manager or corporate officer who knows he or she could be held personally liable and jailed in the event of a violation will be much more likely to insure that maintenance and repairs are performed and conditions are corrected to prevent the violation or release from occurring.

CHRONIC VIOLATORS AND PERMIT BARS

Several states have enacted habitual or chronic violator statutes that provide for greater penalties or other sanctions for companies or individuals that are repeatedly found to be in non-compliance with environmental standards or requirements. The Delaware General Assembly adopted such provisions during the 2001 legislative session that allow for greater financial penalties, as well as the imposition of special permit limitations, for chronic violators.

"At least 20 states have adopted some version of a permit bar or 'bad actor' provision, authorizing the environmental agency to deny an initial permit, reject a permit renewal or to disqualify a company from obtaining government contracts. In addition, a few

states also have the ability to issue an order suspending or permanently revoking a permit. When such an order takes effect immediately and continues pending an appeal by the facility, it ensures that the facility bears the burden of proof and must litigate on 'its own time and dime'." ("Keeping Bad Actors Off the Stage – Some Tools for Dealing with Repeat Offenders", P. Balavander, G. Rule, S. Keiner, ECOSTATES, Spring, 2002. pg. 24-27.).

Under most federal environmental statutes and implementing regulations and guidance, a company's compliance history can be taken into account as one of several factors that may be considered in determining the level of penalty to be assessed. In most instances, however, the penalty assessed must still be within the penalty range specified for all other violations. Consideration should be given to allowing a greater range or multiple of the penalties specified in law to be imposed for repeated violations of environmental laws. Under the federal Oil Pollution Act, penalties can be tripled if it can be shown that the release was the result of gross negligence, although gross negligence is a much higher burden of proof than simple negligence as recommended in the discussion on the Responsible Corporate Official.

OSHA WORKER SAFETY STANDARDS

Another area that might be explored is the reconciliation of OSHA Worker Protection Standards with other environmental requirements. The point of greatest integration between environmental and worker standards is the OSHA and EPA Process Safety Management (PSM) requirements. Frequently, the root cause of an incident or release that impacts worker safety is the same as that for environmental violations and releases. Some

effort should be made to integrate these requirements more effectively to eliminate any duplication of effort. OSHA enforcement also needs to be better funded.

ENVIRONMENTAL MANAGEMENT SYSTEMS

State environmental agencies and USEPA have made effective use of Environmental Management Systems (EMSs) similar to the voluntary standard set forth in ISO 14001. Many companies have used this standard to develop a system that can be used to assist them in complying with environmental requirements. Requirements to develop and implement an EMS have been used extensively as an element in administrative settlement agreements or judicial consent decrees to resolve environmental disputes. Although a company may be required to develop and implement an EMS through an enforcement agreement, there is no guarantee that such a system will absolutely ensure compliance. Nonetheless, EMSs can be an effective tool for improved environmental performance.

I appreciate the opportunity to share my experiences and suggestions with you on how criminal and civil enforcement of environmental laws might be improved. I would be pleased to answer any questions the subcommittee members may have.

Statement of Senator Russell D. Feingold
Senate Committee on the Judiciary
Subcommittee on Crime and Drugs
Hearing on Criminal and Civil Enforcement of Environmental Laws:
Do We Have All the Tools We Need?

Mr. Chairman, I am pleased that the Subcommittee is conducting this hearing today. Virtually all of the major environmental statutes, such as the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act authorize civil and administrative enforcement as well as criminal enforcement for violations of their provisions. I am eager to hear more about the Administration's activities to ensure compliance with these laws, and to understand, in greater detail, what we might do to improve enforcement and compliance.

The financial scandals of recent months have raised questions about corporate integrity and responsibility regarding accounting and reporting practices. Similar questions, I feel, should be raised and addressed about corporate responsibility for environmental compliance. In the former, such practices put shareholder's financial welfare at risk; in the latter, our country's environmental health and the health of our citizens. Fortunately, this behavior involves a small fraction of the corporate community, but nonetheless, we should be doing all we can to deter violations of the law and promote a national corporate culture of not only complying with environmental law but of going beyond current legal requirements to improve the overall environmental performance of our nation's business.

I am looking forward to hearing whether the Justice Department and the U.S. Environmental Protection Agency feel that the federal government currently has the tools to review environmental compliance in the instance of corporate mergers and acquisitions. I am also interested in learning how this Administration is interacting with states that are moving into alternative compliance programs, such as my own home state of Wisconsin. Federal programs such as Project XL and the National Environmental Performance Partnership system include industry-wide permits and the development of environmental performance compacts with firms and farmers and facility-wide permitting programs that move away from source-by-source permit requirements. Some are pilot programs; some have become more broad-based initiatives.

States with both Democratic and Republican legislatures and governors are moving in this direction. Among the trend-setters in developing these programs are Wisconsin, Oregon, Illinois, Minnesota, Massachusetts, New Jersey, and Florida. Wisconsin's Green Tier program establishes a two-tier permit option. The first, the Control Tier, applies traditional source-by-source permits. The second, the Green Tier, allows firms that demonstrate high levels of compliance an opportunity to develop a

"performance compact" - in effect, a single, facility-wide permit. This permit establishes a set of performance criteria, potentially on a multi-media basis, spelled out in a contract or compact between the firm and the public.

The functioning of these programs is relatively new, and they are not without risks to environmental quality. I will be eager to hear how the Justice Department and the U.S. Environmental Protection Agency are working to review this new generation of environmental quality programs, in addition to undertaking their more traditional enforcement activities.

Again, I appreciate the opportunity to hear from these witnesses and look forward to their views.

STATEMENT OF SENATOR CHARLES GRASSLEY
HEARING OF THE SUBCOMMITTEE ON CRIME AND DRUGS
"CRIMINAL AND CIVIL ENFORCEMENT OF ENVIRONMENTAL LAWS:
DO WE HAVE ALL THE TOOLS WE NEED?"

July 30, 2002

Mr. Chairman, thank you for holding today's hearing on the enforcement of the Nation's environmental laws. It's an important task for this subcommittee to examine the interaction of the government's criminal and civil efforts to protect our natural resources.

Keeping our air, soil and water as clean and safe as possible must be a top priority for all of us. We have an obligation to future generations to make sure that our environment is safe and clean. It makes economic sense to keep our air, water and soil clean. In other words, protecting the environment is both practical and the right thing to do.

I also believe that it is crucial that we pursue environmental policies that are based on sound science,

not political science. I see no reason why we cannot provide economic growth and environmental protection.

One of the most effective ways to protect the environment is to deter future wrongdoing. We must send the message that if you pollute the environment you'll pay a high price. Whether through criminal or civil penalties, the federal government has to consistently and fairly punish polluters. Those who knowingly harm the environment should be prosecuted and sent to jail, and those who are negligent with the very resources we're to be stewards of, should be penalized monetarily.

Because this is the Subcommittee on Crime and Drugs, rather than the Environment and Public Works Committee (EPW), we'll be looking at the criminal enforcement of our environmental laws. As you may recall, two weeks ago the Judiciary Committee held a joint hearing with EPW on "new source review" issues.

Today's hearing won't be a rehashing of that subject. Instead, we'll be focusing on how criminal prosecution fits into the broader framework of our environmental enforcement. We'll hopefully look at the different factors that are considered in deciding whether to bring a criminal, rather than a civil, enforcement action. We'll also look at what entities bring criminal actions and the various federal environmental criminal enforcement efforts.

This afternoon we will also be hearing from some of the best minds on environmental law from both inside and outside the government. I look forward to the testimony of Mr. Sansonetti and the discussion to follow. It'll also be good to talk with U.S. Attorney Burgess, who prosecutes environmental crimes in one of the most heavily protected States.

It is also good to see that Mr. Leo D'Amico is here with us today. Mr. D'Amico is Director of the EPA's

Office of Criminal Enforcement, Forensics and Training. I want to thank Mr. D'Amico for appearing here this afternoon. It is my understanding that Mr. D'Amico would otherwise be participating with Governor Whitman at the EPA's Award Ceremony recognizing the courageous work done by his agents in response to the attack on the Pentagon and the downing of the commercial airliner in Pennsylvania. The EPA was an important part of the national response to these attacks and I thank Mr. D'Amico and his agents for their many hours of extra duty devoted to our response.

I also want to thank the EPA for creating a Resident Area Office in Iowa. Iowa's two U.S. Attorneys and I've urged the EPA to take this step and I want to thank them for being sensitive to the needs of Iowa. By this Fall, we should have our first EPA agent, Mr. Larry Melville, in place.

On Panel Two we will be hearing from two former heads of the Department of Justice's Environmental Crimes Section. Mr. Judson Starr was the first Chief of that section and can share with us much of the history of criminal environmental enforcement.

We'll also be hearing from Mr. Ronald Sarachan (pronounced Sara-Kan). Mr. Sarachan has recently authored a paper with Steven Solow, another former Chief of the Environmental Crimes Section, entitled "Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of *Hanousek* and *Hong*." I would like to put that paper into the record.

Thank you gentleman for coming today. I'm sure that your testimony will be helpful to our overall understanding of criminal environmental enforcement issues and your analysis will assist us in determining what adjustments may or may not be needed to make enforcement as effective as possible.

For Record

Statement of Senator Orrin G. Hatch
Before the Judiciary Subcommittee on Crime and Drugs on
"Criminal and Civil Enforcement of Environmental Laws"

July 30, 2002

Mr. Chairman, thank you for scheduling this hearing to review the current criminal and civil enforcement efforts to protect our environment. Several weeks ago a joint hearing was held by the Judiciary Committee and the Senate Committee on Environment and Public Works to examine the New Source Review policy and enforcement activities. I think it is also important for us to examine and assess the current civil and criminal enforcement efforts to make sure that environmental violators are stopped and, where appropriate, punished through criminal enforcement efforts. In many cases, the line between a civil and criminal case will depend on evidentiary issues related to proof of intent. No matter what enforcement tool is used, it is critical to coordinate civil and criminal enforcement efforts to ensure that polluters and other environmental violators are stopped dead in their tracks so that our citizens can breathe clean air, drink clean water and enjoy our country's natural resources.

There is no question that criminal enforcement of our environmental laws must provide a significant deterrent. Those who violate the law must know that they will be subject to swift and certain punishment. To this end, we must be vigilant in making sure that the current penalty structure (statutory and guideline penalties) is adequate to deter environmental criminals from wasting our country's national treasures – our land, our rivers, our streams and our wildlife. A person who discharges damaging pollutants in our water or our air – just like any other ordinary criminal who traffics in illegal drugs or steals from any citizen – must be punished and held accountable under our system of justice. Whether it is an ocean vessel operator who discharges pollution in our waterways, a business owner who forces his employees to clean hazardous waste with no safety equipment, or illegal traffickers in chlorofluorocarbons (CFCs), these violators must be held accountable. They are nothing more than common criminals who deserve to be punished under our system of justice.

