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COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY

In re: HB 11/5 - Commonwealth Attorneys Act

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Stenographic report of hearing held
in Room 140, Majority Caucus Room,
Main Capitol Building, Harrisburg, PA

Monday,
July 31, 1989
1:00 p.m.

HON. THOMAS R. CALTAGIRONE, CHAIRMAN
Hon. Gerard Kosinski, Subcommittee Chairman on Courts
Hon. Kevin Blaum, Subcommittee Chairman on Crime and
Corrections

MEMBERS OF COMMITTEE ON JUDICIARY

Hon. Jerry Birmelin	Hon. Nicholas Moehlmann
Hon. Michael Bortner	Hon. Jeffrey E. Piccola
Hon. Lois S. Hagarty	Hon. John F. Pressmann
Hon. David W. Heckler	Hon. Robert D. Reber
Hon. Paul McHale	Hon. Karen A. Ritter
Hon. Christopher K. McNally	Hon. Michael R. Veon
Hon. Terrence F. McVerry	

Also Present:

Hon. James Clark
Katherine Manucci, Staff
Paul Dunkleberger, Research Analyst

Reported by:
Ann-Marie P. Sweeney, Reporter

ANN-MARIE P. SWEENEY
536 Orrs Bridge Road
Camp Hill, PA 17011

02-05-012

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1 CHAIRMAN CALTAGIRONE: We'll start today's
2 hearing on House Bill 1175. The House Judiciary
3 Committee is conducting a public hearing on the
4 Commonwealth Attorneys Act, House Bill 1175, prime
5 sponsor, Lois Hagarty.

6 I'd like to welcome everybody to the
7 proceedings today, and we'll start off with the State
8 Attorney General Ernest D. Preate, Jr. If he would give
9 his testimony and introduce his people for the record.

10 ATTY. GEN. PREATE: Thank you very much, Mr.
11 Chairman, Chairman Moehlmann, and committee members.

12 It's good to see so many members of the
13 legislature and this committee here today, especially
14 pleased to be asked to testify on House Bill 1175, which
15 provides original prosecutorial jurisdiction for the
16 Office of Attorney General in the investigation of
17 environmental crimes. And I want to thank Representative
18 Lois Hagarty for her sponsorship of this important
19 legislation and for her determination to pursue a means of
20 correcting this weakness in the Commonwealth Attorneys
21 Act.

22 One ironic advantage we have in the field of
23 environmental protection is that there is no shortage of
24 unfortunate incidents which demonstrate to the public the
25 need for better law enforcement and more effective

1 enforcement tools. Nationally, the words, "Three Mile
2 Island," "Exxon Valdez," are now indelibly imprinted on
3 the American consciousness, and especially in the
4 Pittsburgh area, the Ashland oil spill won't soon be
5 forgotten. And these are just three of the more
6 conspicuous environmental disasters of recent years.
7 There are many, many more of which our dedicated
8 environmental enforcement agents deal with every day, and
9 I'm very much concerned that there may be even more which
10 are not being dealt with.

11 Like so many other areas of law enforcement,
12 the environmental field is becoming increasingly difficult
13 and complex as waste producers, faced with the closing of
14 disposal sites, are forced into new and usually more
15 expensive ways of getting rid of their unwanted material.
16 Too often, what we get as a result are hypodermic needles
17 washing up on our beaches in Erie, battery acid fouling
18 our streams in Lancaster and oil polluting our rivers -
19 the Delaware, the Monongahela, the Ohio, and the list goes
20 on and on.

21 Experience in the enforcement of drug laws
22 has taught us that we need not only more manpower but more
23 effective enforcement tools. The same is true in the
24 environmental law enforcement area. Whether pursuing drug
25 dealers or midnight dumpers, we must be ever alert and

1 vigilant to protect our beautiful State.

2 What we must do to accomplish this is to
3 maximize the resources of manpower, equipment, and money
4 we now have so we can bring violators swiftly to justice.
5 Frankly, our ability to bring these violators to justice
6 is impaired by current limitations in the Commonwealth
7 Attorneys Act. Therefore, I must speak out in support of
8 House Bill 1157, which would give to the Office of
9 Attorney General original jurisdiction to investigate and
10 prosecute environmental polluters.

11 Let me give you some concrete examples of
12 how the lack of original jurisdiction can cripple
13 enforcement. In 1987, the Environmental Crimes Section in
14 my office attempted to prosecute a Lancaster battery
15 recycler who was discharging battery acid onto a college
16 athletic field and contaminating the ground water. The
17 case was referred to the Office of Attorney General not by
18 the State DER but by the Federal Occupational Safety and
19 Health investigators who had found that this business also
20 was subjecting its employees to lead poisoning.

21 A Lancaster County Common Pleas Court judge
22 dismissed all of the charges on the grounds that we had
23 not received a formal referral from the DER to investigate
24 and prosecute the case. It was purely a technical matter
25 that we got the referral from the Federal government, but

1 it nearly ruined the prosecution. Fortunately, we were
2 able to persuade the judge to re-open the case and the
3 president of the company recently was sentenced to 2 1/2
4 to 5 years in jail and fined \$100,000. And this is the
5 copy of the article from Tuesday, July 11, 1989 edition of
6 the newspaper Intelligencer Journal in Lancaster in which
7 it talks about the president of the company, Stewart
8 Manix, going to jail for this illegal dumping. These are
9 the kinds of things that can be accomplished by strong,
10 efficient law enforcement.

11 If the Attorney General had original
12 jurisdiction in that case, however, there would have been
13 no initial dismissal of the charges. The case would have
14 been judged on its merits and the defendant would have had
15 no technicalities to hide behind.

16 Now, I mentioned the Ashland oil spill a few
17 minutes ago. This is one of the nation's worst inland oil
18 spills. It involved the rupture of a large storage tank,
19 allowing 700,000 gallons of oil to pour into the
20 Monongahela River, the source of drinking water for part
21 of Pittsburgh's suburbs. As a result of the Ashland
22 spill, you, the members of the General Assembly, moved
23 quickly to protect the public and the environment from
24 further such actions by approving legislation which
25 tightly regulates aboveground and underground storage

1 tanks. Yet, despite the severity of this spill and
2 despite the threat to the public health and safety, the
3 Office of Attorney General of Pennsylvania was not
4 authorized to become involved in a criminal investigation
5 until months after the incident. And in the report on
6 this accident, the DER urged the Office of Attorney
7 General not to prosecute, apparently having already
8 decided to proceed with the conciliatory approach toward
9 enforcement.

10 Here are two quotes from that report. They
11 are incredibly revealing. Quote, "Thus, the Task Force
12 concludes that neither Ashland nor its employees acted
13 with the degree of recklessness which the law requires to
14 support a criminal prosecution in which reckless conduct
15 is an element." The second quote: quote, "The Task Force
16 does not recommend consideration of criminal charges
17 against Skinner Tank Company. While the tank builder may
18 indeed have civil liability for a discharge resulting from
19 its failure to comply with API-650, the culpability is too
20 attenuated to warrant prosecution." The Federal
21 government, however, went ahead with its criminal
22 investigation and successfully prosecuted the case in
23 criminal court. Fortunately.

24 These cases are relatively rare but they do
25 occur. Just lately we've had another example. It was

1 discovered last November that Lankenau Hospital in
2 Montgomery County had been burning infectious and
3 pathological waste in violation of environmental laws.
4 Your own Representative Hagarty will tell you more about
5 this later. But I just want to say that when she
6 contacted my office to ask for an investigation, we had to
7 reluctantly tell her that we first needed a referral from
8 DER. I think that experience was significant in leading
9 her to the introduction of this very bill, House Bill
10 1175.

11 In the Ashland and Lancaster County cases,
12 we were lucky. We cannot always expect another branch of
13 government to pick up the ball when we are hamstrung by
14 technicalities, and we cannot expect to always be as
15 successfully persuasive as we were in the Lancaster County
16 case. In the Lankenau case, the hospital subsequently was
17 ordered by DER to pay a civil fine for its violation, but
18 only after years of illegal burning. Even the hospital
19 president expressed concern that the matter went
20 undetected for so long. House Bill 1157 would eliminate
21 these delays and would go a long way toward providing
22 quicker, more effective enforcement of environmental laws.

23 The underlying basis for this legislation is
24 to protect the environment through improved law
25 enforcement. I believe 1175 will accomplish that goal in

1 the following ways: One, giving the Office of Attorney
2 General original jurisdiction puts criminal investigators
3 on the scene of the suspected violation immediately,
4 greatly improving the chances of successful prosecution.
5 I've been a prosecutor, as several members of this
6 committee have been prosecutors, and it's axiomatic in law
7 enforcement that the sooner the investigators reach the
8 scene of the suspected crime, the greater the chances of
9 solving that crime. The vast majority of crimes are
10 solved within 48 hours of the time they are committed.

11 Secondly, original jurisdiction vested in
12 the Office of Attorney General will allow trained criminal
13 prosecutors and investigators to decide whether criminal
14 charges should be brought or whether a civil remedy should
15 be pursued. People trained in criminal law and criminal
16 investigations should make this important decision. It is
17 not a decision for the technicians. The matters we're
18 dealing with are too important. There could be little
19 doubt in anyone's mind that the threat of criminal
20 punishment, including imprisonment, will grab the
21 attention of the polluter much more effectively than will
22 the possibility of a civil fine. A civil fine is a
23 momentary penalty. The criminal sanction is imprisonment,
24 and imprisonment cannot be passed onto the consumer. Ask
25 Stewart Manix, who is now doing 2 1/2 to 5.

1 House Bill 1175 insures that the best people
2 will be involved in the investigation and prosecution of
3 environmental crimes. If we're going to talk about
4 maximizing our resources, then let's do it. My office can
5 have not only Environmental Crimes Section investigators
6 on the scene of a suspected violation immediately, but we
7 can augment their efforts by sending in additional agents
8 from the Bureau of Criminal Investigation, if needed. We
9 also have trained criminal prosecutors here in Harrisburg
10 and in our field offices. In addition, what we can
11 provide is that we can tap the powers of the statewide
12 investigative Grand Jury, which can subpoena important
13 financial and other records which are often critical to a
14 prosecution. These are resources we now are too often
15 precluded from using, and it just doesn't make sense.

16 In the environmental area, I don't want my
17 agents sitting on the sidelines while technicians in the
18 Department of Environmental Resources debate whether I
19 should be in the case. This clumsy and inefficient
20 practice has come close to costing us important cases in
21 the past, and it will continue to do so unless we change
22 the law.

23 Giving the Office of Attorney General
24 original jurisdiction ensures objectivity in the
25 decisionmaking process. As things stands now, there are

1 times when the decision of whether to proceed criminally
2 or civilly in environmental case can raise the possibility
3 of a conflict of interest. A perfect example occurred
4 just the other day when city councilwoman Joan Specter of
5 Philadelphia asked me to investigate the report in the
6 Philadelphia Inquirer on Thursday that two Philadelphia
7 city prisons were discharging raw sewage into Pennypack
8 Creek, and, according to the Inquirer, have been doing it
9 for at least the last two years, and Mr. Chairman I
10 submitted that document to you before I took the stand to
11 testify here today.

12 CHAIRMAN CALTAGIRONE: (Indicating in the
13 affirmative.)

14 ATTY. GEN. PREATE: Now, what that article
15 reveals from the Inquirer is that a DER technician
16 apparently responded to a complaint in 1987 and did
17 nothing about it because at the time of his visit to the
18 scene the pump didn't happen to be running. And worse,
19 according to the Inquirer, he didn't investigate further
20 because no further complaints were received. That's
21 hardly an example of investigative tenacity.
22 Unfortunately, my response to the councilwoman was that I
23 could not investigate and I could not even, as she had
24 suggested, ask DER to ask me to investigate.