I know that this Administration is committed to vigorous civil and criminal enforcement of our environmental laws. I look forward to hearing from Assistant Attorney General Thomas Sansonetti, Assistant Attorney General for the Environment Division, and Timothy Burgess, United States Attorney for the District of Alaska, as well as the other witnesses who are testifying today. I am sure that they will help us to examine the current enforcement efforts and the need for any changes to our laws in order to fully protect our country's environment.

SENATE JUDICIARY COMMITTEE

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Introduction

Mr. Chairman, thank you for this opportunity to testify on the subject of environmental law enforcement at this critical time in considering the accountability of individuals and corporations under the law, and reassessing the federal government's role in fostering environmental protection and security. My name is Michael Penders, and I am the President of Environmental Protection International, a firm which conducts environmental investigations and audits, vulnerability assessments, designs environmental management and security systems, and provides training in the implementation and enforcement of environmental laws. Previously, I served as Director of Legal Counsel at EPA's Office of Criminal Enforcement, Forensics, and Training. My duties while at EPA included Chairing the Voluntary Disclosure Board, which considered the application of EPA's Audit Policy to criminal violations disclosed to the government, and Chairing the G8 Nations' law enforcement project to investigate international environmental crime.

The deterrent of criminal sanctions, imposed in practice, is well known to this committee. The Senate recently voted unanimously to enhance the criminal sanctions for corporate fraud in a Bill signed into law by the President today. I don't think it was mere coincidence that the stock market turned around the same day that Adelphia officials were led away in handcuffs.

In recent years, standards for auditing, reporting, and managing environmental compliance, risk, and liabilities have been the subject to similar concerns, including how these liabilities are reported to the SEC. Just last week, Assistant Attorney General Sansonetti announced that Tanknology, the nation's largest tester of underground storage tanks, pled guilty to ten felony counts of falsifying test results, in several different states. It is critical for the integrity of the environmental laws that the government's capacity to detect and investigate false reporting is credible and national in scope, and proceed in full partnership with state and local officials.

Criminal enforcement has had a powerful impact in achieving compliance with environmental laws over the last twenty years in the United States. The real prospect of criminal prosecution of individuals and corporations has been a principal driver of safer and more secure environmental management practices, including the current generation of environmental management systems which reduce or prevent pollution at the source. As this committee considers changes to the criminal law, and other

committees consider 'next generation' environmental legislation, it is critical to preserve direct accountability for individuals and entities that 'knowingly' violate environmental laws, particularly where there is risk of harm and economic benefit to violators. This requires the capacity to detect violations, investigate complex technical requirements, and enforce these laws fairly and consistently. Otherwise, those who pay costs associated with environmental compliance will be put at a competitive disadvantage to violators.

At the same time, in order for the criminal enforcement deterrent to have maximum impact, it must be made as clear as possible what an individual or organization must do to avoid criminal liability after discovering a compliance issue, other environmental risk, or historical contamination through a voluntary audit, assessment, or other means. EPA's Audit Policy, amended in 1999, DoJ's Holder Memorandum On Charging Corporations, the U.S. Sentencing Guidelines, and voluntary programs and laws on the state and federal level such as EPA's Performance track have provided guidance in this area. The success of many of these voluntary programs depends, however, on the expectation of fair enforcement for those who violate.

Highlights of the United States Experience in Building a National Enforcement and Compliance Program

In the United States, before there was a national system of environmental laws and enforcement, hazardous waste was illegally dumped and shipped from those states with stringent laws and strong enforcement to those regions and states where it was lacking. As a result, the citizens and communities in those latter states were put at greater risk. Some polluters, compelled by economic incentives, transported waste to these states or moved facilities there in order to avoid costs associated with sound environmental practices. All too often these savings were achieved at the expense of the environment.

Beginning in the 1970s, the United States decided as a nation that these practices were unacceptable, and that a minimum level of environmental protection should apply across the land. The development of national environmental laws followed, in large part, in order to prevent polluters from taking advantage of inconsistency in laws and enforcement practices between the states.

After national laws were enacted, there was a period of education, compliance assistance, and then almost exclusive use of administrative and civil sanctions, mostly monetary fines, in the initial enforcement efforts against pollution to the air, land, or water that was determined to be illegal. It was observed during this period that companies that faced only monetary penalties and a small chance of being detected in violation, could put off coming into compliance and if they were ever caught and fined, they could pass the cost of any penalty on to consumers, in the form of higher prices.

Beginning in the 1980s, the United States began a serious national effort at criminal enforcement and other sanctions that set the stage for widespread compliance efforts on behalf of industry. It was not mere coincidence that shortly after the U.S. enacted national laws that severely punished violators of environmental requirements (including imprisonment for knowing violations by corporate officials or other persons) and developed the capacity for effective enforcement, that many industrial concerns began to take their environmental obligations very seriously. Corporations began to improve their environmental performance and deploy systematic approaches to monitor and assure compliance with environmental requirements.

There is strong empirical evidence for the correlation between strong laws, enforcement, and substantial investment in environmental compliance. For example, there was a survey of corporate officials in the United States in 1993 as to what their motivation was for adopting environmental management systems to ensure the sound and legal disposal of their industrial wastes. The number one response was concern with being targeted by EPA for enforcement.

This is really common sense. Ask yourself a question: if you are a manager of a business and face only a small chance of being caught violating an environmental law and then only a small fine if detected, how much would you invest to improve the environmental performance of your company and how soon would you begin to spend the money?

I am not now addressing organized crime. Unfortunately, there will always be those who will deliberately violate any law to make a profit and we must do our best to put them out of business. I am referring to the average business confronted with a choice to spend a significant amount of money to achieve environmental compliance and ensure the sound disposal of industrial wastes, or to look for ways to put off that

investment or dispose of it cheaply by illegal dumping.

Companies may well delay investments to comply with environmental standards if there is a perception that they would face only small consequences if they were ever to face a government action against them for failure to comply with law. Moreover, they may be competing against businesses that confront the same incentives, and which may not be as inclined to comply with the law, further reducing a company's incentive to spend on compliance, absent an expectation of consistent and fair enforcement of the law.

I'll cite seven developments in the United States which were among those that led to long term investment in environmental compliance becoming a rational choice for corporate managers:

(1) When the national environmental laws were reauthorized in the U.S. in the 1980s, Congress changed what had been misdemeanor offenses for certain violations and established felony crimes for knowing violations, providing for up to five years imprisonment for each such violation. In addition to greater punishment and therefore greater deterrence, this also improved the prospects for environmental enforcement in the criminal justice institutions. Prosecutors became more interested and devoted more resources to felony prosecutions than misdemeanors and judges took them more seriously in scheduling court time and other judicial resources. Congress also established "Knowing Endangerment" offences for endangering another person by knowingly violating certain environmental laws, and provided for up to 15 years of imprisonment for such offences.

(2) Sentencing Guidelines were promulgated which limited the discretion of courts in sentencing environmental defendants, and made it clear that even for a first offense, if there was a knowing violation of most federal environmental laws, violators would be imprisoned.

(3) Capacity Building for Environmental Enforcement. In 1990, Congress passed the Pollution Prosecution Act, mandating EPA to deploy 200 specially trained criminal investigators of environmental law with full law enforcement powers to supplement state and local efforts to enforce environmental laws. Congress also created the National Enforcement Training Institute dedicated to training state, local, and federal law enforcement personnel in the safe and effective enforcement of

environmental laws.

(4) Listing and Debarment. Federal law provided that corporations that are convicted of certain environmental offenses are prohibited from government contracts and they may be debarred for other environmental violations as well.

(5) Superfund Liability. The law known as Superfund in the U.S. with its joint and several civil liability for cleaning up toxic waste sites provided economic incentives for minimizing pollution and disposing of waste soundly in the first place. It came to establish that any business that dumped a hazardous waste in what became a superfund site could be financially liable for cleaning up that entire site.

(6) Financial liability. As the liability imposed by the environmental laws, such as Superfund, became established, financial institutions, such as banks and insurers, came to insist upon environmental assessments and cleanups before real estate transactions or insurance policies could be entered into. Accordingly, potential environmental liabilities became a factor for investment purposes as well.

(7) Toxic Release Inventory and the Community Right to Know. Federal law mandated that polluters must publish a list of the pollutants and quantities they release annually and ensured the public of information about industrial facilities.

Taken together, these developments and others provided the legal framework and economic incentives for managing waste and other dangerous substances in safer and more environmentally sound methods. This system of regulation operates to internalize the long term costs of these pollutants and creates incentives for reducing waste and for preventing pollution in the first place. In the United States, with credible enforcement as a basis, these laws have made a difference in improving the environment.

Cooperative Law Enforcement Approaches to Environmental Crime

Experience in investigating and prosecuting environmental crimes has demonstrated that cooperative approaches are essential in confronting the law enforcement challenges associated with the nature of pollution which, once released to the environment, respects no borders and defies traditional law enforcement jurisdictions. With this in mind, it is important to promote structures for extensive cooperation

between federal, state, local and international law enforcement authorities.

States, local police, and other federal law enforcement agencies have become essential partners with EPA in environmental criminal enforcement. EPA's criminal investigators, moreover, regularly join task forces composed of specialized federal, state, and local law enforcement agencies to pool resources and intelligence and conduct multi-jurisdictional investigations such as those to address the illegal smuggling of CFCs into the U.S. or focused upon an industrial sector or geographic area, sometimes both, as with the petro-chemical industry along the Houston Ship Channel.

ENVIRONMENTAL LAW ENFORCEMENT AND HOMELAND SECURITY

Among the more chilling stories to emerge after September 11, 2001, is that of Danny Whitener, a Tennessee salvage-car dealer. According to Whitener, a man calling himself "Mo" landed his small plane at Copperhill airport in March 2001 and began asking questions about a nearby chemical plant. As Whitener recounted to the FBI and the press, the stranger wanted to know "What kind of chemicals are in those massive storage tanks?" Whitener informed the pilot he thought the tanks were empty but he was in fact wrong. The tanks actually contained as much as 250 tons of sulfur dioxide, an amount that if released would be sufficient to harm as many as 60,000 people, according to worst-case estimates developed by the plant. Whitener and at least two other witnesses believe the stranger in Tennessee that day was none other than Mohamed Atta, a key suspect in the strike that felled the World Trade Center.

The terrorist attacks of September 11, subsequent anthrax attacks, and the prospect of terrorist groups using chemical, biological, and nuclear weapons has altered the calculus of risk that underpins much of environmental law and brought a mandate for greater security. Risks that seemed too remote or isolated to be addressed in a serious and comprehensive way by most governments, corporations, or individuals last year now are now all too real. The priorities of environmental protection and security efforts have shifted accordingly to reflect this sea change in risk analysis on national, international, and local levels.

For example, in the aftermath of September 11, the President created the Homeland Security Office. Federal legislation such as "The Chemical Security Act of 2001"

was introduced in the Senate (S.1602). State anti-terrorism legislation was introduced placing new restrictions on hazardous materials transportation. Facilities with large amounts of hazardous chemicals stepped up security efforts and minimized the amounts of the most hazardous substances kept on site. The District of Columbia's Blue Plains Waste Water Treatment Plant, just a few miles from the Capitol, quietly at night under guard, removed 900 tons of liquid chlorine and sulfur dioxide. Within days they accelerated a program to use less toxic chemicals like bleach instead of chlorine gas for wastewater treatment.

Of course, efforts to protect society from threats in the wake of great human loss and suffering are nothing new. Indeed, security is defined in every generation by identifying the greatest risks to human life, including threats to the environment, and by implementing measures to eliminate or minimize those risks. Freedom from risk, the first definition of security in many dictionaries, is the aspiration of much of the law itself, and has particular relevance to the development of criminal and environmental laws.

Early environmental laws resorted to the most severe sanctions of the criminal law to protect human life and health from water contamination, waste, and airborne pollution.
Following the major plagues of the 12th century, in 1372 Edward the Third of England proclaimed that "throwing rushes, dung, refuse and other filth and harmful things
into the [Thames] shall no longer be allowed". In 1388, an act of Parliament "forbade the throwing of filth and garbage into the waters." Even earlier, in 1306, King Edward the Second of England had prohibited the burning of coal on pain of death when Parliament was in session. In more recent times, nations have continued to employ the deterrence of the ultimate criminal penalty to help assure the security of resources and prevent threats to human health and the environment. In the mid 1990s, both Egypt and the People's Republic of China adopted death penalties for water pollution crimes and the illegal disposal of hazardous wastes.

In the international context, over the last decade, concepts of environmental security have emerged in broad terms to address global and regional environmental changes, particularly impacts from human activity that pose threats to national security and resources. In the wake of September 11, international efforts at environmental security must be sharpened and redefined to include a focus on immediate risks from

biological, chemical, and nuclear materials, and those individuals and groups who would use them as weapons of mass destruction and terror. Addressing these risks in an era of global commerce and freer and faster trade, requires better international frameworks for systematic integration of information among law enforcement agencies, customs services, environmental regulatory agencies, trade agencies, and intelligence sources. Nations must improve their capabilities to share and analyze such data across borders, using new information technologies, to detect shipments of chemical, biological, or nuclear agents that may be precursor to acts of terrorism or environmental crime.

Within the United States, the environmental laws themselves were designed to address risks to human health and the environment posed by a complex industrial society, which became all too apparent by the 1960s. It is worth noting that many federal environmental laws, and the capacity to enforce them, were developed in response to industrial risks that became tragically manifest with the death of thousands in Bhopal, India and other serious incidents in the United States. Every environmental law reflects a calculus of risk and constructs compliance requirements designed to reduce the risks and minimize the impacts of pollution over time. In recent years, every proposed regulation engenders a debate as to whether it is reasonable and proportionate to the risk it addresses, and how that risk compares to others we accept as a society.

The events of September have changed the terms of those debates, imposing security as a paramount value in environmental law, regulation, and for environmental management systems. New legislation has been introduced on every level of government that would superimpose new security measures on the construct of existing environmental laws. The imperative to implement environmental security measures for critical infrastructure will provide a new lens in considering 'next generation' environmental legislation, with an emphasis on facilitating the widespread deployment of more strategic and efficient approaches to minimizing environmental risks.

Even with advances in environmental management over the last decade, few facilities have integrated security monitoring and defenses into their Environmental Management System (EMS), or adequately addressed risks of sabotage from outside or inside the facility. Conversely, despite advances in technologies for security systems, often a very separate operation from environmental management at facilities,

very few adequately address threats from chemical or biological agents. In recent years, certain sensitive facilities have deployed environmental managements systems with integrated approaches to information management and security monitoring, using new technologies. The search for safety from a newly apparent array of threats, at home and from abroad, has created new incentives for sustainable and secure environmental management practices, as well as a new urgency in defining and implementing environmental security for our time.

Towards a National Environmental Security Policy With an Integrated International Law Enforcement Response

Over the last decade, as the concept of environmental security evolved from a minor point to a significant element of United States national security policy, the capacity of the various agencies required to work together to implement these policies lagged behind. In October 1998, the White House published a 'National Security Strategy for a New Century'. Under its environmental initiatives, it described threats to environmental security this way: "Decisions today regarding the environment and natural resources can affect our security for generations. Environmental threats do not heed national borders and can pose long-term dangers to our security and well-being. Natural resource scarcities can trigger and exacerbate conflict. Environmental threats such as climate change, ozone depletion, and the transnational movement of hazardous chemicals and waste directly threaten the health of U.S. citizens."

While the late 1990s witnessed a proliferation of such "policy initiatives", rarely was there a mechanism for implementing these policies across the different agencies with overlapping jurisdiction for international traffic in hazardous substances, much less resources to follow through in a serious way. Many of the environmental initiatives themselves consisted largely of urging ratification of various conventions, United Nations agreements, and calling for "increased cooperation in fighting trans-boundary environmental crime." This latter point reflected a growing recognition that the treaties themselves had little or no impact on actual environmental security unless the Multi-lateral Environmental Agreements (MEAs) were adequately implemented in law, and unless there was a capacity to enforce these laws across national borders. As the United Kingdom's Secretary of State for the Environment John Gummer put it: " These Conventions are worthless words on paper, unless their provisions are enforced in practice."

At about the same time, several multi-agency, multi-national enforcement initiatives emerged to bring together the data from environmental agencies with law enforcement agencies charged with international investigations in order to detect violations of international environmental agreements. An examination of these operations provides a model for the broader and more systematic approaches of information and law enforcement integration required for homeland security from chemical, biological and other threats that cross national borders.

The 1990s Black Market in Ozone Depleting Chemicals: Lessons for Law Enforcement in Detecting Illegal Shipments of Chemicals in International Commerce

After the United States implemented the phase out of CFCs under amendments to the Clean Air Act in the early 90s, and consumers were required to pay more for the alternative chemicals and for retrofitting their air conditioning and refrigeration equipment, a black market emerged for smuggling these prohibited CFCs into the United States from countries that were still permitted to manufacture and use them, such as Mexico, Russia, and China. Once in the United States, these illegal CFCs were virtually indistinguishable from the existing stockpiles that were permitted until they were depleted. In 1995, someone could purchase a container of refrigerant in Mexico for two dollars, and sell it in Texas for twenty dollars. This was more profitable than trafficking in cocaine.

In fact, illegal trafficking in ODS was second only to narcotic trafficking for periods in the 1990s. After United States Customs Service, EPA, IRS, the Department of Justice and other agencies began working together to identify illegal shipments, thousands of tons of CFCs were seized in U.S ports in Miami, New Jersey, California, originating in places like Russia, China, and India. Major U.S. chemical companies assisted in the effort to identify illegal shipments of ODS, which were shipped in containers that were identical to legal imports of compressed gasses by providing information, machines, and pressure gauges which could be used to distinguish prohibited forms of ODS that were labeled as permitted forms of these gases. The chemical industry cooperated with law enforcement in this way, in part, because the it had spent hundreds of millions of dollars in developing the alternatives to CFCs, and that market was being crippled by the illegal imports.

The multi-agency initiative involved bringing together Customs agents with their automated customs and trade data, EPA agents and data from EPA's Office of Air and Radiation regarding the notification and controls of lawful shipments of ODS under the Montreal Protocol, IRS agents and their tax information on such shipments and receiving facilities, the FBI, and United States Attorneys as well as prosecutors from DOJ's Environmental Crime Section, who played a coordinating role. Ultimately, this initiative involved foreign governments and international organizations such as the World Bank, with its data on the allowable production of ODS by facilities around the world. Dozens of prosecutions, hundreds of years of imprisonment, and hundreds of millions of dollars in fines resulted from this coordinated effort that became known as the National CFC Initiative.

The CFC initiative identified the type of compliance information, trade data, and various law enforcement information that needs to be brought together in a systematic way to detect illegal shipments of chemical, explosives, and other goods in international commerce that may be precursor to acts of terrorism, or forms of international environmental crimes that threaten environmental and national security. It also demonstrated the type of public and private partnerships necessary to detect illegal traffic that can be easily disguised as lawful commerce in chemicals or biological substances.

Towards Broader Application of these Lessons and New Technologies for International Environmental Security

By the late 1990s, the successful prosecution of smugglers of CFCs into the United States was recognized internationally as a model for how law enforcement agencies, regulators, and international organizations could work together to enforce national laws which implemented international environmental agreements. It was also acknowledged, however, that the success of the CFC Initiative was the exception not the rule. Very few countries had the capacity to detect violations of these laws at all. Even in the U.S., it is unknown how many CFCs got through for every illegal shipment detected, and the ability of Customs to detect other violations of environmental laws varies greatly from port to port around the country.

Senior policy makers around the world recognized the need for better mechanisms for sharing data within and among nations as a prerequisite for meaningful enforcement of laws governing international commerce in regulated substances. At the G8

Summit Meeting in Birmingham, England in 1998, the Heads of State of the G8 Nations committed to greater cooperation among their nations and the developing world to address threats to national security posed by international environmental crime, estimated at that time to exceed 5 billion dollars a year in illegal trafficking in chemicals, hazardous wastes, and other regulated substances.

Pursuant to the Heads of State direction at the Birmingham Summit, in 1999 the G8 Nations' Lyon Group of Senior Experts in Transnational Organized Crime initiated a law enforcement project on international environmental crime. This project was launched to improve information exchange, data analysis, and cooperation among law enforcement agencies, international organizations such as INTERPOL, the World Customs Organization, and the Secretariats of the MEAs, as well as environmental and trade regulators. The G8 Project was asked to develop collaborative mechanisms to detect violations of international environmental laws, and the organized crime and terrorist groups associated with them.

In meetings at the U.S. Embassy in Rome and the Consulate in Naples, participants of the G8 Nations' Project began to collaborate in the use of new technologies, as well as information and intelligence exchange to detect international environmental crime.
Specifically, they agreed to adopt tools such as the Internet based communication system established between the ports of Rotterdam and Hong Kong which transmits pictures of suspect containers with their ID numbers to the receiving port. They also agreed to collaborate in the use of satellites to detect evidence of illegal dumping by ships at sea, as well as dumping and deforestation on the land.

Perhaps most relevant to broader application for environmental security efforts was the G8 Project's agreement to pursue link analysis of compliance data and other information across nations, and the various regulatory and law enforcement agencies in those nations, to detect shipments that violate environmental or other laws administered by regulatory agencies. The U.S. EPA's Center for Strategic Environmental Enforcement designed an international environmental crime and intelligence system to provide the U.S. and participating nations' law enforcement agencies access to compliance data and law enforcement information over secure Internet connections regarding a specific shipment or exporter, importer, receiving facility, or other entity or individual involved in a suspect shipment. Using link analysis,

this information may be compared with commercial data bases that track trade in international commerce and other publicly available data to stop these shipments before they clear Customs.