25 The law is strict on these matters and

1 courts have interpreted strictly. The referral must come
2 from the State agency to my office and must come only
3 after that agency has investigated and determined that
4 involvement by the Attorney General is warranted. Here is
5 a member of the Philadelphia city council talking about a
6 severe threat to the public health and safety caused by an
7 agency of government and asking my office to look into the
8 possible charges of malfeasance, those are her words,
9 malfeasance in office or dereliction of duty by public
10 officials, those are her words, and I have to tell her
11 that before I move a muscle, I need a referral from DER,
12 which is the first agency she's blaming for covering up
13 the discharge of the sewage into the creek. It's just not
14 right for DER to be making decisions of this kind,
15 especially in cases where its own personnel may be
16 involved, and we have heard this time and time again
17 across the State, where citizens groups and taxpayers have
18 complained that DER has sat idly by and done nothing to
19 investigate their complaints and they have no place to
20 turn to for assistance. If they call the local district
21 attorney or if they call the Attorney General, we have to
22 say, it's up to DER to do it, and if DER does nothing,
23 where do those people turn for help? Where? Where? I
24 ask this committee, where do they turn? The answer is
25 nowhere but to DER itself, unless the Federal government

1 finds some hook for it to get involved in the case to draw
2 it up as a criminal prosecution. And that's wrong. It's
3 Pennsylvania land, it's Pennsylvania water, it's
4 Pennsylvania that ought to be policing its own State and
5 doing a better job of it than it's doing right now.

6 Fifth, House Bill 1175 will enable public
7 officials and individual citizens to report crimes
8 directly to the Office of Attorney General, as they do in
9 the consumer protection area. My office should not have
10 to rely solely on a department of State government for
11 referrals of possible violations. We should be able to
12 take complaints from a member of Philadelphia city council
13 or from the mayor of a town or from a legislator. We
14 should be able to hear from each and every one of you when
15 you have been informed of an environmental pollution
16 incident in your community and you refer it to us to do an
17 investigation. It should be an outrage to this
18 legislature that they cannot have a response from the
19 Attorney General when they know of pollution in their own
20 back yard, in their own district, that they must refer it
21 to DER. It should be that when they want to see some
22 action taken and action taken quickly, that our elected
23 officials, the Representatives of the people, should be
24 able to come to the Attorney General as they do in the
25 consumer protection area, as every citizen can do in the

1 consumer protection area, come in with a complaint and
2 walk in off the street and say, please help me. But they
3 can't do that now. They've got to go through that
4 bureaucracy of DER and have that complaint smothered.

5 What I'm talking about is maximizing
6 resources. Let's have more eyes and ears out in the
7 field, especially in isolated areas where midnight dumpers
8 do their dirty work. This concept has proven remarkably
9 effective in protecting consumers, and if applied to the
10 environment, would have similar beneficial results. You
11 all know the experience that the -- the good work that's
12 been done protecting consumers from rip-offs and
13 fraudulent contracts and the Lemmon Law. That's because
14 the consumer can come directly to the Office of Attorney
15 General and make that complaint. And you yourselves have
16 made those complaints time and time again to this office
17 and we have responded and responded effectively, saving
18 taxpayers millions of dollars, getting back to them some
19 measure of satisfaction, some measure of justice. And
20 this would help build citizen confidence in government as
21 it's doing in the consumer protection area. If a citizen
22 calls my office to complain about what looks like illegal
23 dumping and is told, "We can't do anything, call DER,"
24 that citizen probably is going to grumble about getting
25 the bureaucratic run-around and probably isn't going to

1 bother to call again, and I don't blame that person. I
2 consider environmental law enforcement too important to be
3 subjected to delays while the arcane niceties of procedure
4 are being discussed. I don't want us to be debating,
5 quote, "who asked who to do what," unquote, while a
6 polluter is destroying a water supply.

7 As a practical matter, the vast majority of
8 causes we prosecuted in the environmental area are indeed
9 referred to us by DER investigators who work closely with
10 the prosecutors in my Environmental Crimes Section. That
11 section, jointly staffed by my office and the DER, has
12 been a model for other States. It has grown in recent
13 years and we plan to expand it even more. I want to
14 emphasize that we have indeed a good and effective working
15 relationship with DER once we get the referrals.

16 The recently enacted State budget provided
17 funds to open two more regional offices, and a Federal
18 grant administered by DER will allow us to open a third.
19 My plan for better enforcement is to open these new
20 offices in the Scranton-Wilkes-Barre area, Meadville area,
21 and the Williamsport area, in addition to those offices
22 that we now have in Pittsburgh, Harrisburg and
23 Philadelphia area. The idea is to have offices staffed
24 with experienced prosecutors and criminal investigators in
25 our more sparsely populated counties to strengthen

1 reinforcement so often used by midnight dumpers.

2 These new offices also will enable our
3 agents and prosecutors in the Philadelphia, Harrisburg,
4 and Pittsburgh offices to be more effective since they
5 will have smaller territories to cover. But I reiterate,
6 as things stand now, none of these new agents can
7 investigate any environmental crime, even if they see it
8 happen, unless the DER asks us to do it.

9 If approved, House Bill 1175 would be the
10 first amendment to the Commonwealth Attorney's Act since
11 its enactment in 1980. The legislative history shows that
12 when the General Assembly approved the act, it envisioned
13 a "vigorous statewide chief law enforcement officer." We
14 need House Bill 1175 so that we can avoid having to
15 litigate our jurisdiction every time we bring a criminal
16 charge. It's a waste of resources.

17 The General Assembly, in 1980, gave the
18 Attorney General original jurisdiction to investigate and
19 prosecute cases which relate to organized crime. You did
20 so because you recognized that organized crime was
21 particularly complex and that many district attorneys'
22 offices did not possess the necessary resources to pursue
23 such cases. The same considerations apply to
24 environmental crimes. These are sophisticated crimes.
25 They involve criminal violations of a specialized, highly

1 technical statute, the Solid Waste Management Act. Their
2 proofs are not easy. Having myself been a district
3 attorney with a small staff, I know that many district
4 attorneys' offices are not equipped to handle these cases.

5 There also was a recognition by the
6 legislature in 1980, and I wanted to emphasize this point,
7 that organized crime transcends county lines. I think
8 we're all aware of the potential for an environmental
9 violation to transcend county lines, even State lines.
10 When someone illegally dumps waste oil into the
11 Susquehanna River in Wilkes-Barre, it has the potential
12 for affecting the people of Lancaster County. And trucks
13 improperly hauling waste across Interstate 80 have the
14 potential of affecting people in several counties,
15 particularly if they are carrying hazardous waste and
16 break open or leak. Indeed, many polluters bring their
17 waste from out of State.

18 As you on this committee very well know, our
19 goal is to protect every corner of the Commonwealth so
20 that nowhere can environmental criminals pollute with
21 impunity. To this end, our Environmental Crimes Section
22 has been instructed to initiate training, to accept
23 speaking engagements and to do whatever in its power to
24 enlist the support of other enforcement agencies in the
25 detection of environmental violations to the local level.

1 The State Police, county sheriffs, municipal
2 police, and Fish and Game inspectors are constantly in the
3 field where the midnight dumpers are occurring. But even
4 the best efforts of these dedicated people can be
5 nullified when a smart defense attorney takes advantage of
6 the procedural obstacle which House Bill 1175 addresses
7 and overcomes.

8 Members of the committee and Mr. Chairman,
9 this bill is badly needed. I wholeheartedly support it
10 and I urge you to vote it out of committee and push for
11 its enactment by the full House.

12 Mr. Chairman, I want to again thank you for
13 the opportunity here to testify, and I'd be happy to
14 respond to any questions the members of the committee may
15 have.

16 Before doing so, I'd like to introduce to
17 you my Chief Deputy in charge of the Environmental Crimes
18 Section, Greg Abeln, who is sitting on my right and your
19 left; and Chief Deputy Attorney General Robert Graci, who
20 assisted in the preparation of this testimony and has been
21 involved in several cases challenging the prosecutorial
22 authority of the Attorney General, and they are here
23 available for questions as well.

24 Thank you, again.

25 CHAIRMAN CALTAGIRONE: Thank you very much,

1 Attorney General Preate.

2 We will now open it to questions from
3 members of the committee.

4 Jeff.

5 BY REPRESENTATIVE PICCOLA: (Of Atty. Gen. Preate)

6 Q. Attorney General Preate, I have some
7 specific questions, but before I get into those, it sounds
8 to me, reading between the lines of your testimony, that
9 there is a cooperation problem between your office and the
10 Department of Environmental Resources, that there is some
11 hesitation either on the part of the Department of
12 Environmental Resources to refer cases to you or some
13 attempt by them not to refer cases that should be referred
14 to you. Could you comment on whether that's accurate or
15 not?

16 A. Well, in those areas where the cases are
17 referred to us, there is good cooperation, there's an
18 exchange. However, there are certain matters which
19 obviously are not being referred to us, and I think that
20 they're perhaps in the minority. We don't know how many
21 there even are now. For example, this case in the
22 Philadelphia area we didn't know about but DER did for two
23 years. Now, if Joan Specter knew about it two years ago
24 and she called us up and said, "We want you to investigate
25 it," we'd have to say then we didn't know about it, but

1 for two years DER knew about it, documented this trail,
2 and never informed us, and yet there's a clear violation.
3 It's a criminal violation to do that.

4 And yet now we see that for the first time
5 just a few minutes before I took this microphone we got a
6 telephone call from DER saying, "We want you to now help
7 us investigate the Pennypack Creek." But query, if the
8 Philadelphia Inquirer hadn't exposed it and if Joan
9 Specter hadn't exposed it last week, do you think that the
10 DER would call me up on a Monday five minutes before I'm
11 to testify before this very committee and tell me we want
12 to you do this investigation? I don't think so. I don't
13 think so.

14 So what we're looking, I see, is the need
15 for us to be able to receive complaints from citizens and
16 from lawmakers and public officials to do our job, do it
17 effectively. We ought to be working together from the
18 beginning, just like we do with the State Police.

19 Q. I agree we should be working together, and I
20 was on the task force that helped to write the
21 Commonwealth Attorneys Act and that was our biggest fear
22 when we wrote it is that we were going to get involved
23 with a lack of cooperation between the Office of Attorney
24 General and various State agencies, which are also
25 represented by counsel through the Office of General

1 Counsel.

2 On a much smaller scale than the
3 Philadelphia situation that you referred to but very
4 similar would be a case that I had in my legislative
5 district of a very small sewage authority in Berrysburg,
6 Pennsylvania, which was discharging from its sewage
7 treatment plant into a local creek. It was a one-man
8 operation, and Berrysburg numbers maybe 300 or 400 people
9 total, and the sewage plant operates by itself. It
10 doesn't require anybody present to operate it except a
11 periodic maintenance. And they went back and forth with
12 DER for a couple of years before DER finally was able to
13 get the necessary action done. And I guess in a technical
14 sense, someone in Berrysburg was violating the criminal
15 statute and at some point in time I guess the Attorney
16 General could jump in, if this bill becomes law, and start
17 prosecuting municipal officials in Berrysburg, and I don't
18 know if that's such a good idea, given the few resources
19 that we have in your office, whether we should make them
20 available to every small town to go prosecuting municipal
21 officials.

22 A. Well, in answer to your question, I'm not
23 familiar with that, that particular situation, but I think
24 not every investigation, as you well know, Representative
25 Piccola, results in a criminal prosecution. But what

1 would happen as a result of this bill would be that if you
2 wanted to make or a citizen had a complaint, we would be
3 able to get into the case quicker, faster, and be able to
4 move it in such a way that it would get resolved or the
5 situation would get fixed, that the matter would then be
6 resolved short of, if necessary, a criminal prosecution,
7 because prosecutors -- every criminal case doesn't get
8 prosecuted. There's a certain amount of discretion that's
9 involved, but at least if you get the Attorney General
10 into the picture faster, you might have that rectified
11 quicker.