Also, certain Customs and trade data may be compared with EPA regulatory data governing the import or export of regulated chemicals or wastes in a proactive and systematic way to identify noncompliant or suspicious shipments in the first place. This approach was successfully deployed to detect illegal shipments of ozone depleting chemicals between Canada and the United States and other shipments originating in China and Russia. Bringing together such information on a broader scale and in real time is one key to enhancing national security from illegal import of hazardous substances, and identifying the organized criminal groups and terrorist who are behind some of these shipments.

Challenges for Homeland Security-- With Dozens of Relevant Federal Agencies and over Ten Thousand State and Local Law Enforcement Agencies, as a Nation "We don't know what we know" about threats to security.

On Tuesday, December 11th, 2001, testimony before the Senate Judiciary Committee considering anti-terrorism legislation aimed at better sharing of information between federal, state, and local authorities provided a compelling illustration of how better integration of such information is critical to security efforts. Baltimore Mayor Martin O'Malley testified about a Maryland state trooper pulling over one of the hijackers of the jetliner that was crashed into the pentagon just days before September 11. O'Malley testified that the trooper had no way of knowing that the man was an international terrorist, even though the federal government had him on a watch list.

O'Malley told the Committee, "the CIA had him on a watch list, the FBI didn't, and no information was shared with state or local law enforcement. The state trooper who pulled this driver over would have known he was wanted if he had an outstanding speeding ticket in the State of Maryland, he would have known if his insurance was expired, but he had no way of knowing that he had just pulled over an international terrorist."

It is only over the last decade that technology has enabled law local law enforcement to identify drivers that have outstanding tickets, warrants, and matters pending in

other jurisdictions, using computers. In order to improve security nationally, there needs to be greater integration with appropriate information on the federal level, and internationally between relevant agencies, so that the law enforcement agency in the best position to stop a threat knows what is already known by the government on some level.

The challenges of coordinating different law enforcement agencies and integrating information among them have long been recognized, but difficult to surmount absent a task force approach in a high priority case or initiative, or a galvanizing event such as September 11. In May 2000, the President's Interagency Commission on Crime and Security in U.S. Seaports published its report, urging throughout greater coordination of all federal, state, and local law enforcement agencies with significant regulatory and enforcement missions. Just on the federal level, for detecting illegal imports that threaten security, these agencies include Customs, Immigration, the Food and Drug Administration, the Environmental Protection Agency, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the FBI, the Coast Guard, and the Departments of Agriculture, Commerce, and Labor, and aspects of the intelligence community. The report's first recommendation was to strengthen interagency, intergovernmental, and public/private sector efforts to address the threats of seaport crime (including terrorism), and to enhance control of imports and exports.

While this report focused on crime and security at the 361 public seaports themselves, these ports are among the most vulnerable components of the international and inter-modal trade system. With the billions of tons of cargo coming through these ports every year, and the smuggling of contraband and illegal aliens that may be connected to terrorism, the report's finding that the state of security in U.S. seaports generally ranges from poor to fair is not comforting.

Among the reasons for vulnerabilities at ports is the exponential growth of trade over the last twenty years, the nature of modern container shipments, and the failure of inspection and control resources and technologies to keep pace. Economic globalization has compressed reaction time for law enforcement and has blurred national borders. Most import crimes go undetected at ports because less than two percent of cargo is inspected. This includes illegal transport of pre-cursor chemicals, hazardous materials, drugs, munitions, and potential weapons of mass destruction. Less than one per cent of export cargo is inspected.

Complicating efforts at homeland security from illegal imports further, the 'stove-piping' of traditional law enforcement agencies presents obstacles to working together and sharing data to combat newer crimes that cut across law enforcement jurisdictions and involve regulatory agencies. With different law enforcement agencies, regulatory agencies, all with their disparate data collection and dissemination systems designed for their administrative functions, there is too little integration across these functions to allow for a central assessment of illegal imports that may pose threats to national security. Meanwhile, international criminal and terrorist threats change constantly and adapt to law enforcement capabilities. In an era when organized crime and terrorists use advanced communications around the world, national law enforcement agencies can no longer afford "not to know what we know".

While reports like the Seaport Crime and Security study have identified these issues in recent years, little has been done to implement recommendations from these reports in a serious and comprehensive way across the government agencies. Indeed, agencies spread thin to cover their core functions are often reluctant to devote their resources to an inter-agency process. They are particularly reluctant where other agencies have overlapping jurisdiction and when an investment in new information technologies may be required. Even with the current mandate, resources that are likely to be appropriated, and a new focus on asymmetrical threats to national security from terrorists, it presents many challenges to existing institutional structures to bring the right information together in the right way and in time to detect threats before it is too late.

It is clear, however, that technology that is widely used in the private sector and for military purposes is available to bring together relevant information across agencies and nations through link analysis and other measures to enable law enforcement authorities to better determine threats as they cross national borders. It is imperative that agencies and international organizations that have designed and are administering regulatory processes, or are developing new ones, structure them in such a way to take full advantage of these technologies, particularly electronic reporting, and design them to be compatible with other agencies information systems, particularly Customs automated data systems.

Some government agencies have been slow to move forward with electronic reporting and record keeping, which is the only way to facilitate comparison with Customs

data, and other agencies law enforcement information in a timeframe consistent with detecting illegal imports before it is too late. Efforts to move forward with bar coded electronic manifests and with rendering as much compliance data in secure and harmonized electronic form as soon as possible can only improve the ability of law enforcement to detect and track illegal shipments and other violation of international agreements. If trucking and shipping lines can track their cargo using Global Information Systems, and grocery stores can track their inventory using bar codes and electronic systems, shouldn't governments be in a position to use these same technologies to detect and track shipments that pose threats to national security?

While the National CFC Initiative, the G8 Nations' Project on Environmental Crime, and other international task forces provide models for how agencies can bring together this information and use these new technologies, in order for these approaches to be effective on a broader scale, building blocks have to be in place to facilitate the sort of communication required, not just between federal agencies, but between trading partners as well. New international agreements designed to provide international environmental security from the most harmful chemicals and other risks need to keep up with the pace and methods of automated trade, and with the methods of those who would violate these agreements to make illicit profits or commit acts of terror.

Structuring International Environmental and Trade Agreements to Take Advantage of Integrated Communications and Deliver More of the Security They Promise.

Unless law enforcement agencies at the border have systematic real time access to regulatory information to determine whether a shipment complies with regulatory requirements, nations cannot realistically expect to achieve widespread compliance with international agreements designed to control the trade in hazardous substances, including those that may be used as weapons of mass destruction. Yet, many international agreements, such as the Basel Convention on the Control of Trans-boundary Movement of Hazardous Wastes and their Disposal, still rely on the environmental agency from the exporting nation faxing notification and consent forms to the environmental agency of the importing nation, with no direct connection to customs agencies and their largely automated data systems for tracking trade. Moreover, the regulatory classification systems for hazardous wastes bore little

resemblance to the tariff codes and other nomenclature used by customs services to track goods in international commerce. These are among the obstacles that have made certain international agreements notoriously difficult to enforce.

New environmental agreements, and revisions to existing ones, must facilitate the exchange of compatible data between regulatory agencies and customs services, using electronic reporting harmonized with the automated data processes governing international trade and customs' clearance processes. Negotiators of recent agreements have considered the problems of detecting illegal traffic, but whether nations implement measures enabling them to detect violations in the real world of international trade remains to be seen.

For example, leading up to the agreements last year on Persistent Organic Pollutants (POPs) and Prior Informed Consent (PIC), parties at preparatory meetings considered recommendations for detecting and preventing illegal traffic in these chemicals, based upon the experience of those with experience in enforcing the import and export laws governing hazardous wastes and ozone depleting substances. In October 2000, at the meeting of the Intergovernmental Forum on Chemical Safety in Salvador, Brazil, the final report accepted several proposals aimed at the prevention of illegal international traffic in toxic and dangerous products, including urging mechanisms the integration of compliance information, with customs data, and law enforcement intelligence. While the POPs Convention adopted language on compliance and enforcement, unless nations implement administrative notification and consent regimes using electronic reporting with real time connection to customs trade data and inspection and control functions, an opportunity will be lost to use the best available technologies to provide a greater measure of international environmental security.

Other avenues for pursuing the type of data integration required to better assure compliance with international environmental agreements include the trade agreements, and the Customs agreements that implement technical exchange of information between nations. While trade agreements have become increasingly sophisticated in their use of technologies, and Customs electronic data systems have facilitated faster trade with expedited clearance processes, they do not have adequate interface with environmental regulatory information under the statutes that implement most environmental agreements. With increased international trade and relatively fewer opportunities for meaningful inspection, it is all the more important that the framework for data exchange imbedded in trade agreements, such as the Free Trade

Agreement of the Americas, facilitate a link with the environmental compliance data necessary to determine whether a shipment is legal, or may pose a threat.

The World Customs Organization and governments have supported such measures as a matter of policy. When it comes time to negotiate the actual trade and technical agreements themselves, however, integration with environmental agencies' compliance data has not been a priority or received much in the way of resources from Customs or from the environmental agencies themselves. While harmonizing waste, chemical, and pesticide definitions and codes under environmental laws with corresponding Customs' nomenclature for categories of goods in commerce may require additional attention and resources, without such harmonization, there is no effective way to detect suspect shipments on a broad enough scale to minimize the risks illegal shipments currently pose, with trade predicted to triple by 2020.

New Urgency for Industry and Facilities to Adopt Environmentally Sound and Secure Management Practices

Just as better integration and management of data from different sources is a key to improving national and international efforts to enhance security, these same fundamentals apply to achieving greater environmental security for industry, critical infrastructure, and specific facilities in the U.S. As Frederick Webber, President of the American Chemistry Council, testified before the Senate on November 14, 2001 on the proposed Chemical security Act of 2001, "Knowledge is security. The cornerstone of effective security is intelligence about potential threats that allows the threat to be intercepted and allows the target of the threat to be properly prepared. In fact, knowledge is our best defense. Our industry believes it is critically important to establish formal procedures for circulating information about potential, and, importantly, credible and specific threats to the nation's critical infrastructure. At the same time, such a system can provide government decision makers with the full range of information on which to make their decisions.

"After September 11, everyone began to revisit potential threat scenarios. Our estimations of the probability of a worst-case scenario have changed, and we are moving rapidly to prepare for these new potential threats. Our preparations are most effective when we have high quality and timely intelligence regarding such threats. Our industry is moving aggressively to establish better information sharing

mechanisms with federal, state, and local officials. More can be done in this area, especially with the Office of Homeland Security."

The potential infiltration or sabotage of a large chemical facility or a petroleum refinery raises a host of other frightening scenarios. According to the U.S. Environmental Protection Agency, more than 123 plants each maintain amounts of toxic chemicals that if, if released, could endanger more than 1 million people. The submittals of firms under the Clean Air Act Risk Management Program Rule describe a host of evils that could occur in the event of an explosion or significant toxic chemical release. Recognizing these risks and the need for even stricter discipline in the wake of 9/11, the American Chemistry Council, the American Petroleum Institute, the Fertilizer Institute, and other industry groups have urged member companies to undertake a range of actions to increase security. Even they concede, however, that more can and should be done to enhance security still further.

New Jersey, the nation's most densely populated state with a large number of facilities with highly hazardous chemicals, has implemented programs that go well beyond the federal requirements under the Clean Air Act.. In 1986, shortly after the tragic release in Bhopal, India, the New Jersey Legislature passed the Toxic Catastrophe Prevention Act (TCPA). As New Jersey Environmental Commissioner, Robert C. Shinn testified before the Senate in November, 2001, "Over the course of nearly two decades, we have built a coordinated, effective program that not only works to prevent releases of hazardous chemicals but also provides us with the information and infrastructure so that we can be ready at a moment's notice to respond if a release of a hazardous substance does happen. In this way, any releases that occur, whether they are accidental or intentional, can be contained and the impacts minimized."

The New Jersey programs place a greater emphasis on risk analysis, prevention and preparedness than the federal scheme. As Commissioner Shin went on to testify: "...our law requires facilities to perform comprehensive reviews and risk assessments of all possible release scenarios that may cause off-site impacts. Presently, federal regulation only requires facilities to perform analysis of worse case scenarios and one alternative case scenario. Furthermore, in New Jersey, we require that facilities quantitatively assess and characterize risk, going a step beyond any other process safety management and risk management program regulations in the

U.S. This means that the potential releases and resultant off-site impacts must be quantified."

Since September 11, many facilities have reviewed both their security and environmental management practices to create greater defenses. In October, the American Chemistry Council published Site Security Guidelines for the Chemical Industry. Measures to enhance security have included the following: centralizing receiving operations; increasing surveillance and the number of security guards; enhancing access control measures; moving rail tank cars within the fence-line; permitting employee vehicles only on facility premises. The security guidelines themselves are available at www.americanchemistry.com.

Environmental Management, Information Systems, and Security

While many facilities are just now reassessing crisis management, response, and evacuation plans and reviewing their environmental management approaches, other companies have been minimizing the risks and liabilities of their operations by implementing strategic approaches to environmental management over the last decade. The elements of these environmental management systems designed to assure compliance with law, minimize or eliminate the use of the most hazardous substances and wastes, reduce emissions and releases, and improve process efficiencies are important from a security perspective as well.

In recent years, as part of their environmental and information management systems, some facilities have deployed innovative technologies, electronic commerce techniques, remote sensing, and integrated monitoring for compliance and security over secure internet based systems. In addition to achieving new levels of environmental security, such facilities in the public and private sectors have realized efficiencies that have saved costs and natural resources. These facilities have come to rely on Environmental Management Information Systems that allow for real-time monitoring and integration of many different systems over the internet.

For example, NASA's White Sands Test Facility developed a facility wide electronic monitoring and reporting system. Under an XL Agreement with the State of New Mexico and U.S. EPA, the facility can send its electronic report to the State in electronic form, saving thousands of dollars every reporting cycle. At the same time, electronic reporting and central monitoring within the facility has made that

information more readily available to managers, as well as state and federal officials. The White Sands facility is moving towards web site and internet posting of its environmental compliance monitoring reports, including using three dimensional, digital mapping of the facility, its sources, and releases. Having real time access to this information provides a greater level of security monitoring in and of itself, as well as facilitating greater access and quicker notice of compliance and or other problems that may pose a risk to the facility or community at large.

Certain military bases have also moved to sophisticated environmental management information systems. In addition to monitoring for environmental compliance, these systems also monitor for minute amounts of biological and chemical agents upstream of the facility, monitor for meteorological conditions, releases from off the site, and other parameters that are important from a security perspective, using remote and wireless devices, accessible from the secure web based control center. In the last year, one of these facilities saved 400,000 gallons of water a day due to the efficiencies realized by moving to this system. Another facility, by moving to electronic commerce and just in time delivery of the most toxic chemicals, was able to eliminate an on-site warehouse where these chemicals were stored, and avoid having to submit a RCRA Subpart B permit at all because they remained under the regulatory threshold.

Thus, some of the same techniques that leading companies have come to deploy for sound environmental management purposes may be brought to bear at facilities to achieve new levels of security and efficiency as part of an Environmental Management and Security System (EMSS). Accordingly, facilities looking to minimize their risks from acts of terrorism and other threats need to evaluate both their traditional security operations and their environmental management practices. A security audit, terrorism threat assessment, and environmental management gap analysis may reveal vulnerabilities that may be addressed through various commonsense measures. Advances in communication technologies and remote sensing over the last decade offer new ways to monitor and integrate information relevant to detecting a greater array of risks than ever before. These tools put managers in position to know what is happening, respond quicker, and minimize consequences from risks that materialize.

JOINT STATEMENT OF THE UNITED STATES DEPARTMENT OF JUSTICE AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY PRESENTED BY ASSISTANT ATTORNEY GENERAL THOMAS L. SANSONETTI BEFORE THE UNITED STATES SENATE COMMITTEE OF THE JUDICIARY SUBCOMMITTEE ON CRIME AND DRUGS

July 30, 2002

Chairman Biden, Senator Grassley, and Members of the Subcommittee, I am pleased to be here today to discuss the Department of Justice's environmental crimes program. Attorney General Ashcroft has identified protection of our natural resources through strong enforcement of environmental law as a top priority for the Department of Justice, and our environmental crimes program is a crucial part of our enforcement efforts.

In my testimony today, I will provide the Subcommittee with a picture of how environmental criminal prosecutions fit into the larger picture of enforcement of the environmental laws. Virtually all of the major environmental statutes such as the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act authorize civil and administrative enforcement as well as criminal enforcement for violations of their provisions, and I will discuss the types of factors we take into consideration in determining whether a violation should be pursued civilly or criminally, including examples of recent criminal cases.

I will then explain who is involved in federal environmental criminal enforcement efforts, with a focus on the work of the Environmental Crimes Section (ECS) within my Division and the United States Environmental Protection Agency's (EPA's) Office of Criminal Enforcement, Forensics, and Training (OCEFT). ECS has 28 attorneys devoted full-time to criminal

enforcement. To leverage the tremendous expertise of these prosecutors and to enhance our enforcement efforts, we have forged partnerships with U.S. Attorneys' Offices, EPA, the Federal Bureau of Investigation (FBI), and other federal, state and local agencies across the nation. Through Law Enforcement Coordinating Committees and environmental task forces developed in U.S. Attorneys' Offices across the country, we have increased cooperation among local, state, and federal environmental enforcement offices.

Finally, I will discuss some of the enforcement initiatives that ECS, working with the U.S. Attorneys' Offices, FBI, EPA, and other federal, state, and local investigative agencies, have developed. These initiatives address problems as diverse as vessels polluting our oceans, environmental testing laboratories engaging in systematic fraud, and smuggling of chlorofluorocarbons (CFCs) that destroy the protective ozone layer in our atmosphere.

THE BIG PICTURE OF ENVIRONMENTAL ENFORCEMENT

Firm and fair enforcement of the laws is an important component of environmental protection. It helps ensure that (1) our citizens can breathe clean air, drink pure water, and enjoy our Nation's natural resources; (2) law-abiding businesses have a level economic playing field on which to compete; and (3) those who fail to comply with the law know they will be penalized and will as a result be deterred from non-compliance.

As I have already mentioned, virtually all of the major environmental statutes have provisions authorizing civil and administrative enforcement for violations of statutory and regulatory requirements. These environmental statutes also have criminal provisions for knowing violations of those same statutory and regulatory requirements. Some environmental statutes, including the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26, and the Hazardous

Materials Transportation Act, 49 U.S.C. §§ 5101-5127, also require that the criminal violations be willful, that is, that the violations be committed with an intent to do something that the law forbids, while the Clean Water Act, 33 U.S.C. § 1319, has misdemeanor provisions making it a crime to negligently violate the statute.

The vast majority of environmental violations are addressed and resolved administratively by state and local governments. At the federal level, administrative enforcement is done by agencies, primarily EPA.

Civil judicial cases constitute the next largest category of environmental enforcement matters. The major federal environmental laws such as the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act provide for EPA authorization of State environmental programs. Accordingly, the States handle many civil enforcement actions under those laws. However, the Department of Justice also plays a significant role in this area. My Division's Environmental Enforcement Section brings civil enforcement cases that seek to control and/or prevent pollution of our air and water and to obtain cleanup of hazardous waste sites across the country, with a focus on multi-state and large, resource-intensive cases. In the hazardous waste area, cases are brought under the Superfund statute for the purpose of protecting the public health and ensuring that the parties responsible for contamination, rather than the public, bear the burden of paying for the cleanup of the sites.

Although the threat of civil and administrative sanctions are sufficient in most cases to deter potential violators of the environmental laws, there will always be those who see a civil or administrative penalty as little more than a cost of doing business. For those individuals and corporations, civil and administrative sanctions are not enough to secure the protection of public

health and the environment. As a result, a vigorous criminal enforcement program is an essential component in environmental enforcement.

In my Division, it is the Environmental Crimes Section that is primarily responsible for prosecuting individuals and corporations that have violated the major environmental laws. (The Division's Wildlife and Marine Resources Section is responsible for our efforts to crack down on international wildlife smuggling, which constitutes a major worldwide black market.) As I will discuss in greater detail later in my testimony, ECS works closely with criminal investigators for the EPA, the FBI, the Coast Guard, the Department of Transportation Inspector General's Office, and the Defense Criminal Investigative Services, among others.

WHAT MAKES A VIOLATION OF THE ENVIRONMENTAL LAWS CRIMINAL

In deciding whether to bring a criminal prosecution in an environmental case, we look carefully at the facts and the law in each case. Among other factors, we consider the sufficiency of the evidence to establish violations, the seriousness or risk of environmental harm and the public health impacts, the nature of the acts (i.e. were there deliberate acts of pollution or blatant failures to obtain permits or meet core regulatory requirements), the violator's compliance history (e.g. were there repeat violations?), and whether the conduct involved deception or false statements. To give you a flavor of what this means in practice, I will discuss some recent examples of prosecutions that we have brought.

An example of deliberate conduct that endangered the health of workers and our communities is United States v. Elias, in which my Division worked closely with the U.S. Attorney's Office in Idaho to prosecute Allan Elias, a Wharton-educated businessman, for criminal violations of the Resource Conservation Recovery Act (or "RCRA."). Elias, who

owned a fertilizer manufacturing facility in Soda Springs, Idaho, ordered his employees to clean sludge from the bottom of a 25,000 gallon tank containing sodium cyanide, and the workers were given no safety equipment. One of his workers was overcome by cyanide gas and now has serious brain damage, which make it difficult for him to accomplish even the simplest physical tasks, such as brushing his teeth.