12 Q. I agree, but isn't, in theory, that's what
13 DER is supposed to be doing?

14 A. Well, DER -- I don't know. You tell me.
15 You have a longer experience with DER than I do.

16 Q. The Joan Specter allegations, did they
17 involve allegations that employees of DER were covering up
18 criminal activity?

19 A. Well, let me read to you what she wrote.
20 The Philadelphia Inquirer also has a story on it. This is
21 a letter that she had written to me and to Secretary Davis
22 on Friday. She says, on July 28, letter to Secretary
23 Davis, "Dear Secretary Davis," quote, "I am writing in
24 regard to the matter involving the pumping of raw sewage
25 into Pennypack Creek by officials of the Philadelphia

1 Prison System. As you know, this matter was recently
2 brought to the public attention by the media. I have
3 written Attorney General Preate requesting that he ask DER
4 to invite his office into the case to construct a criminal
5 inquiry. I urge to you extend such an invitation. I
6 understand that DER is currently looking into the matter
7 as a violation to the Clean Streams Act, however, I
8 believe that the actions of the prison officials and other
9 public officials may constitute malfeasance or dereliction
10 of duty worthy of a criminal inquiry."

11 She then continues, "Because DER was
12 involved in the failed enforcement effort, I believe that
13 it is not appropriate for your department to assume total
14 responsibility for the investigation. In addition, the
15 Attorney General has a capable environmental staff
16 equipped to deal with the criminal implications of these
17 matters. For these reasons, I believe that the public
18 trust would best be served by the involvement of the
19 Attorney General," unquote.

20 Now, what she's saying is that DER
21 essentially did nothing, knowing for two years that this
22 sewage was being dumped into Pennypack Creek. And how
23 many other cases of a similar nature are around the State?
24 I can think of one up in Lackawanna County in my own area
25 where DER did nothing to prosecute criminally a battery

1 acid plant that was spewing lead out into the area, and
2 today, the Federal government has declared it one of its
3 major hazardous clean-up sites and it's presently digging
4 up every person's yard, every tree, every grass,
5 everything that they could probably find that has lead in
6 it in a several block square area, and yet DER did
7 nothing, sat on its hands for 10 years in that case. And
8 there was lead in the area. They had samples taken. Lead
9 in the grounds. The tomatoes were full of lead, and there
10 was no criminal prosecutions that emanated in that
11 instance.

12 It seems to me that there may be more of
13 these kinds of cases where the Attorney General can get in
14 to get DER to move. I think that's entirely appropriate.

15 Q. But there were no allegations that employees
16 of DER were involved in the criminal conduct?

17 A. I don't know. I haven't seen it. It hasn't
18 been referred to me until just now.

19 Q. Well, from reading her letter, from
20 listening to her letter that you read, it didn't sound as
21 if she was alleging that DER participated in any cover-up.
22 Maybe she was. I don't know.

23 A. It certainly -- if she didn't say it, Mr.
24 Piccola, she certainly implied it.

25 Q. Okay, if DER--

1 A. If you read the article, I think you'd get
2 the clear implication is there.

3 Q. Okay, if DER is involved in a cover-up or
4 DER employees, do you not have jurisdiction already under
5 the Commonwealth Attorneys Act, Section 205(a)1, to
6 proceed against DER employees?

7 A. If there's an allegation of public
8 corruption, yes, we can get involved. Yes, we can get
9 involved.

10 Q. But it is your strong feeling that DER is
11 not referring certain cases or certain significant cases
12 to your office for prosecution in a timely fashion?

13 A. I think that's the thrust of this. Just get
14 us in a timely fashion. I mean, I come from a
15 prosecutorial background. The best cases are made,
16 members this committee, when you're out there with the
17 investigators at the time the incident occurs and not six
18 months later, and not when witnesses have already been
19 told that they're not going to get their Miranda rights,
20 that they're protected therefore from criminal
21 prosecution. That the paper trail is already shredded and
22 destroyed so that you can't proceed. I mean, this is what
23 you're faced with. That the initial momentum of the
24 discovery of the incident is now receded to the back pages
25 of the newspaper and nobody's really concerned about it

1 and assuming -- thinking that everything is all right and
2 well, and in fact it's not. We should be involved right
3 up in front, as good law enforcement demands.

4 REPRESENTATIVE PICCOLA: Thank you, Mr.
5 Chairman.

6 CHAIRMAN CALTAGIRONE: Thank you.
7 Chris.

8 REPRESENTATIVE McNALLY: Yes.

9 BY REPRESENTATIVE McNALLY: (Of Atty. Gen. Preate)

10 Q. Mr. Preate, first I'd like to ask you about
11 a part of your testimony that would directly impact upon
12 my district, and that is the account of the Ashland oil
13 spill on page 3.

14 A. Yes, sir.

15 Q. And first of all, at the bottom of page 3 in
16 your testimony you quote a report of a task force. What
17 was -- specifically, what was that task force?

18 A. Well, the task force was established here in
19 the State, this was before I took office so I was not a
20 party to it, it was in the term previous to my taking over
21 the Office of Attorney General, and this task force
22 studied the problem of the Ashland oil spill, and
23 basically it was a DER study and they concluded that there
24 should be no criminal charges filed in the case. Well,
25 that may very well be the correct assessment, but the

1 problem is that the Office of Attorney General was, at
2 best, only tangentially involved in that case.

3 Q. Were members of the Attorney General's
4 Office members of the task force?

5 A. There were two investigators that were
6 assigned to do work requested, but no attorneys. The
7 Attorney General's Office was not referred the case. They
8 were not brought in initially by letter saying we now want
9 you to help us participate in this investigation. The
10 investigation was done by DER, they asked for a couple of
11 agents from our office, is that correct, Greg?

12 MR. ABELN: That's correct, sir. It was
13 done because they didn't have the ability to investigate
14 such a magnitude of a problem. They had two of my
15 principal investigators, one from Pittsburgh and one from
16 Harrisburg, assigned them to conduct a civil
17 investigation. It wasn't a criminal investigation.

18 BY REPRESENTATIVE McNALLY: (Of Atty. Gen. Preate)

19 Q. Well, I guess, Mr. Preate, you would agree
20 that any type of law enforcement or investigation, and
21 particularly in the area of environmental law, would
22 require a substantial degree of cooperation between the
23 regulatory body and the Office of the Attorney General?

24 A. The same as it does right now between all of
25 the municipal police departments, the State Police, the

1 DEA, whatever, the FBI, the U.S. Attorney. We do it all
2 the time.

3 Q. I'm just wondering though, if you were to
4 initiate a prosecution against Ashland, or against the
5 Skinner Company, what would a jury think about a task
6 force which includes the Attorney General's investigators
7 that recommends that criminal prosecution not be
8 initiated? I mean, it would seem to me that the Attorney
9 General's prosecution would be at variance with the task
10 force, and that would substantially hinder a prosecutorial
11 effort.

12 A. You see, the point is that we did not
13 control that task force. That was controlled by DER.
14 That was all civil investigation. They asked for a couple
15 of agents out of how many in the total investigative
16 package, Greg, was it?

17 MR. ABELN: Twelve, at the time.

18 ATTY. GEN. PREATE: Twelve at the time, and
19 they were just assigned to do investigative work. We were
20 not involved in the most important thing, Representative,
21 and that's the decisionmaking. The decisionmaking is
22 critical. If we had made -- if it was up to me, if
23 somebody came to me and said that today we want to have
24 two investigators assigned to investigate an oil spill,
25 uh-uh. I want to be involved in the decisionmaking that

1 says whether we go or no go on criminal or civil
2 prosecutions.

3 The way it is now, it's up to the DER to
4 make that decision solely, totally. They make the
5 decision of whether there's a criminal charge to be
6 brought in the case or whether to go civilly. I think
7 that that decision ought to be left to people who are
8 experienced and trained and who have criminal
9 responsibility. There is a vast difference between those
10 two positions that we feel that it is important if you're
11 going to make a decision to go or no go civilly or
12 criminally, as they did in this case, that the criminal
13 side ought to be heard from and heard from in an
14 appropriate way through its lawyers, through being a major
15 party in the investigation, through being a co-equal, if
16 you will. That's what I'm talking about. We were not
17 co-equals in that task force study of the Monongahela, but
18 the fact of the matter is, the Federal government, which
19 operated independently of DER, did bring criminal charges
20 and successfully prosecuted the case.

21 BY REPRESENTATIVE McNALLY: (Of Atty. Gen. Preate)

22 Q. Then my second question, really, I am very
23 pleased that you would be willing to accept complaints
24 from legislators, because at least in my district I could
25 probably occupy your office on a full-time basis.

1 A. Be happy to do that.

2 Q. Well, as long as the other 202 members of
3 the House don't feel shortchanged, I'd be happy to have
4 you.

5 REPRESENTATIVE KOSINSKI: I'm next in line,
6 Chris.

7 BY REPRESENTATIVE McNALLY: (Of Atty. Gen. Preate)

8 Q. Because, in fact, House Bill 1175 is rather
9 broad. It would involve investigations involving
10 violations of every environmental law of the Commonwealth,
11 and I am not being facetious when I say that, you know, I
12 hope that you realize the magnitude of environmental
13 violations in this Commonwealth, and truthfully, I could
14 probably occupy your office on a full-time basis. I have
15 a great many watersheds throughout my district, there's a
16 lot of industrial waste that's carried through my district
17 on trucks and trains, and you know, I really doubt whether
18 you could effectively investigate these alleged violations
19 in my district alone, to say nothing of the other 202
20 districts.

21 A. So the thrust of your argument is that we
22 shouldn't begin in the first place, is that it?

23 Q. Well, I guess the thrust of my comment and
24 question is, do you think that your rhetoric is really up
25 to the magnitude of the problem? You know, you seem to

1 suggest--

2 A. I understand. I understand.

3 Q. --you seem to suggest you can investigate
4 every violation--

5 A. No, I can't do that. I simply can't do
6 that.

7 Q. I don't think you could investigate half the
8 violations in my district.

9 A. I agree, but shouldn't we start somewhere?
10 Shouldn't we start with -- and you point out a perfectly
11 legitimate problem. It's the same that exists in the drug
12 area, you know, it's the same that exists in consumer
13 protection, but we've just got to make the start to serve
14 the public and serve the public interest. And yes, our
15 staff is small, but I think that we ought to begin this
16 process of effectively searching down these midnight
17 polluters, these dumpers, whatever they happen to be
18 doing, and if we can maximize our resources. All I'm
19 saying is, just don't have DER doing it. Bring the
20 Attorney General's Office into it, too. Maximize your
21 resources, your tax dollars. You just gave us an 80
22 percent increase, at my request, in my budget for the
23 Environmental Crimes Section, and I doubled the size of my
24 office therefore, doubled the size of the Environmental
25 Crimes office to protect your own back yards, from the

1 whole northern tier of the State. That was my idea
2 because I live up in that section and I know what's going
3 on up there.

4 I've been an environmentalist since 1970. I
5 was the chairman of Earth Day. I wrote the Federal
6 Surface Mining Law. I helped to write it with some people
7 this room in 1977, which is now the law of the United
8 States. For seven years I worked with DER officials in
9 that, so I know about environmental protection. I've been
10 involved in it for a long time. And I know what's going
11 on back in Lackawanna County. I know what's going on in
12 northeastern Pennsylvania in the Poconos, and I think that
13 there's a way that we can begin to protect the
14 environment. We can be more responsive to the complaints
15 that come in from yourselves, like Representative Hagarty
16 or Councilwoman Specter. I think that it's entirely
17 feasible for us to respond to those important events
18 particularly. Maybe not every single little overrun of a
19 sewage treatment plant, but certainly where there's a
20 major environmental disaster we ought to be able to be
21 there and respond effectively and maximize our resources.