Elias was convicted of knowingly endangering the health and safety of his employees, illegal hazardous waste storage and disposal activities, illegal disposal of hazardous waste, and making false statements to federal inspectors in an effort to conceal the knowing endangerment of his employees, and was sentenced to seventeen years in prison, the longest sentence ever given in the United States for a federal environmental crime. The court also ordered him to pay $5.9 million in restitution to the worker's family and $400,000 in cleanup costs. Last fall, the Ninth Circuit affirmed the sentence, holding among other things that the federal government's ability to enforce federal laws and penalties both criminally and civilly is not affected in states with authorized RCRA programs. Although we were disappointed by the Court's decision to reverse on the issue of restitution to the immediate victim of Elias' outrageous conduct, we believe that Elias' sentence will deter others from engaging in similar behavior.

Our asbestos prosecutions are another example of our ongoing efforts to protect worker health and safety. For example, at the end of May, we obtained guilty pleas in a Virginia case for asbestos-related violations of the Clean Air Act. The defendants in United States v. David Klein et al. hired homeless people and other workers to remove asbestos insulation from pipes and boilers. These workers were neither told that the material they were removing was asbestos, nor were they provided with any protective equipment adequate to prevent the inhalation of asbestos

fibers during the removal or transportation for disposal of the asbestos-containing insulation, thereby putting their health in jeopardy. The investigation revealed that not only was asbestos improperly disposed of at a municipal landfill, but also at various other locations including a dumpster at a high school, by a restaurant and in a cistern. The individual defendant faces up to five years in prison and a $250,000 fine, while the defendant real estate partnership faces up to five years of probation and a $500,000 fine.

WHO IS INVOLVED IN FEDERAL ENVIRONMENTAL CRIMINAL LAW

As in other areas of law enforcement, the two major categories of participants in the environmental crimes arena are investigators who initially develop the evidence and prosecutors who put the cases together for indictment and trial. The investigators in our cases are typically agents from the EPA's Criminal Investigative Division (EPA-CID) and the FBI, but we have also received substantial support in this area from other federal agencies, including the Department of Transportation, the Coast Guard, the Fish and Wildlife Service, the Army Corps of Engineers, the U.S.Customs Service, the Defense Criminal Investigative Service, the National Oceanographic and Atmospheric Administration, and countless other state and local environmental-protection-related offices and agencies. All of these entities – but particularly the EPA-CID and the FBI – are critical to the success of our criminal enforcement efforts.

On the prosecution side, we in the Division share responsibility with the United States Attorney's Offices around the country for bringing cases. As a general rule, U.S. Attorney's Offices initially decide whether they wish to handle cases referred by investigators. Sometimes they decide to handle a case entirely on their own, while in other cases they prosecute them jointly with attorneys from ECS. In other instances, ECS ends up handling a case in its entirety.

Regardless of which office ends up handling a given case, we cooperate and offer assistance as needed.

In addition to the front-line work of bringing prosecutions, ECS also acts as a resource for the training of, and the dissemination of information to, the FBI, the EPA, U.S. Attorneys' Offices, and state and local investigators and prosecutors. In fact, one of ECS's most important roles has been to provide training to prosecutors, investigators, and regulators on the federal, state and local levels to enhance their interest and effectiveness in the area of environmental criminal enforcement. For example, each year the section puts on a three or four day training course for Assistant U.S. Attorneys, EPA, FBI, and other federal and state agency personnel. ECS attorneys also serve as instructors at the FBI's in-service environmental crimes training course in Quantico, Virginia. Attorneys also have worked closely with the EPA in providing training to federal, state, and local agents at the Federal Law Enforcement Training Center in Glynco, Georgia.

ECS also holds quarterly Environmental Crimes Policy Committee meetings, where a group of approximately 25 experienced Assistant U.S. Attorneys, ECS attorneys, and EPA attorneys meet to discuss policy, legislation, and litigation issues that affect the prosecution of environmental crimes. The Committee provides the Division and the Department with the perspectives gained by those most experienced in the day-to-day investigation and prosecution of environmental criminal cases.

EPA's Criminal Enforcement Program

The mission of EPA's Office of Criminal Enforcement, Forensics, and Training (OCEFT) is to establish and oversee implementation of the agency's strategy for investigation of federal

environmental crimes. OCEFT's primary investigative unit is CID, which houses the agents who investigate potential crimes under all environmental statutes nationwide. At the end of December 2001, CID had approximately 186 special agents located in 50 duty stations throughout the United States. Like their counterparts in the Secret Service, Customs Service, FBI, and other federal law enforcement agencies, and pursuant to the authority set forth in Title 18, United States Code, Section 3063 (18 U.S.C. § 3063), CID agents are fully-authorized federal law enforcement officers, empowered to execute arrest and search warrants, conduct investigations, and carry firearms. Those agents participate in 93 interagency federal, state, and local environmental crimes task forces organized under the direction of United States Attorneys. Many of CID's cases involve criminal violations of not only federal environmental statutes, but also non-environmental criminal laws, such as mail fraud, smuggling, money laundering, racketeering, and other related crimes. To develop the skills required for this work, CID agents receive extensive training at the Federal Law Enforcement Training Center in Brunswick, Georgia, in basic criminal investigative skills and from the National Environmental Training Institute in the more complex and skills necessary to investigate environmental crimes. OCEFT's National Enforcement Investigations Center provides technical and forensics support.

CRIMINAL ENFORCEMENT TASK FORCES AND INITIATIVES

Two of the most important fruits of the cooperation promoted by ECS are the development of task forces and enforcement initiatives. The formation of an environmental crimes task force, which is typically comprised of representatives of local, state and federal agencies, offers one of the most effective means of investigating and prosecuting environmental violations in a district. Task forces provide two important benefits: (1) the opportunity to gather

and exchange information with others interested in the enforcement of environmental laws in an efficient and systematic manner; and (2) the ability to mobilize quickly the investigative, technical and legal staff and resources of many diverse agencies in the investigation of a serious environmental violation or concern. Formal and informal task forces now exist in approximately half the 94 federal districts in the nation, and have been instrumental in increasing the number and complexity of cases developed in those districts.

While task forces are centered on particular districts, enforcement initiatives are national in character and are focused on a particular category of environmental violation. What follows is a description of some of our current enforcement initiatives.

Vessel Pollution Enforcement Effort

Vessel pollution is a major problem throughout the world. ECS has led the effort, both nationally and internationally, to confront this problem (which includes the dumping of oil, plastics, and hazardous wastes) through the creation of a Vessel Pollution Enforcement Initiative. The Initiative is a concentrated effort to deter pollution from ships into oceans, coastal waters and inland waterways through the vigorous prosecution of intentional and negligent violators. In coordinating this program, ECS works closely with the Coast Guard, the EPA, the FBI and U.S. Attorneys' Offices. One of the critical elements of the Initiative has been the training of key Coast Guard personnel and enforcement personnel from other federal and state agencies that have enforcement authority over vessel pollution. Another fundamental component of the initiative has been a highly coordinated federal approach to the prosecution of serious violations.

In the past year, the work of the Vessel Pollution Initiative has contributed to a number of important prosecutions. For example, this past March, D/S Progress, an oil tanker management

company, pled guilty in Maryland to violations of the Ports and Waterways Safety Act, the Act to Prevent Pollution from Ships, and to conspiracy for its attempts to conceal a hazardous leak in the hull of one of its tankers. Despite the risk that this hazardous condition posed to the safety of the vessel's crew and to other maritime traffic, the company's managers directed that false logs be presented to the Coast Guard in order to disguise the leak and to hide the deliberate acts of oil pollution that resulted from the leak.

Following the events of September 11, 2001, ECS has intensified its coordination with the Coast Guard to ensure that the Coast Guard's environmental enforcement mission is effectively integrated with its expanding mission involving port and coastal security. ECS has made presentations to the Coast Guard's Chiefs of Port Operation regarding the integration of environmental enforcement with the Coast Guard's other critical missions, and has worked with Coast Guard Captains of the Port to integrate environmental protection safeguards into port security plans that are being revised in the wake of September 11.

Chlorofluorocarbon (CFC) Initiative

Over the last five years, smuggling of the refrigerant popularly known as "Freon" has threatened to undermine an international agreement intended to phase out world-wide production and use of the chemicals called chlorofluorocarbons, or CFCs. CFCs endanger human health and the environment by destroying the high-altitude, or stratospheric, ozone layer that shields the Earth from harmful ultraviolet solar radiation. The black market in Freon, used principally in car air conditioners, has been driven by the markup available to smugglers, which is higher than for narcotics.

Nationwide to date, 114 individuals have been convicted in illegal CFC import schemes

and over 56 years of imprisonment and $67 million in fines and restitution have been imposed. We have brought a number of actions prosecuting CFC smugglers. Most recently, Barry Himes, John Mucha and Richard Pelletier pled guilty in March to conspiring to smuggle CFCs into the United States. Under the terms of their plea agreements, Himes agreed to a term of 78 and 97 months in prison, and Mucha and Pelletier agreed to a term of between 70 and 87 months in prison as a consequence of the illegal importation scheme to import over 660 tons of CFCs. Their pleas were accompanied by agreements to civilly forfeit a $2 million mansion on the Connecticut River, and various luxury goods, all of which were purchased from the smuggling proceeds.

Underground Storage Tank Initiative

There are approximately seven hundred thousand Federally regulated underground storage tanks in this country which store petroleum and hazardous substances. Based on State reporting, as many as 25% of the tanks may not be in compliance with UST regulations. Investigators also have reported widespread fraud by environmental contractors cleaning up sites contaminated by leaking USTs. The victims of the frauds range from small gas station owners to large state and federal government facilities. Not only have tank owners and operators been defrauded by unscrupulous contractors, but federal and state trust funds established to help pay for site remediation have been defrauded of millions of dollars, according to criminal investigators. Most important, the unscrupulous contractors involved in these scams are risking the contamination of millions of gallons of groundwater.

The UST Initiative represents an aggressive effort at addressing these problems. One recent success in this area involved the case of a former environmental contractor, James Edward

Adams of Inman, S.C., who pled guilty to charges that he directed employees of his company to fraudulently provide false UST test reports to owners and operators of UST facilities located in South Carolina, North Carolina, Florida, Georgia, Virginia and Tennessee. In January, Adams was sentenced to 27 months in prison and three years of supervisory release for conspiracy to commit mail fraud and related crimes.

Laboratory Fraud Initiative

Laboratories are used to analyze soil, water and other media to determine their chemical composition, to assess whether such chemicals pose human health risks, and to determine whether such media is contaminated and in need of remediation. In light of the role that labs play in the environmental arena, maintenance of the integrity of laboratory sample tests, results, and reports is critical.

Some years ago, the federal law enforcement community became aware of widespread fraud by a growing number of laboratories across the country. As a result, the Lab Fraud Task Force was established to survey the problem of fraudulent laboratory testing and to determine how best to tackle it. Since that time, we obtained pleas from defendants in several cases of lab fraud, including last fall in *United States v. Kaminski, et al.* (D.N.J.), when three executives and one corporation pled guilty in connection an investigation into fraudulent testing of petroleum products, including reformulated gasoline, by Caleb Brett, Inc., a testing laboratory in Linden, New Jersey. We had successfully prosecuted Caleb Brett and six Caleb Brett officials during the previous year.