22 CHAIRMAN CALTAGIRONE: Paul.

23 REPRESENTATIVE McHALE: Thank you, Mr.

24 Chairman.

25 BY REPRESENTATIVE McHALE: (Or Atty. Gen. Preate)

1 Q. Good afternoon, General. Let me say
2 initially that I support House Bill 1175 and want to
3 commend Representative Hagarty for her effort on this
4 legislation. I'd ask her, if she would, as a courtesy, to
5 join me as a cosponsor when the bill is released from
6 committee.

7 I particularly want to applaud the aggressor
8 approach which you're taking, Attorney General, to
9 environmental protection and to indicate that at least
10 from my view it's about time. It's good to hear a strong
11 voice on behalf of the environment, and it's good to hear
12 the echo of Quantico in the tone of that voice.

13 Now, having said all those nice things to
14 you--

15 REPRESENTATIVE KOSINSKI: Whose district is
16 that in?

17 BY REPRESENTATIVE McHALE: (Of Atty. Gen. Preate)

18 Q. --and at the risk of now taking away the
19 good will that perhaps I generated a moment ago, let me
20 put things, if I may, in a bit longer historical
21 perspective.

22 You made a comment a moment ago to
23 Representative Piccola that perhaps he had been dealing
24 with DER for a longer period of time than you had. I've
25 had the responsibility of a similar relationship with DER

1 over four terms in office, seven years, and I really don't
2 mean to make this sound partisan. You've taken a very
3 critical attitude toward DER. What I would point out to
4 you is that if you think things are bad today, you should
5 have been here in 1982, 1983, 1984.

6 I came here shortly after Secretary Watt
7 became the Secretary of the Department of Interior on the
8 Federal level. President Reagan came to office pledging,
9 perhaps not quite this bluntly, but essentially a
10 relaxation of environmental protection, and if I remember
11 the quote correctly, our Governor at that time indicated
12 that he thought there was too aggressive an attitude in
13 DER, and I think the exact quote was that DER was trying
14 to put too many corporate pelts on the wall. Your
15 rhetoric is wholly at odds with that rhetoric. I happen
16 to agree with yours and disagree with that.

17 I was on the Conservation Committee in 1983
18 and '84 when we investigated DER, and I think that
19 investigation highlighted again and again a completely
20 timid, a completely lackadaisical attitude toward
21 environmental protection. So if you believe that things
22 are not as they should be today, and perhaps they are not,
23 I guarantee you things are far better today than they were
24 when I first came here.

25 Now, I didn't mean to give a long speech,

1 but--

2 A. No, that's fine.

3 Q. --but I think it's important to recognize
4 that there has not been a sufficiently aggressive attitude
5 on behalf of the environment, and that that lack of
6 aggressiveness spans several gubernatorial
7 administrations.

8 Now, with all of that kind of as an
9 introduction, if we were to pass House Bill 1175, how
10 would your office continue to interface, continue to
11 cooperate, with enforcement officials within DER? In
12 short, if the gentleman who's seated to your right becomes
13 our point of contact so that Representative McNally or
14 Hagarty or McHale might have a complaint we would call
15 this gentleman, does that mean that Deputy Secretary Mark
16 McClellan could disconnect his phone? What's he going to
17 be doing if we broaden the scope of your charter?

18 A. I think that's a fair question and I want to
19 address it.

20 DER has very, very fine people in it. Keith
21 Welks, who you'll hear from later, is a friend of mine and
22 we disagree on this issue, but I respect Keith and he is
23 Greg Abeln's counterpart on the environmental side of
24 things for DER, and for the most part it's a very good
25 working relationship. This will not disturb this

1 cooperative relationship, as I see it. It's like putting
2 us on the same footing as we are with the State Police or
3 with other police agencies where you have to cooperate.
4 It just seems to me that you can't legislate cooperation,
5 you've just got to give people the opportunity to work
6 together and hope that the leadership qualities of both
7 organizations comes out to the front and that they work to
8 achieve a common goal.

9 The best answer that I can give to you is
10 that I think that if we -- that we would not be intruding
11 upon any relationship. It should not affect any
12 relationship we have with DER. In fact, it should be
13 looked at in support of them, that we can call upon them
14 if we need help, and we certainly would, we need their
15 technical assistance, their knowledge of the area, their
16 maps, their hydrology studies. Whatever it happens to be,
17 we would need all their technical expertise, so it would
18 not be a confrontational mechanism. It would be the
19 opportunity for us to continue and enhance a cooperative
20 working relationship.

21 Q. Well, I think that sounds nice, but I'm
22 afraid in the real world there might be a few more
23 difficulties than those which you articulated. Let's say
24 we have a theoretical Governor who is of one political
25 party and an elected Attorney General of the other

1 political party. The Governor believes that we have to
2 spur economic development and for that reason,
3 environmental protection is not one of his top priorities.
4 We have a hard-charging former marine elected as Attorney
5 General who believes that criminal conduct should be
6 vigorously prosecuted. I think that there is the
7 likelihood of a clash between those differing attitudes.
8 A lackadaisical attitude on perhaps the gubernatorial
9 administration reflected in DER's position, and an
10 aggressive attitude on behalf of the environment which
11 might be articulated by an Attorney General. If we don't
12 have some institutional, some statutorily defined or
13 controlled by a regulatory process the relationship
14 between that gentleman and the Deputy Secretary of DER, I
15 see a real potential for conflict. I see them with the
16 possibility of tripping over one another.

17 A. Well, I think that there may be instances
18 that there would be some duplication, but I seriously
19 would doubt it. If we're -- let's take a specific
20 example.

21 A citizen complains about pollution, a
22 midnight dumper, all right? And it would involve perhaps
23 an analysis of the soil, tracing the chemicals involved.
24 I mean, our office doesn't have laboratories. We don't
25 have maps. So the first thing that we would do would be

1 not only to be on the site but call in the Department of
2 Environmental Resources and their technicians and their
3 specialists and to have them work with us in a cooperative
4 way.

5 As it stands right now, under the same
6 circumstances, in the same circumstances, the DER would go
7 to the scene. Even though we knew about it, the DER would
8 go to the scene and it would investigate and do whatever
9 it has to do, but we would never be involved in the
10 investigation. It may be months down the road. We would
11 not even, with the paper trail, Representative McHale,
12 would be lost and we wouldn't have the availability of the
13 Grand Jury, for example, to subpoena people.

14 Q. General, I hope you're right and I hope if
15 we pass 1175, and it certainly will have my support, that
16 that kind of cooperative spirit exists between your office
17 and DER, but I can tell you from past experience that at
18 times DER has shown an amazing lack of concern for the
19 protection of the environment, and part of the reason is
20 this: Not all polluters are midnight dumpers. Sometimes
21 they wear white button-down shirts, cloth ties,
22 pin-striped suits, and they attend political fundraisers.
23 And I have a real concern that in some administrations
24 past or theoretically in the future there might not have
25 been or might not be an aggressive attitude toward

1 environmental protection as you have voiced it today. I
2 had enormous problems the first four years that I was here
3 trying to interest DER in the protection of the
4 environment where blatant violations of the law were
5 brought to DER's attention by me and DER failed to
6 respond.

7 I hope that you're correct. I hope that we
8 continue to have a bipartisan approach, aggressive
9 approach to the protection of the environment, but I'm
10 worried that if we don't have some kind of institutional
11 definition of the relationship between your office and
12 DER, that we will have the duplication of effort, and
13 perhaps from time to time a direct conflict between the
14 differing philosophies of your office and that of a
15 Governor's Office, any Governor, not necessarily this one.

16 A. I think that one final note is that it's
17 better to have someone there that has the ability to
18 respond when--

19 Q. I agree.

20 A. The Governor's Office, as you point out did
21 not respond.

22 Q. Agreed.

23 A. You can then turn around and say, well, if
24 you answer the question, I can go over to the Attorney
25 General's Office and they'll look at it.

1 Q. I agree.

2 A. And that's maybe one of the reasons you're
3 supporting this bill.

4 Q. Exactly. That's why I'm supporting this
5 bill. That's why I'm praising you in the approach you've
6 taken in your testimony today.

7 One final question, and this relates to the
8 specifics initially touched by Representative McNally. I
9 see this as an enormous increase in the jurisdiction of
10 your office. A completely valid, appropriate increase in
11 the scope of your jurisdiction, but those of us that
12 support it should not underestimate the responsibility
13 we're giving to you at your discretion should this become
14 law. What would you anticipate would be your need, if
15 any, for increased resources in order to, at that point,
16 effectively carry out your responsibilities, should House
17 Bill 1175 become law? Will you need more money? I'm
18 prepared to vote for it. Would you need more people?
19 Would you need other types of administrative resources
20 that are currently lacking in order to translate your
21 rhetoric into reality?

22 A. Well, you know, I'd have to do a fiscal note
23 on this and I certainly would intend to do that. I would
24 examine just exactly what parameters would you set down
25 for me in my office to discuss with you just exactly how

1 you want it to be carried out. I believe in a working
2 relationship with the legislature. You have some problems
3 with some legislation that's submitted, whether it's this
4 or any other area, I'm going to work with you in making
5 sure that we understand what you want to accomplish. I
6 will sit down with you and develop that fiscal note. If
7 it may need some additional personnel for the office, I
8 don't know. But I want you to know that in anticipation,
9 and in also in trying to deal with a problem that exists
10 right now of the lack of enforcement across the top of the
11 northern half of this State, I had planned, you know, I
12 announced that as part of my campaign and part of my
13 January 17th swearing-in ceremony that I was going to set
14 up three different offices across the top of the State,
15 and you permitted me do that, and I commend you for it. I
16 thank you. I'm grateful.

17 The people of this State ought to know that
18 it was your initiative in support of what I requested
19 that's going to protect a lot of people in this State.
20 Now, those are people, incidentally, so you know where
21 they're going to be, to try to ensure the cooperation in
22 which you're concerned, those people will be housed right
23 in the DER offices. My agents, my attorneys, my
24 environmental attorneys and the offices will be housed
25 right in DER offices, so that there will be this absolute

1 assurance of connection, cooperation, exchange of
2 information that's so vital.

3 Q. Well, I've been a backpacker for 10 years,
4 longer than 10 years, 20 years I've been backpacking with
5 Jeff Schmitt from the Sierra Club, who's sitting in the
6 back audience today, and I've been appalled in the last
7 decade as I've observed from my own experience some of the
8 most pristine areas of Pennsylvania fall under the threat,
9 and in some cases the reality, of outrageous environmental
10 pollution. Streams that I used to swim in 10 years ago I
11 would now not allow my children to enter today. One just
12 two weeks ago which I visited, having not been there for
13 about five years, to witness two weeks ago obvious
14 pollution floating down one of the most pristine streams
15 in northcentral Pennsylvania.

16 We need vigorous environmental protection.
17 I strongly support not only the specifics of what you
18 presented today but your aggressiveness in indicating that
19 environmental protection should receive a top priority.
20 I'll do what I can to help.

21 A. Thank you.

22 Q. I think this is clearly a step in the right
23 direction.

24 A. Thank you very much.

25 REPRESENTATIVE MCHALE: Thank you, Mr.

1 Chairman.

2 ATTY. GEN. PREATE: Good luck to you.

3 REPRESENTATIVE MCHALE: Thank you.

4 CHAIRMAN CALTAGIRONE: For the benefit of
5 the members of the committee, I just want to say that the
6 Attorney General and his staff have been extremely
7 cooperative in all phases of legislation that this
8 committee has handled, and it's been an extreme delight
9 working with the Attorney General in crafting many of the
10 pieces of legislation that we've already acted upon, and
11 his office has been very, very cooperative.

12 Dave.

13 REPRESENTATIVE HECKLER: Thank you, Mr.

14 Chairman.

15 BY REPRESENTATIVE HECKLER: (Of Atty. Gen. Preate)

16 Q. General, I'd like to offer some observations
17 and then hear your response.

18 My first observation is that I'm a cosponsor
19 of this legislation. I have and am a jealous guardian of
20 the jurisdiction and the discretion of district attorneys
21 and would normally have some concern about enhancing the
22 jurisdiction of an Attorney General, even an elected one,
23 even you, if I felt that were going to be at the expense
24 of the authority of the law enforcement officers closest
25 to the public they serve. However, in this case, it's

1 certainly been my experience the district attorneys in
2 many cases lack the expertise, the staff, and the working
3 relationship with DER and other agencies which might be --
4 might encounter these situations and these offenses and be
5 in a position of making referrals.

6 I think that some of the comments we've
7 heard today may ignore or fail to take note of what
8 happens in the criminal justice system in general.
9 Generally speaking, prosecutors, whether it's at your
10 level or the local DA's level, learn of criminal offenses
11 by virtue of actions of the local police or some other
12 agency whose job it is to investigate those offenses.
13 Nevertheless, there are very few situations in which a
14 prosecutor is barred from acting if some specific agency
15 of government, whether it would be a police force or
16 whoever, fails to call this to the prosecutor's attention
17 in some formal way. Most district attorneys have
18 investigative staffs, at least larger district attorney's
19 offices have investigative staffs of their own so that on
20 a day-in-day-out basis their activities can overlap with
21 the investigative activities of a host of the State
22 Police, local police forces, city police forces.

23 Nevertheless, in my experience, while
24 there's certainly potential for friction and there are
25 certainly situations in which friction takes place, by and

1 large, that system works very well. I have a great deal
2 of difficulty with situations in which the prosecutor
3 would be -- is literally choked off, unless some formal
4 referral is made. And I guess that finally gets me down
5 to a question.

6 Is it the case that district attorneys under
7 the Commonwealth Attorneys Act, as it stands right now,
8 are similarly prevented from initiating a criminal
9 complaint or initiating an investigation unless they
10 receive a referral from somebody?

11 A. No. The district attorneys could initiate,
12 once upon receipt of an environmental complaint, they
13 could begin to do prosecution. The problem as you have
14 clearly pointed out, correctly pointed out, Representative
15 Heckler, is that they don't have the environmental
16 technical expertise or the staff to do it. They're busy
17 prosecuting murder cases and drug cases, robbery cases,
18 you know, all kinds of major crimes, and the environmental
19 summary criminal prosecution is down at the bottom of the
20 list. And it means that they would have to go to DER,
21 refer it to them anyway, and indeed that's what happens in
22 99 percent of the cases, that we accept designation from
23 the district attorneys to wind up prosecuting the case. I
24 did that myself as a district attorney. I mean, when
25 somebody came in with an environmental prosecution,

1 indeed, it was Mr. Keith Welks from DER who was then a
2 member of the Attorney General's Office, and we asked them
3 to prosecute a case in Lackawanna County.

4 So it's important that we recognize that
5 district attorneys, while they have the original
6 jurisdiction, nonetheless do not have the resources and
7 the close working relationship that the Office of Attorney
8 General has. We have people working with the specialist.
9 They, themselves, like Mr. Abeln and his staff and his
10 investigators, have developed a special expertise in the
11 investigation of environmental crimes and are specialists
12 in prosecution of those cases, and that means it's a
13 tremendously efficient way to deal with it. We, in fact,
14 have designated people from DER to be members of the
15 Attorney General's Office to assist us in the prosecution
16 of these criminal cases, and I'm pleased to note that,
17 that that's how close our relationship is that I think
18 there's five people designated from DER now, is that
19 right, Greg, to prosecute crimes--

20 MR. ABELN: Correct.

21 ATTY. GEN. PREATE: They're in DER, they're
22 paid by DER, but they're designated Deputy Attorney
23 General so they can prosecute the cases.

24 REPRESENTATIVE HECKLER: That, it seems to
25 me, especially in view of the fact that district attorneys

1 have this authority without this referral provision, and
2 given that the realities of the situation, and I say that
3 having been part of an office that I think had one of the
4 first successful criminal prosecutions of the Clean
5 streams Act and put somebody in jail as a result of it
6 down in Bucks County, that it makes -- the status quo
7 makes no sense, and I, at least in my experience, I can't
8 imagine why there should be any presumption attached to
9 this legislation that there will be competition, that
10 there won't be the same kind of active referral conduct on
11 top of whatever enhanced investigation may be available
12 through the Office of Attorney General.

13 Thank you, Mr. Chairman.

14 ATTY. GEN. PREATE: Thank you, sir.

15 CHAIRMAN CALTAGIRONE: Mike.

16 REPRESENTATIVE BORTNER: Thank you.

17 BY REPRESENTATIVE BORTNER: (Of Atty. Gen. Preate)

18 Q. Mr. Attorney General, how big is your
19 environmental unit right now?

20 A. We have -- right now, we have 3 offices and
21 30 people spread out Philadelphia, Harrisburg, Pittsburgh.
22 That's basically what we have. And we will have, with the
23 implementation of the new budget that you passed, and with
24 a Federal grant that's being administered by DER, we'll
25 set up 3 new offices and we will add approximately about

1 12 new people to the staff, lawyers and investigators.

2 Q. That was my next question. Of those 30, and
3 now of course what will be 42, how many are investigators,
4 how many lawyers?

5 A. Just a second. I'll get you the exact
6 figure, Representative.

7 We have seven prosecutors, seven attorneys,
8 and we have six agents now, eight are authorized; four DER
9 people are added to our staff.

10 Q. Okay, and those four DER people, are they
11 attorneys or are they investigators?

12 A. No, they're technicians. They're
13 specialists. They're environmental specialists. They're
14 the ones that we have to work with, as I was explaining to
15 Representative McNally and Representative Piccola, that we
16 work with these people to build a case. Criminal
17 investigator, environmental specialists work with the
18 attorney, who is the prosecutor from our office, and
19 that's the tri-part relationship that we have with DER.
20 In many instances, we will be working with a DER attorney.
21 also.

22 Q. Well, like, I suppose, everybody else up
23 here, I strongly support more strict enforcement of
24 environmental laws and also would support maximizing
25 resources, but I think what you're hearing here, and I

1 would join Representative Piccola and McNally and perhaps
2 McHale in that I would not like to see a duplication of
3 efforts, and I guess I do envision a lot of overlapping
4 jurisdiction, and that's what I'm trying to get a handle
5 on here.

6 Would you envision assuming responsibility
7 for all environmental prosecutions?

8 A. No, it would seem -- on, we certainly could
9 -- see, many, many environmental cases are civil in nature
10 and there are civil penalties. The DER handles those.

11 Q. I understand.

12 A. So we would not be involved in those.

13 Q. But DER also prosecutes criminal cases.

14 A. No, they do not.

15 Q. They do not?

16 A. They do not.

17 Q. They do not?

18 A. They either refer them to our office or they
19 refer them to the district attorney. And in the instances
20 where there has to be a criminal prosecution and
21 litigation, for example, in the Stewart Manix case, that
22 was our office that prosecuted that. We will take on, for
23 example, in DER there are five lawyers in DER that I have
24 deputized as special deputies that are able to represent
25 the Office of Attorney General in summary cases before

1 magistrates.

2 Q. Okay.

3 A. So that's where you may be getting the
4 impression that there's also DER prosecuting criminal
5 cases. They are because I have deputized them and told
6 them that they are authorized as special deputy attorney
7 generals. Basically, all the criminal prosecution,
8 therefore, of the state's criminal law, upon referral from
9 DER, is done by our office.

10 Q. Has it always been the case with
11 representatives of DER? Have there always been deputies
12 who had the authority to go into local counties and
13 prosecute cases?

14 A. Only--

15 Q. The reason I'm asking is I can specifically
16 recall situations when I was an assistant district
17 attorney that DER people came down, would work with us but
18 would actually do the prosecution.

19 A. Yes, designated by the district attorney or
20 designated by the Attorney General to be a deputy. That's
21 what I did in my county, and you've obviously recognized
22 the same practice.

23 Q. I guess what I'm trying to find out here,
24 what I'm trying to see is where the real failing in the
25 present law is, and I guess I join Representative Heckler

1 in having a good deal of concern about the Attorney
2 General actually being barred from stepping into an
3 investigation and becoming involved. That I see as a
4 problem. On the other hand, I would hate to see
5 investigators from DER, investigators from the Attorney
6 General's Office, getting the same complaints and
7 essentially running out and tripping over each other
8 conducting investigations. And that's -- I guess I'm
9 trying to understand how we can solve the first problem
10 without opening up a jurisdictional nightmare that could
11 possibly create what I see as a second problem.

12 A. Yeah, and I think that's a legitimate
13 appreciation of the problem and I think that--

14 Q. I mean, particularly when I thought I heard
15 you fairly strongly saying that you want those complaints,
16 you want those complaints coming to your office first, if
17 I understood you?

18 A. If a citizen wants to, they ought to be able
19 to bring the complaint to our office, as Representative
20 Hagarty has done or Councilwoman Specter has done or any
21 citizen or you could. If you wanted to make a complaint,
22 you could have a choice of going to DER or the Attorney
23 General, and what I have tried to do in anticipation of
24 the problem that you've outlined is to set up my
25 prosecutions, my Environmental Crimes Prosecutions Section

1 in the same office that the DER is. So if the call came
2 in, that my people would then automatically exchange the
3 information. And we have to work with DER. We simply
4 can't do it by ourselves. We would have to go to them for
5 specialized information, for maps, for analysis, for lab
6 tests, and that sort of thing.

7 Q. I understand what you're saying and in both
8 those cases you referred to, Councilwoman Specter and
9 Representative Hagarty. Those were both situations where
10 at least allegedly or where it appears as though DER had
11 not fulfilled their responsibilities. I guess I'm not
12 sure, it doesn't seem to me that we would want the
13 Attorney General's Office to be the place of first
14 complaints.

15 Let me give you a specific. I just recently
16 had somebody come to me, somebody I knew, who said that
17 she was looking out her back window, a very small
18 contractor, a neighbor out in the country, and much to her
19 surprise and horror saw him backing up a dump truck with
20 construction materials dumping it into a stream. I called
21 DER. DER got out. It's being cleaned up. I haven't
22 followed it close enough to know whether there will be
23 fines or criminal prosecution, but presumably, they were
24 on the scene, at least got a head start. It doesn't, to
25 me, make a lot of sense to have that kind of a case coming

1 right to the Attorney General's Office any more than it
2 would to have reports of traffic accidents going to the
3 district attorney's office instead of to the local
4 township or municipal police officer. Do you understand
5 what I'm saying?

6 A. Oh, yes, absolutely, and I think that
7 there's a certain amount of referral that has to be done
8 by our office, and it indeed is done every day in a lot of
9 different areas, whether it be in the consumer protection
10 area, whether it be in the area of drug enforcement; in
11 any areas that we receive a complaint.

12 For example, the Governor's Office has a
13 hotline and they get lots of calls, and some of them are
14 referred to DER and some of them may be referred to us.
15 It's done all the time. I think in the working
16 relationship that builds up, we would make the kinds of
17 discretionary decisions that have to be made that this is
18 not worthy of our prosecutorial involvement but much
19 rather it should be handled by DER in a civil way. All
20 I'm saying is that give us the same benefit on the other
21 side. When DER gets a complaint and they say it's a civil
22 case but nobody is there from the criminal side to say,
23 hey, wait a minute, this is Ashland Oil, this may be a
24 criminal discharge of oil here into the Monongahela, or
25 another incident, the battery acid case in Lancaster

1 County, you know, this should be referred to criminal
2 prosecution rather than going civilly. Both sides have to
3 be involved in the decisionmaking, and I think that's the
4 simplest way I could put it. We both should be involved
5 in this decision.

6 Q. And I would agree, and if everybody's
7 pulling together, this ought to work. I guess the
8 potential problems I see may never materialize, but it
9 seems to me that at least there is the potential out there
10 for a lot of overlapping jurisdiction, and if perhaps the
11 personalities involved some time in the future aren't
12 quite as cooperative, I guess I could see some problems.