WILDLIFE SMUGGLING

Before I close, I would like to take a moment to tell the Subcommittee about our wildlife

criminal enforcement program. Many people are not aware that the market in illegal traffic in wildlife and flora is second only to drugs in size, and that we have a criminal program targeting this traffic for enforcement. For example, we announced earlier this year that Alfred Yazback, president and owner of Connoisseur Brands Ltd., will serve time in prison and pay fines for conspiring to smuggle protected sturgeon caviar and making false statements to the U.S. Fish and Wildlife Service, as well as selling counterfeit caviar to retail food companies with false labels in violation of the Lacey Act, a wildlife protection statute. Yazback and Connoisseur Brands sold specialty food stores counterfeit caviar using protected American Paddlefish in jars and tins labeled as Russian caviar.

Another successful prosecution in this area occurred last year in the Northern District of California against Anson Wong. Nearly two years after his apprehension by Mexican authorities on a provisional U.S. arrest warrant, Wong, an international live reptile-trafficker from Malaysia, waived extradition and pled guilty in San Francisco to 40 felony counts including conspiracy, smuggling, money laundering and Lacey Act violations stemming from a 1998 federal indictment for trafficking in some of the most rare and endangered reptile species on earth. Among other methods of smuggling, he and his co-conspirators would use FedEx shipments to illegally import live animals. Wong was sentenced to almost six years in prison.

CONCLUSION

The Department of Justice takes seriously its obligation to protect public health and the environment and is committed to strong enforcement of the environmental laws, criminal as well as civil. The cases that I have described in my testimony provide only a sampling of the many criminal prosecutions in which we are involved, and we will continue to press forward in this

area to ensure the protection of all Americans and of our environment. I would be happy to answer any questions that you may have about my testimony.

TESTIMONY OF RONALD A. SARACHAN

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BEFORE THE UNITED STATES SENATE

JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME AND DRUGS

REGARDING

CRIMINAL AND CIVIL ENFORCEMENT OF ENVIRONMENTAL LAWS

JULY 30, 2002

Good morning Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify before you today on the topic of criminal and civil enforcement of the environmental laws.

For the record, I am a partner in the law firm of Ballard Spahr Andrews & Ingersoll, LLP and am a member of the Environmental and Government Enforcement/White Collar Crime Practice Groups. Prior to joining Ballard Spahr, I was an Assistant United States Attorney and Chief of the Major Crimes Section in the United States Attorney's Office for the Eastern District of Pennsylvania. As Chief of Major Crimes, I supervised all federal environmental criminal prosecutions in the district from 1990 to 1994. From 1994 to 1997, I served as Chief of the Environmental Crimes Section in the Department of Justice.

Because of my background, I will focus my remarks on criminal enforcement of the environmental laws. I understand that one of the topics about which the Subcommittee is interested in hearing testimony is enforcement of the Clean Air Act. Under that Act, there have been criminal prosecutions in two specific areas: the improper and unsafe removal of asbestos insulation during building renovations and demolitions, and the unlawful importation into the United States of banned chlorofluorocarbons – CFCs like freon - that destroy the ozone layer of the upper atmosphere. However, other than asbestos and CFC cases, there have been an extremely small number of criminal prosecutions under the Clean Air Act. In my testimony, I will address two questions. Generally, how are cases selected for criminal enforcement? Specifically, why are there so few Clean Air Act criminal cases?

The Importance of Case Selection

One of the most important elements of criminal enforcement of the environmental laws is case selection. Criminal enforcement – often involving lengthy and intensive investigations and prosecutions – requires the expenditure of a great amount of resources, and the government brings relatively few environmental criminal cases. Careful case selection is a way to ensure that the limited number of criminal cases that are brought have maximum impact, that criminal prosecutions are brought where they matter most and will make the biggest difference. For environmental enforcement, the goal is to achieve maximum compliance; prosecutors speak of the same goal in terms of maximizing general deterrence.

The chart below lists the total number of environmental crimes cases brought by the federal government over an eleven-year period. The prosecutions are brought by individual U.S. Attorneys' Offices, the Environmental Crimes Section at Main Justice, or jointly by both. These statistics are derived from publicly available information from the Justice Department.

YEAR	TOTAL CRIMINAL CASES
1987	86
1988	63
1989	107
1990	85
1991	96
1992	104
1993	176
1994	151
1995	154
1996	150
1997	178
Totals	1350

The chart shows the limited number of cases. The average number of environmental crimes prosecutions per year was only 123, or less than 1.5 per judicial district per year.

Careful case selection is also important for another reason. Since criminal sanctions are the harshest the government can impose, and even being the subject of an investigation that does not lead to prosecution can exact a very heavy toll on individuals and companies, careful case selection is necessary to ensure that the government acts justly and fairly.

Case Selection and the Importance of Integrated Enforcement

EPA has a broad array of tools and enforcement options to promote compliance, from education and compliance assistance, to administrative, civil and ultimately criminal enforcement. Environmental criminal investigations are handled within EPA by a separate office, called the Criminal Investigation Division or CID, which falls within the Office of Criminal Enforcement, Forensics and Training. Other federal agencies also investigate environmental crimes, including the FBI and the Coast Guard.

If EPA had an integrated enforcement program, the agency would be able to use all of its enforcement tools in a coordinated way. When a specific violation was uncovered, all possible enforcement options could be considered and, when determined to be appropriate, egregious violations could be investigated for criminal enforcement. Similarly, when EPA identified enforcement priorities, integrated enforcement would help ensure that the criminal program supported those agency goals.

To understand why integrated enforcement would be especially important in the environmental area, it is helpful to consider how criminal enforcement fits into EPA's overall enforcement program. The regulatory side of EPA depends on the honesty of the regulated community. Compliance with the environmental laws is largely based on self-monitoring and self-reporting. This is a necessity. There are not enough and could never be enough regulatory inspectors to keep watch over everything. Inspections provide periodic spot checks. But between inspections, the regulators generally must trust that the information and reports received from the regulated community are accurate and truthful. The regulatory programs in EPA, and in delegated states, are not well-equipped to handle dishonesty.

That is where the criminal program comes in. The focus of criminal enforcement in the environmental area, as in other areas of white collar crime, is – in the words of one former U.S. Attorney - "lyin', cheatin' and stealin'." The special role of criminal enforcement is to police the integrity of the environmental regulatory system by dealing with those that are dishonest and intentionally break the environmental laws.

While criminal prosecutions are brought against such intentional violators, the legal standard for most environmental crimes is substantially broader. Under most of the criminal provisions, a violation is made criminal if committed with general intent, that is, knowledge of the physical action or event that constitutes the violation. It is not necessary for the government to prove that defendants knew what they were doing was wrong or that they intended to violate the law. It is not even necessary to prove that they knew what the law was. However, despite the legal standard, cases actually brought for criminal prosecutions are ones where defendants knew what they were doing was wrong and intended to break the law. This is the way federal prosecutors and agents uniformly are trained and how they exercise their discretion in selecting cases. Indeed, as I used to instruct new prosecutors and agents when I was Chief of the Environmental Crimes Section, the conduct for which we prosecuted people in environmental crimes cases was conduct that my then-five-year-old daughter would have known was wrong.

By focusing on intentional violators – those who are "lyin', cheatin' and stealin'" – the criminal program could complement and fill what is otherwise a hole in the regulatory programs. To be effective, however, the criminal and regulatory programs must coordinate and communicate closely, with the regulatory side identifying potential compliance problems in their programs and the criminal side channeling resources to those areas. Integrated enforcement would serve to ensure that the regulatory and criminal sides do work together, and in particular that the criminal program addresses areas of program needs. The natural assumption is that environmental enforcement is integrated, with the regulatory programs identifying compliance problems and making referrals to the criminal program.

The Lack of Integrated Enforcement

Unfortunately, for the most part, integrated enforcement is not the way the case selection system has worked. The typical criminal case has not been referred from within EPA. Traditionally, criminal cases most commonly resulted from calls from a disgruntled former company employee or, less commonly, a disgruntled current employee. The former or current employee may be disgruntled for a lot of different reasons, not necessarily environmental. The

result has been criminal prosecutions of companies with serious employee and labor problems, but not necessarily companies with the worst environmental practices.

When I prosecuted environmental crimes, the investigating agents and I regularly received feedback from government field inspectors asking why we were prosecuting Company X when Company Y was worse. The answer was simple. We only knew about Company X because EPA-CID or the FBI happened to get a call from a former employee of Company X, not Company Y.

Criminal case selection often has resulted from happenstance of where within the government the case originated. For example, if a violation was discovered by a program inspector, it was handled administratively or civilly. If the same violation was reported to CID by a disgruntled former employee, it was then considered as a potential criminal matter, and the violation was prosecuted or declined as a criminal case. Thus, exactly the same violation could be treated entirely differently, depending on what part of the agency learned of it first. In other words, rather than pooling information and deciding on the most appropriate enforcement responses, the fact of which office obtained information about a violation – whether the criminal program or one of the regulatory programs – generally dictated how a violation was treated, that is, whether it became the subject of criminal or other enforcement action.

This has been a weakness throughout the history of the environmental program. It is not a characteristic of just this administration or any other single administration. EPA and DOJ have recognized the problem and have taken steps to correct it. Perhaps the most important step has been the formation of joint federal and state task forces. These task forces have provided channels of communication between state and local regulators, who are often enforcing delegated federal programs, and federal prosecutors and special agents. In addition, within the various EPA regions, various individuals have worked to improve coordination, with the success of these efforts appearing to vary region to region. In 1999, the Environment and Natural Resources Division of DOJ adopted a new global settlement policy and new integrated enforcement policy to promote joint investigations, along the lines successfully used in health care fraud investigations. The prior policies had actually reinforced barriers in communications between criminal and civil prosecutors.

Despite these efforts, problems remain. While the criminal program and the regulatory programs may no longer go their separate ways as starkly as in the past, it still appears true that the selection of an enforcement tool or tools is often not based on an agency determination of what is best, but on where a case begins. A case that happens to begin on a civil or a criminal track is still likely to stay there, and there still does not seem to be a great deal of consistent communication between criminal and civil.

The present process by which criminal cases are "selected" raise additional matters of concern to government and the public:

1. The system remains largely reactive. A reactive system does not set its own priorities nor does it coordinate with overall agency enforcement priorities.

2. There is no question EPA should be responsive to calls from the public, particularly potential whistleblowers. That is an important element of a strong enforcement program. However, while good criminal cases can result from some of these calls, there is no assurance that they are the most important cases that the government could be bringing with the resources available.