13 I think from my point of view, while I
14 support this, I will be looking at the bill with at least
15 an eye to see that some of that perhaps can't be
16 eliminated while still giving the Attorney General that
17 sort of final responsibility which I do agree ought to
18 exist in those kinds of cases to make final decisions that
19 the highest law enforcement officer in the State ought to
20 have the authority to make.

21 A. Thank you, and I'll work with you,
22 Representative--

23 Q. Thank you.

24 A. --in helping to draft that kind of
25 appropriate response.

1 Q. Thank you.

2 CHAIRMAN CALTAGIRONE: Representative Reber.

3 REPRESENTATIVE REBER: Thank you, Mr.

4 Chairman. I'll try to be very, very brief.

5 Just for the record, I'd like to state I
6 served on that conservation investigatory hearing back
7 five terms which Representative McHale was referencing
8 earlier. Possibly it's because I sit on a different side
9 of the aisle than Representative McHale, but my
10 recollection of that witch hunt, as I called it at the
11 time and would so continue to categorize it, took a little
12 bit different flavor than earlier postulated, but
13 nonetheless, I couldn't let the record go without stating
14 that.

15 BY REPRESENTATIVE REBER: (Of Atty. Gen. Preate)

16 Q. Additionally, General Preate, my concern
17 here is the area of that task force report with the
18 Ashland situation, and as I read between the lines, as me
19 and my colleagues have been doing in listening to your
20 testimony today, just so I have this clear, the two
21 investigators from your office, they were there in
22 strictly a fact-finding basis, capacity, turned over those
23 facts to someone headed in DER, correct? Those people
24 then in DER made a determination from those facts what
25 they wanted to do. No one from the Attorney General's

1 Office had any opportunity to analyze those facts and make
2 a determination whether there was a basis for criminal
3 action to be taken or the criminal action had in fact been
4 carried out on the site, is that correct?

5 A. I'm going to ask that Greg Abeln, who was a
6 part of the office at the time, address each of one those
7 facts.

8 MR. ABELN: That's correct. Keith Welks,
9 who was my predecessor, headed that task force and he,
10 through my then head of the Criminal Law Division, Paul
11 Yatron, obtained two of my investigators because he just
12 didn't have the expertise to conduct investigations and do
13 interrogations of those type of people on his staff. And
14 we gladly gave him our two best investigators. As I
15 understand it now, Keith has now hired one of those
16 fellows back to his office and they now have criminal --
17 or not criminal, but criminal-type investigators working
18 in DER to do that exact thing should ever that situation
19 ever arise again. But at the time, those two people were
20 given to Keith to work strictly for DER, and there was no
21 referral to me until the conclusion of the report where
22 DER, through Mr. Welks, had made the recommendation that
23 there was -- it was not a prosecutable case, in his
24 opinion. And that was published and it's of record. We
25 didn't have any input as to whether or not it should have

1 been investigated criminally by ourselves until that
2 report was made public, and I believe the Governor made
3 the referral himself six months later.

4 REPRESENTATIVE REBER: General Preate, I
5 imagine there is the concern of the overlappingness here
6 and the magnitude of this problem with your office getting
7 involved, but I assume that in many, if not most, of the
8 instances, if something came to your attention under this
9 proposed legislation and it was not of the magnitude that
10 necessitated the expertise, technicians, and what have you
11 and you made an administrative decision in-house, you
12 would probably be referring a vast majority, I'll use that
13 as opposed to a percentage, of these cases to the local
14 district attorneys where you felt that they could capably
15 handle the prosecution. Is that a fair observation?

16 ATTY. GEN. PREATE: I think it's a fair
17 observation. We would be referring it either to the local
18 prosecutors if they were -- or to DER to handle it in a
19 civil way. Sixty percent of the cases, that's the way
20 it's done right now.

21 All we're asking for is to be involved in
22 the decisionmaking upfront, that's basically what it is,
23 so that we can respond and there's some checks and
24 balances. If somebody doesn't act in DER, at least
25 there's an outlet, there's somebody that you can go to

1 that says, hey, look, DER hasn't acted, maybe you can get
2 them to move. And that's all we're saying here. Right
3 now, if DER decides, as they did in the Ashland Oil case,
4 to go one direction, there's no real way that we can turn
5 that around.

6 REPRESENTATIVE REBER: Can you or one of our
7 deputies give us some idea of the number of inquiries that
8 you receive that are not referred to you by DER as well as
9 the number of referrals that you do get from DER? Can you
10 give us some idea of what we're talking about, the
11 magnitude of that?

12 MR. ABELN: Well, that's a difficult
13 question to answer because of the ones that come through
14 directly into DER that go in for civil pursuits that we
15 may never know about. But the typical referral system
16 comes in, a complaint will be made in a region, let's say
17 the Williamsport region, and their regional office of DER
18 will assess it to determine whether or not they feel
19 there's any need for a criminal investigation. They, in
20 turn, refer it to us. We do a preliminary investigation--

21 REPRESENTATIVE REBER: How many of those do
22 you get a year? I mean, is there any--

23 MR. ABELN: Michael, would you guess how
24 many in a year? 100? Somewhere between 75 and 100 total
25 referrals?

1 MR. STAUB: Maybe 75.

2 REPRESENTATIVE REBER: Approximately '75 a
3 year.

4 How many types of inquiries, or maybe you
5 don't keep these statistics, how many inquiries do you get
6 that your response has to be, uh-uh, we can't touch it,
7 has to be referred to us first through DER, sorry, take
8 your case to that agency. How often does that takes
9 place?

10 MR. ABELN: I'd say not a large degree, but
11 to some degree, and there's also a situation where it's
12 patently a civil violation and it's not a prosecutable
13 case that's referred to us by the regional office of DER
14 or by a citizen and we will inform that citizen and the
15 regional office that we are referring it back to them for
16 civil prosecutions, and I'd say that happens maybe 20
17 percent of all referrals all the time. We have a good
18 working relationship with the regional offices in that
19 regard.

20 REPRESENTATIVE REBER: Thank you.

21 Thank you Mr. Chairman.

22 CHAIRMAN CALTAGIRONE: Are there any other
23 questions?

24 Lois.

25 REPRESENTATIVE HAGARTY: Thank you.

1 BY REPRESENTATIVE HAGARTY: (Of Atty. Gen. Preate)

2 Q. Again, thank you for sharing your support
3 today.

4 As I understand the law, the Clean Streams
5 Act and the Solid Waste Management Act are themselves, and
6 correct me, I'm probably wrong, criminal violations. If
7 that's the case, my question is, what takes this then from
8 being a civil case to a criminal case? Is it the
9 culpability of the defendant and not the violation but the
10 culpability? Is that what makes the difference?

11 MR. ABELN: The Solid Waste Management Act
12 and the Clean Streams Act provide for both civil and
13 criminal penalties.

14 BY REPRESENTATIVE HAGARTY: (Of Atty. Gen. Preate)

15 Q. Okay. And then what is it that causes you
16 to determine that there is a criminal violation rather
17 than a civil violation?

18 A. The whole point is that DER determines
19 whether it's civil or criminal.

20 Q. Right.

21 A. And we don't have any input into that
22 process.

23 Q. Right, I understand that, but I'm saying, if
24 you did have input for what DER is doing now, what is it,
25 since both civil and criminal penalties are available -- 1

1 mean, unlike most of our laws, this is what I'm grappling
2 with, and here I am a former prosecutor and trying to
3 figure this out, but unlike most of our laws, it's the law
4 itself. I mean, you either violate a criminal law when
5 you kill someone or you're engaged in a civil process by
6 virtue of a different law. I mean, these laws, as you
7 indicated, provide for both civil and criminal penalties.
8 So if you were to determine which to charge, is it then --
9 my question is, is it then the action of the defendant and
10 not the nature of the violation which makes the
11 difference?

12 A. It's both. It seems to me that what you're
13 looking at is the nature of the harm that's been done, the
14 intent of the person who is doing the harm, and maybe
15 other factors that are involved. It may be important that
16 clean up be immediate and it be done by the company
17 involved as it is, for example, in the Exxon Oil case
18 right now. They haven't charged the company criminally in
19 Alaska, but they are charging the skipper of the Exxon
20 Valdez, and maybe that's what would happen in a local
21 case. They wouldn't charge the company, you might go
22 after the dump truck fellow that did it and dumped it in
23 the stream, as you pointed out.

24 Q. And what would his conduct have to be to
25 charge him -- for you to--

1 A. I think basically it's a question of intent.

2 Q. I guess that's my question.

3 A. Yeah. You know, something much more than
4 mere negligence. It would have to be, and it seems to me,
5 a deliberate intentional act with full knowledge of what's
6 in the cargo, that sort of thing, and the nature of the
7 harm that was involved. If it just created an odor
8 problem, you know, I mean that's one thing. But if it
9 creates a fish kill and pollutes an athletic field or a
10 bunch of homes, then, you know, where people are going to
11 be breathing lead or they're going to have problems down
12 the line, then you have to think about criminal charges
13 under those circumstances. We just want to be involved in
14 the process that makes that decision.

15 Greg has a thought.

16 MR. ABELN: The Solid Waste Management Act,
17 for example, has a strict liability provision that it puts
18 absolute liability on corporations and vicarious
19 liability, which, if you technically look at the language
20 of the act itself, it gives our section the power, once we
21 have the jurisdiction over the case, to literally arrest
22 somebody and prosecute them for something they have
23 absolutely no idea occurred. Let's say, for example, a
24 corporation loads its truck up with hazardous chemicals to
25 take it to a treatment plant. During the way, they have a

1 crooked employee who just dumps it on the ground and makes
2 some money somehow by going on to his place of business.
3 Well, that corporation or the people that sent him away
4 may not have any idea that that had occurred.
5 Technically, under the law, I could arrest not only the
6 guy that did it but the company itself.

7 REPRESENTATIVE HAGARTY: Okay. Okay, thank
8 you.

9 CHAIRMAN CALTAGIRONE: Paul.

10 REPRESENTATIVE McHALE: Thank you, Mr.
11 Chairman. Just a couple of quick follow-ups.

12 BY REPRESENTATIVE McHALE: (Of Atty. Gen. Preate)

13 Q. Excluding the summary cases, which
14 apparently are being handled by those five specially
15 deputized attorneys general--

16 A. And by members of our office, too.

17 Q. And by members of your office within DER,
18 excluding those summaries cases, how many criminal
19 prosecutions are you pursuing now as a result of referrals
20 previously made by DER?

21 A. All of them.

22 Q. I'm wondering--

23 A. The numbers? You want the exact, absolute
24 numbers?

25 MR. ABELN: We had 10 referrals that have

1 been made, I just checked my notebook, since the beginning
2 of the year. We had some that--

3 REPRESENTATIVE MCHALE: Those are all
4 misdemeanor and felony cases?

5 MR. ABELN: Yes.

6 REPRESENTATIVE MCHALE: All right.

7 MR. ABELN: My section does nothing but
8 misdemeanor and felony cases. We may have a summary
9 offense that's tied in there that we might pursue just for
10 a technical reason, but generally, my section, which is
11 composed of DER lawyers as well as deputy attorney
12 generals, they prosecute only the misdemeanor and felony
13 provisions.

14 REPRESENTATIVE MCHALE: And so at the
15 present time there are approximately 70 cases in the
16 criminal--

17 MR. ABELN: No, there are more than that.

18 ATTY. GEN. PREATE: Just this year, Paul.

19 MR. ABELN: Just this year we've had 70
20 referrals. Now, out of those referrals, some have been
21 rereferred back to the Department of Environmental
22 Resources, like I said, about 20 percent of those, and
23 then another group of them would have been dismissed
24 outright as having no foundation. And a lot of times
25 we'll get a referral from DER on a disgruntled employee

1 who has been fired and he wants to come back at that
2 company and make a referral for something that didn't
3 exist. Now, we take that investigation, after it's been
4 referred to us by DER, and do a preliminary inquiry into
5 the allegations he's made. I'd say a good 50 percent of
6 the time they're unrounded, but then on the other hand, 50
7 percent they do have substantial foundation and we proceed
8 accordingly.

9 REPRESENTATIVE McHALE: All right, that's
10 really what I was getting at. Then let's say if we have
11 70 cases in the course of a given year, or at least up to
12 this point in the year--

13 ATTY. GEN. PREATE: Six months.

14 REPRESENTATIVE McHALE: --being referred to
15 you and 20 percent of those are sent, for good reason,
16 back to the regional offices of DER, and of the remaining
17 number, perhaps half are dismissed by your office because
18 there apparently is no legal foundation for a criminal
19 prosecution, we're down to a relatively small number of
20 serious criminal cases that have been and are being
21 effectively prosecuted under the existing system of law.

22 ATTY. GEN. PREATE: That's right.

23 MR. ABELN: And I might also add, of those
24 70 cases, we're talking about classifying a case as in a
25 general just as one, but we might have, under that one

1 case, 20 defendants. So it all depends. And each one of
2 those defendants would take investigation and prosecution.
3 I'd say there's an average of five defendants per each
4 referral that we have, minimum.

5 REPRESENTATIVE MCHALE: My final, I guess,
6 is a summary question reflecting the statistics which you
7 have just given, and then viewing those statistics in
8 light of the testimony presented earlier by the Attorney
9 General, you held up a newspaper clipping indicating that
10 someone who obviously deserved to go to jail, in my view,
11 went to jail. How often does that happen?

12 MR. ABELN: It's happening a lot. Mr.
13 Welks, my predecessor, started it, and he successfully
14 prosecuted the first organized crime environmental case
15 that ever had been done in the United States. And that
16 fellow got a substantial sentence under his regime. I
17 personally prosecuted -- the last two corporate presidents
18 I prosecuted have received terms in the State penitentiary
19 of two years or more, which is the mandatory aspect of the
20 Solid Waste Management Act. In the provisions, and Mr.
21 Heckler will tell you, there's very, very few mandatory
22 sentences in all of the criminal violations other than
23 drunken driving.

24 REPRESENTATIVE MCHALE: I guess what I'm
25 getting at is this: When someone deliberately, with what

1 we would call criminal intent, threatens the public health
2 and safety by polluting the environment, how likely, under
3 the existing system of law, is it that that individual
4 will actually go to jail?

5 MR. ABELN: It's very likely now. In the
6 last two months, for example, we've had, of the cases my
7 section has been prosecuting, I can tell you that at least
8 six cases where individuals have been -- have been put in
9 jail for substantial terms. As a matter of fact, just as
10 we speak today, a case in Pittsburgh -- or in Erie, I'm
11 sorry, I was just called before I came over here, this
12 case was, I think, like four years old and it's gone up
13 and down the chain of appellate issues, he was finally
14 sentenced today to, I believe, two weeks to five years in
15 a local county prison. Now, in that particular case, it
16 was on a misdemeanor of the third degree, but he still
17 went to jail on a misdemeanor of the third degree. If you
18 ask Mr. Heckler, he'll tell you that it's rare in any
19 criminal case that a person goes to jail on a misdemeanor
20 of the third degree. So we're very, very pleased with the
21 way the judges have been treating the cases.

22 REPRESENTATIVE McHALE: I certainly think
23 you're moving in the right direction. I think that's a
24 message we need to communicate, that when someone
25 deliberately violates the law, threatening the public

1 health and safety of all of our citizens, that if that
2 person is caught, prosecuted, and convicted, he's going to
3 go to jail. He's not going to face a slap on the wrist,
4 it's not going to be a minor fine. We need to
5 communicate, I think, the rhetoric that the Attorney
6 General properly articulated earlier that if you commit
7 those kinds of acts in Pennsylvania, no matter who you
8 are, no matter what corporation you head, you're going to
9 go to jail.

10 ATTY. GEN. PREATE: Thank you.

11 REPRESENTATIVE MCHALE: Thank you, Mr.
12 Chairman.

13 ATTY. GEN. PREATE: It's been a pleasure to
14 be before the committee, Mr. Chairman.

15 CHAIRMAN CALTAGIRONE: Thank you very much.

16 ATTY. GEN. PREATE: We'll continue to work
17 with you in developing any legislation that you feel is
18 appropriate in this manner.

19 CHAIRMAN CALTAGIRONE: At this time, we'll
20 hear from Representatives Hagarty and Clark.

21 REPRESENTATIVE J. CLARK: Thank you, Mr.
22 Chairman.

23 I think in an effort to better understand
24 the circumstances and the facts surrounding the Lankenau
25 Hospital case, for the benefit of the members of this

1 committee, I might briefly summarize some of the
2 circumstances around that event.

3 On January 13th of this year, Senator
4 Richard Tilghman, Representative Hagarty, and myself met
5 with the local Department of Environmental Resources,
6 Director, Mr. Leon Gonshur, and his staff. This meeting
7 was stemmed from the concern expressed by many community
8 citizens surrounding the Lankenau Hospital area, and these
9 concerns really dated back to 1987. The meeting was a
10 briefing on allegations culminating in a recent expose in
11 late 1988 by the Philadelphia Daily News, and in these
12 Daily News articles in December the paper, newspaper,
13 cited very clear evidence of the burning of infectious
14 waste and pathological waste, in violation of Lankenau's
15 Type 0 permit. I might add that a Type 0 permit strictly
16 regulates the moisture content as well as the specific
17 content of any material being burned.

18 To the newspaper articles I would add the
19 context of a letter from a Mr. Elmer Bogart from the
20 Lankenau Hospital, Director of Maintenance and Facilities,
21 to a Mr. Philip Bedein, of the local DER office. This
22 letter or this section is taken as a reply to Mr. Bedein
23 by Mr. Bogart from a request to identify specifically what
24 was being burned in that hospital's incinerator. The
25 letter states:

1 "As a follow up to our letter of January 12,
2 and in accordance with your request, we are listing below
3 some of the items which make up the infectious waste which
4 is incinerated daily at the hospital: Dressings, sharps,
5 membrane oxygenators, disposable mattress pads, dialysis
6 unit wastes, blood and blood byproducts, isolation wastes,
7 cultures and stocks of etiologic agents, contaminated food
8 and other products, and finally, contaminated laboratory
9 wastes."

10 The letter goes on to state that, "These
11 wastes are placed in red plastic bags, to distinguish them
12 from other hospital waste, and they are transported in
13 special carts to the incinerator.

14 "We are enclosing copies of letters sent to
15 Lower Merion Township and Montgomery County Planning
16 Commission, along with proof of delivery slips."

17 It says that, "If any further information is
18 required, please let me know." And it is signed, Elmer
19 Bogart, Director of Maintenance.

20 Now, on the face of this evidence, this
21 clear-cut evidence, in 1987 DER inspected the incineration
22 plant at Lankenau Hospital on a couple of different
23 occasions, but they focused in these investigations
24 strictly on the operational parameter of the burning unit,
25 not on the content of the waste being incinerated. As a

1 result, the incinerator was found to be in technical
2 compliance at that time. Mr. Gonshur, in our meeting,
3 revealed that the inspections did show evidence that the
4 hospital had in fact burned pathological waste in the
5 past, and although he was unable to cite for us at that
6 time specifically how that evidence was obtained, he
7 candidly admitted that the inspection should have focussed
8 on the content and not just on the technical aspects of
9 operation.

10 Despite the fact that evidence existed of a
11 violation by Lankenau Hospital of their permit, no
12 penalties or no formal compliance action was taken at the
13 time. Instead, the DER simply reached an agreement with
14 the hospital not to burn pathological waste in the future.

15 In November of '88, another technical
16 inspection was undertaken and again the hospital was found
17 to be in compliance. In December of '88, a joint air and
18 technical inspection was done and the burning of
19 infectious wastes this time was found. The hospital was
20 notified that they were not in compliance with their
21 permit and they would have to submit a proposal to
22 segregate such waste in the future. The hospital, at this
23 point, volunteered to cease operation of the incinerator,
24 just a matter of days before DER themselves finally
25 suspended the hospital's burning permit.

1 Mr. Chairman, I think what concerns the
2 citizens of our area and the citizens around the hospital
3 is that two very different divisions of DER, the Air
4 Quality Division and the Solid Waste Division, could have
5 such documented, very radically different, opinions as to
6 what does or does not constitute a violation of a Type 0
7 burning permit and not come to any consensus over almost a
8 two-year period of time. And it seems to us that our
9 community's risk regarding their health can really not be
10 adequately addressed by the DER investigation of itself,
11 the same agency that's really shown absolutely no
12 inclination in the past to enforce the laws that relate to
13 this incident.

14 In summary, I would say that in
15 circumstances such as these we need an independent
16 factfinding process through the legal tool given to us by
17 House Bill 1175 to the Attorney General's Office.

18 Thank you for your time.

19 REPRESENTATIVE HAGARTY: Good afternoon.
20 Thank you, Mr. Chairman, for calling this public hearing
21 today, and members of the committee.

22 House Bill 1175 was introduced by
23 Representative Clark and myself to provide, as you have
24 heard, the Attorney General with original jurisdiction to
25 prosecute crimes involving the environmental laws of the

1 Commonwealth, including but not limited to violations of
2 the Clean Streams Law and of the Solid Waste Management
3 Act.

4 We deemed this action to be necessary as a
5 result of the inaction you have heard detailed by
6 Representative Clark, inaction by DER in response to
7 serious environmental violations by Lankenau Hospital.

8 I might add that I called DER personally in
9 1987 when I received community complaints of obnoxious
10 odors at night in the area of this hospital and was told
11 specifically by our regional office of DER at that time
12 that Lankenau Hospital was burning in accordance with
13 their permit, and so I personally told residents of this
14 area that there was no problem. That remained my opinion,
15 based on what DER had told me, my belief that this was our
16 Environmental Protection Agency and that I could rely upon
17 that, and I did not form a contrary opinion until the
18 Daily News formed a contrary opinion for me because of
19 their detailed investigation some two years later.

20 The community's continuing concern regarding
21 the burning of infectious waste by Lankenau Hospital, the
22 need for an independent factfinding investigation, and the
23 lack of public confidence in the regional office of the
24 Department of Environmental Resources led to the
25 introduction of this bill.

1 On January 19, 1989, we requested Attorney
2 General Preate to initiate an investigation of
3 environmental violations by Lankenau Hospital. We
4 detailed the history of this case and the lack of action,
5 despite knowledge, by DER. We felt that it was important
6 for the Attorney General's Office to take over this
7 investigation because of the community's continuing
8 concern regarding risks to their health. Any reassurance
9 at this point by the same agency that had shown no
10 inclination in the past to enforce the law could not
11 restore public confidence.

12 The Attorney General's Office accepted this
13 responsibility. A preliminary investigation was
14 initiated. While this preliminary investigation found no
15 evidence of criminal wrongdoing, it did note that the
16 inaction of DER contributed to Lankenau's continued
17 violation of its burning permit.

18 We also learned that even if criminal
19 violations were found, the Attorney General would have
20 been powerless to prosecute the case. This was because,
21 as you have heard, the Commonwealth Attorney's Act as
22 originally amended in 1980 when the legislature first
23 provided for an elected Attorney General did not provide
24 the AG with original jurisdiction. Instead, that act set
25 forth a scheme in which an investigation of an

1 environmental crime only fell within the power of the
2 Attorney General upon the request of a district attorney
3 or upon the request of a Commonwealth agency. Other rare
4 examples, as I understand them, of times when the Attorney
5 General could prosecute would be if an investigative Grand
6 Jury returned an indictment or with court permission in
7 certain enumerated cases.