3. An integrated enforcement system allows the government to ratchet up its enforcement responses from administrative or civil to criminal. This is often good enforcement. Criminal enforcement is used where it is clearly needed – against recalcitrants who still refuse to comply following administrative or civil enforcement action. Ratcheting is also fair enforcement and conserves government resources – first bringing an administrative or civil action puts the respondent on notice and is often more than adequate to obtain compliance.

While there are certainly egregious cases of intentional violations where criminal prosecution is warranted without a prior civil or administrative action – the midnight dumper and fraudulent environmental laboratory come easily to mind – the model of "ratcheting up" the government's responses makes sense in many situations. However, the reactive system is more likely than an integrated system to take violations in isolation and trigger a criminal response where a lesser response may have been adequate and more appropriate.

Developing a more fully integrated approach to case selection will not be easy given long institutional histories, the need to change people's attitudes and the decentralized nature of environmental programs. Steps that are needed include additional cross-training between the regulatory programs and the criminal program, increased joint screening of cases and earlier joint screening nearer the time of initial case intake, greater participation of enforcement managers from both the regulatory and criminal programs in agency enforcement planning, and the creation of incentives and elimination of any remaining institutional disincentives to integrated enforcement.

Criminal Enforcement under the Clean Air Act

As stated above, with the exceptions of asbestos and CFC cases, there have been extremely few criminal prosecutions under the Clean Air Act. In my experience this is not the result of any decision by government officials not to bring Clean Air Act prosecutions, but instead the result of a variety of factors.

First, since the criminal program is reactive, the case mix in part simply reflects the types of calls that CID and the FBI have received.

Second, the Clean Air Act contained misdemeanors until the 1990 Amendments created felony violations. By contrast, the Clean Water Act, RCRA and CERCLA already had felony provisions. The government puts enforcement resources where it gets the "biggest bang for its buck," and that is generally felonies, not misdemeanors.

Third, by 1990 prosecutions of Clean Water Act, RCRA and CERCLA criminal cases were already very well established. Agents and prosecutors continue to be trained in how to bring these cases, and they can use many past successes as models. It is a much more efficient use of limited government resources to bring more of these cases than to develop an entirely new

area, and these same types of cases can be seen being brought again and again. By contrast, Clean Air Act prosecutions require breaking new ground with greater uncertainty of success.

Fourth, in Clean Air Act cases evidence is literally gone with the wind. The illegal emissions have left the stack and disappeared into the atmosphere. Without the corpus delicti, the would-be prosecutor may have only engineering calculations to rely on. By contrast, Clean Water Act cases often leave physical evidence of fish kills or fouled shores, and many RCRA cases include dramatic evidence of buried drums. Moreover, Clean Air Act cases are perceived as involving greater engineering and technical complexity than Clean Water Act cases, in part because of differences in calculating air emissions and in monitoring water discharges. This further discourages undertaking Clean Air Act cases.

Fifth, the law appears better developed in the other areas than under the Clean Air Act. Criminal enforcement is not the place to clarify ambiguities in the law, for two reasons. First, from the government's standpoint, it is better to develop the law in the context of civil litigation where there is a presumption in favor of the agency's regulatory interpretations. In the criminal context, any ambiguity in the law is interpreted against the government under the Rule of Lenity. Second, the purpose of criminal enforcement is to go after intentional wrongdoers. In gray areas, where there is a good faith disagreement on the meaning of regulations or on the proper application of the law, criminal prosecution is inappropriate. The rules under which environmental criminals are prosecuted under the Clean Water Act and RCRA are clear; juries are willing to convict and judges are willing to sentence them to jail because they deliberately break these rules. By contrast, the law is still evolving and the government assessing its application under areas of the Clean Air Act.

If matters are left to themselves, a greater number of criminal Clean Air Act cases can be expected over time. But if these prosecutions are to be accelerated, a focused enforcement effort is needed to overcome the practical restraints and to identify intentional violations in areas where the law is already clear.

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee. I look forward to answering any questions you might have.

Testimony of Eric Schaeffer

Director, Environmental Integrity Project

Before the Senate Judiciary Subcommittee on Crime and Drugs

July 30, 2002

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.

Testimony of Judson W. Starr

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Before the United States Senate

Judiciary Committee

Subcommittee on Crime and Drugs

"Criminal and Civil Enforcement of Environmental Laws:

Do We Have All the Tools We Need?"

July 30, 2002

Mr. Chairman and Members of the Subcommittee:

Good afternoon. My name is Judson Starr and I am very pleased to accept your invitation to provide my perspective on the federal environmental crimes program and to suggest areas where there is more work to be done.

Personal Background

After I returned from Vietnam in the early 70's and while attending Georgetown University Law School, I had the privilege to work on the staff of Bill Ruckelshaus during his first tenure as EPA's Administrator and also at the Environmental Law Institute, a local environmental think tank. Once I had my law degree, however, I turned to criminal law. That combination of environmental and criminal law led me to the US Department of Justice in 1978. At Justice I first held the title of Director of the Environmental Crimes Unit. Later I became the first Chief of the Environmental Crimes Section. During my decade at Justice, I worked closely with my counterpart at the Environmental Protection Agency and others in implementing a federal environmental crimes program. In 1988 I left the Justice Department to head the Environmental and Energy practice at the Venable law firm, then and now chaired by former US Attorney General, Benjamin Civiletti.

My practice concentrates primarily on advising individuals and corporations on environmental compliance and management systems, conducting internal investigations where wrongdoing is a concern and in representing those charged with violations of environmental laws. I therefore have spent roughly half of my professional career prosecuting environmental criminal cases and the other half representing those with serious or potentially serious environmental problems.

Background of the Environmental Crimes Program

For more than two decades I have experienced or observed many of the "growing pains" in the development of this program. I have watched Congress change the federal environmental statutes, which once were only misdemeanor sanctions, to felonies. The strengthening by Congress of these sanctions made a significant impact in capturing the attention at that time of US Attorneys offices, judges and investigative agencies which previously treated federal environmental crimes as a much lower priority when they were misdemeanors. In an attempt to achieve a higher standard of corporate accountability, which is no small issue today, I have seen the development of the Responsible Corporate Officer Doctrine, a doctrine peculiar to this field, take hold and be refined. In the process, this doctrine has made it easier for the government to prosecute individual corporate officers. Since 1987 I have seen the application of federal sentencing guidelines to individuals who have now been sentenced to lengthy periods of incarceration. Until these guidelines were enacted, judges generally treated environmental wrongdoing as a mere regulatory violation.

I have also watched as EPA's investigators obtained law enforcement authority and no longer were treated as the "poor stepchild" in the law enforcement community. I have also seen the Federal Law Enforcement Training Center in Glynco, Georgia expand its basic and advanced curriculum to ensure that federal and state law enforcement officials are properly trained about how to build the environmental criminal case. I have witnessed the evolution of the prototypical defendant grow from so-called Mom and Pop entities to the point where, particularly in the maritime field, well known, large corporations have been targeted, charged and convicted. Lastly, I watched the program work through its "political baptism" during the end of the first Bush Administration and the beginning of the Clinton Administration when then House Commerce Committee Chairman Dingell held lengthy oversight hearings into how cases were being handled by the Department of Justice during that period of time.

Present Times

Since the tragedy of September 11, I have been very concerned about the direction of this program. No one can argue that intentional and serious environmental crimes that can have a significant adverse effect on the public health and welfare should not be prosecuted. But I wonder whether the priorities after 9/11 may have changed the definition of villain so as to omit the environmental criminal. For the past year EPA criminal investigators have been tasked to assist at the site of the World Trade Center and at the Pentagon and to shift their time and attention to other anti-terrorism efforts. Will the focus of EPA's investigators permanently move to where the resources and the spotlight shine on an even greater danger than "ordinary" environmental crimes?

Furthermore, and somewhat unrelated to 9/11 issues, what will happen in the cities like Boston, Baltimore, Houston, and others where individual prosecutors with extensive experience in environmental crimes have been transferred to other, more pressing matters or simply moved on professionally? To the best of my knowledge, out of the 94 US Attorney offices, only the offices in Syracuse, Miami, Seattle and Anchorage, currently have experienced criminal prosecutors assigned to do these environmental cases.

It is self evident that the Department of Justice cannot do cases alone. The government's latest initiative -- the prosecution of those in the maritime field -- has been very successful if success can be measured by the strengthening of an industry's environmental compliance programs to a much higher level when much less emphasis was placed on these programs only a short time before. The involvement of the Coast Guard in that initiative has been essential. However, post 9/11 there are many other demands placed upon the Coast Guard. While the FBI has contributed to the prosecution of environmental cases, the FBI has also experienced even greater demands on its priorities. And, as noted, the EPA has found itself shouldering new burdens. What do these events mean, however, for the prosecution of these cases? My sense from speaking to people across the country is that environmental enforcement, and environmental crimes particularly, is no longer the priority it once was.

Reprioritization of investigative and prosecutorial resources away from serious environmental crimes at this time, would, in my opinion, be the wrong step. This is because the relationship between the environment and internal security and anti-terrorism efforts is a critical one. Most companies which have considered the lessons of 9/11 have looked to their environmental compliance units to also beef-up security and anti-terrorism efforts. We must remember that policing a pipeline, a port or terminal, and overseeing the transportation of hazardous waste, from a security or anti-terrorist perspective, is only an extension, not a departure, from otherwise normal environmental compliance activities. For example, the American Chemistry Council and other Associations have published "Site Security Guidelines for the U.S. Chemical Industry," that is meant to be easily adapted into most existing environmental, health and safety compliance programs, particularly those that follow the standards in the Federal Sentencing Guidelines compliance program. I might also suggest that Congress consider legislation that would mandate coordination of the functions of environmental compliance with anti-terrorism security.

However, if federal criminal enforcement efforts are diminished because of other pressing priorities, so also will be the authority of the corporate environmental officers charged with internal compliance with the environmental laws in a large number of companies. The people who perform these essential functions within the corporate hierarchy are sometimes perceived as producing little that can be attributed to the bottom line. They derive their powers from another source. What I have seen time and time again is that their powers emanate from a fear – a fear that if they do not do their job well, their company and their bosses might be exposed to criminal liability. A strong criminal enforcement program that wisely selects cases appropriate for criminal prosecution is essential to their empowerment and therefore to protection of our nation's health, welfare, safety and natural resources. They are also a part of our overall homeland security.

As always, emphasis must be placed on the wise selection of cases. The Department of Justice is often criticized, sometimes with justification, for how it exercises its wide discretionary powers in the cases it brings. The discretion is wider in environmental cases than in any other area of criminal law. My colleague and also a former Chief of the Environmental Crimes Section, Ron Sarachan, will address some of those case selection issues. However, if the goal is to obtain greater compliance with the environmental laws, and not to see how many people can be put in jail or how high corporate fines can exponentially grow, choosing clearly the cases to focus on and enunciating a unified DOJ/EPA centralized system will give the program greater credibility.

Mr. Chairman, I appreciate your invitation to present my views to the Subcommittee and I look forward to answering any questions you may have.