8 This scheme of limited powers works well in
9 most cases because local district attorneys can and do
10 initiate investigations. District attorneys' offices in
11 almost all situations are well prepared and quite capable
12 of enforcing the criminal laws of this Commonwealth.
13 However, we felt that the complexity and far-reaching
14 nature of environmental issues were such that vesting
15 concurrent jurisdiction to prosecute in the Attorney
16 General's Office would ensure better enforcement and
17 punishment of wrongdoers in this growing area of criminal
18 activity.

19 We believe that if our bill is enacted, the
20 Attorney General would have a clear path to launch an
21 investigation if and when he feels it is appropriate, and
22 that can only improve environmental safety for the people
23 of Pennsylvania.

24 Thank you.

25 CHAIRMAN CALTAGIRONE: Are there any

1 questions?

2 (No response.)

3 CHAIRMAN CALTAGIRONE: Thank you.

4 REPRESENTATIVE HAGARTY: We were clearer
5 than the Attorney General then.

6 CHAIRMAN CALTAGIRONE: We will next hear
/ from A. Gerald Renthall, M.D., President of the Lower
8 Merion Board of Health.

9 DR. RENTHALL: Good afternoon. I'm Dr.
10 Gerald Renthall. I'm president of the Lower Merion
11 Township Board of Health, in which township Lankenau
12 Hospital is located. I'll add my small voice to Mr.
13 Preate's very impressive presentation and would like to
14 support House Bill 11/5. I had prepared some remarks in
15 relation to the Lankenau Hospital situation which are
16 somewhat in variance with the statements that you just
17 heard, and I don't think this is necessarily the place to
18 try that issue, but a little later I would like to set
19 some of the record straight as I see it.

20 I believe it's highly desirable for the
21 Attorney General to have the authority of original
22 jurisdiction in prosecuting violations of environmental
23 laws. I believe that there are three major advantages to
24 having this power in the Attorney General's Office.

25 First is that it would provide a mechanism

1 for dealing with violations of environmental laws when the
2 agency having primary jurisdiction fails, for whatever
3 reason, to deal with those violations. And I think you've
4 been given a number of examples of that kind of a
5 situation, and mostly involving the DER.

6 Secondly, it establishes a threat of
7 sanction against violators, which provides a greater
8 incentive to obey the law, especially if the regulatory
9 agency is perceived as ineffectual.

10 And third, it provides an inducement for the
11 regulatory agency itself to be diligent in promoting
12 compliance with environmental laws.

13 Rather than describe the sequence of events
14 in the Lankenau Hospital case, you've already heard some
15 of that, I would like to clarify some of the issues.

16 The DER has two divisions, an Air Quality
17 Division and a Solid Waste Management Division, each of
18 which is responsible for issuing permits in such a case as
19 a hospital incinerator, and each of which inspects
20 separately the operation of an incinerator. And the DER
21 inspections of the Lankenau Hospital apparently were
22 carried out on a regular basis by the Air Quality Division
23 but not by the Solid Waste Management Division.

24 The DER also was somewhat ambiguous in its
25 standards which the hospital was trying to apply. There

1 are two main types of waste relating to this situation,
2 one is Type 0, infectious waste, and the other is the,
3 quote, "Type 4" or pathological waste. The hospital had a
4 permit to burn Type 0 waste, and that does include
5 infectious material, most infectious material. The
6 hospital was always allowed to burn infectious material
7 and there was no hazard relating to that burning.

8 The Type 4 waste, pathological waste,
9 includes things like body parts, animal remains and blood.
10 As far as we can determine, as far as I know from the
11 situation, what the hospital was burning was blood, which
12 was a component of Type 4 pathological waste, which in
13 fact was not permitted but which the hospital thought was
14 permitted because a standard for Type 0 waste was that
15 they were not allowed to burn waste which included a
16 moisture content of greater than 10 percent. The
17 ambiguity was that was the 10 percent relating to the
18 entire amount of waste, in other words, 10 percent of the
19 entire charge of the incinerator, or did it represent
20 individual portions, like a bottle of blood? And it seems
21 that the hospital believed that it related to the entire
22 charge of the incinerator rather than the individual
23 portions, so that a bottle of blood, included with a lot
24 of other wastes, would represent less than 10 percent.
25 That's as I read the situation.

1 I was not aware or did not believe that the
2 hospital had willfully violated the environmental laws.
3 There may have been sloppy management on the part of the
4 hospital. Unfortunately, local township officials and the
5 Department of Health and the Board of Health do not have
6 the personnel or the expertise to make an investigation of
7 that kind of situation and does not have the legal
8 authority to deal with it. The main problem was that the
9 -- and this is a legitimate concern -- the citizens
10 adjacent to the hospital believed their air was being
11 polluted and believed there was a health hazard. That was
12 a perfectly legitimate concern.

13 The Board of Health did not agree that there
14 was a health concern, but there was no redress for the
15 local citizens. The only agency that they could go to was
16 the DER, and the DER had apparently not dealt with the
17 problem in an adequate or effective way. In fact, that
18 lack on the part of DER seems to have been the reason why
19 the problem escalated to the point where it was necessary
20 to try and bring the Attorney General's Office into it to
21 get some sort of resolution.

22 For that reason, I believe that it's
23 important to have a path of redress for citizens who
24 believe that environmental laws are being violated to
25 bypass the regulatory agency which they perceive is not

1 doing its job directly.

2 I believe that fairly states my position and
3 I am very much in support of the legislation, despite our
4 disagreement on the culpability of the hospital in this
5 case.

6 Thank you very much. I'll answer any
7 questions, if you'd like.

8 CHAIRMAN CALTAGIRONE: Thank you, Doctor.

9 Lois.

10 REPRESENTATIVE HAGARTY: Thank you.

11 BY REPRESENTATIVE HAGARTY: (Of Dr. Renthall)

12 Q. And let me specifically thank you for being
13 with us here today to share that perspective.

14 I agree that this is not the time or place
15 to determine the culpability of the hospital. One of the
16 things that has most concerned me is our incapability, I
17 believe, to determine the culpability of the hospital,
18 because I don't see any agency that could possibly, at
19 this point, determine whether they were culpable, since
20 clearly DER, put in its best possible light, is equally
21 culpable. So I think that if nothing else, this points
22 out the problem with the current state of the law.

23 More importantly, though, and I think that
24 your testimony made clear that we had a situation where
25 DER couldn't even interpret correctly or translate that

1 correct interpretation, which seemed evidence to me simply
2 upon reading the chart of what can be burned under 0 and
3 4, and I have no background in environmental law, if that
4 wasn't being communicated clearly to a hospital, I can't
5 imagine why the public should feel any confidence in an
6 agency or why they shouldn't have reached the level of
7 concern that they have in terms of jeopardizing their
8 health. And that's -- I mean, I think that regardless of
9 this culpability issue, which is yet undetermined, I think
10 that's what gives such glaring concern to citizens.

11 A. I agree. I think your statement is
12 absolutely correct.

13 Q. Thanks.

14 CHAIRMAN CALTAGIRONE: Jim.

15 REPRESENTATIVE J. CLARK: Thank you, Mr.
16 Chairman.

17 BY REPRESENTATIVE J. CLARK: (Of Dr. Renthall)

18 Q. As was expressed by Lois, Dr. Renthall, I,
19 too, want to thank you for taking the time to come here
20 and offer your testimony, and to offer just a couple of
21 quick comments again to make clear that we're in no way
22 questioning or looking at the culpability of Lankenau
23 Hospital.

24 Specifically, Lois and I in that meeting in
25 January, earlier this year, I believe, it certainly was

1 for me the first time I had the opportunity to look at the
2 regulations or a detailed sheet on exactly what was Type 0
3 through Type 4 permit. And as you stated yourself, I
4 think it's the ambiguity in those guidelines that created
5 some of the confusion in the hospital.

6 I'm in no way implying that the hospital
7 willfully -- in fact, it's been proven by the Attorney
8 General's Office that there was no criminal wrongdoing in
9 this case. At best, I think they they were feeling their
10 way, doing the best they could with an ambiguous set of
11 rules and guidelines for the operation of that
12 incinerator.

13 I made a point earlier in my testimony of
14 pointing out the difference of opinion, or rather the lack
15 of a consensus between the Solid Waste Division and the
16 Air Quality services of DER. I recall specifically this
17 same information such as I have read from that letter
18 being presented to both divisions of the agency. The Air
19 Quality manager, and the names escape me for the moment
20 but I can recall them later, the Air Quality manager
21 stated that because of the 10 percent moisture content
22 rule that you had just cited, that the hospital would in
23 fact be in compliance as long as the temperature of that
24 secondary burn chamber was, I believe, 1,800 degrees
25 Fahrenheit or greater.

1 The Solid Waste Division chief, upon looking
2 at the same evidence and the same list of what was being
3 burned, said, and I quote from memory, "If this is what is
4 being burned, then they are clearly in violation of the
5 Solid Waste Act."

6 There are always differences of opinions in
7 government agencies, and again, what concerned me and gave
8 rise to support of this legislation was that you could
9 have a two-year timeframe in which the two divisions and
10 the chiefs in the divisions of DER never had the
11 opportunity or never by themselves resolved this
12 difference of opinion to address the health concerns of
13 the residents.

14 Hopefully, again, that puts the accent on
15 where our concerns lie, and at this point it's not with
16 the hospital. I believe they were going along with what
17 they had as a documented okay by the DER to continue in
18 that vein.

19 A. I think that's correct. I think the
20 hospital was getting signals from DER by lack of action or
21 by failure to communicate the standards correctly that
22 enabled them to continue doing something that was probably
23 in violation but inadvertently so.

24 Q. True. In fact, I further make the point
25 that the hospital on several occasions, this was not the

1 only letter, the hospital on several occasions documented
2 very willingly and very expediently to DER and to the
3 press exactly what it was burning.

4 A. Yes.

5 REPRESENTATIVE J. CLARK: Thank you, Mr.
6 Chairman.

7 CHAIRMAN CALTAGIRONE: Thank you.
8 Paul.

9 REPRESENTATIVE McHALE: Thank you, Mr.
10 Chairman.

11 BY REPRESENTATIVE McHALE: (Of Dr. Renthal)

12 Q. Doctor, which regional office of DER had
13 jurisdiction of this case?

14 A. It's located in Norristown. I'm not sure of
15 the name of it.

16 Q. Could you provide a very brief summary of
17 your relationship with that office? Specifically, would
18 you describe how DER responded to the citizen complaints
19 concerning Lankenau Hospital brought to the attention of
20 that regional office of DER?

21 A. I'm not sure I can give you all the details.
22 As I understand it, as I remember it, a local commissioner
23 communicated with the DER in 1987 over some concerns. I
24 don't know what kind of response he got, but the citizens'
25 concern continued and escalated so that I believe that he

1 was not satisfied by the kind of response he got.

2 Q. I guess what I'm getting at is over what
3 period of time were these complaints brought to the
4 attention of the regional office, and once the complaints
5 were brought to the regional office, how did DER respond?

6 A. Well, I believe there was a period of about
7 a year and a half to two years during which communications
8 went back and forth on a regular basis. Our Department of
9 Health sent some communications to the Department of
10 Environmental Resources asking for some clarification,
11 independently of what the citizens were doing, and those
12 responses were not entirely satisfactory. They didn't
13 really answer many of the questions that we had. They
14 were not very rapid in their response. During 1989, when
15 this whole issue came to a head, DER appeared dilatory in
16 trying to deal with the problem. They seemed to be bogged
17 down with a lot of bureaucratic--

18 Q. All right, that's really what I'm getting
19 at. They appear to be dilatory, I think that was the word
20 you used.

21 A. Yes.

22 Q. You didn't sense on their part any kind of
23 an aggressive response to the citizens' complaints?

24 A. No. No.

25 Q. All right.

1 A. And further, they failed to communicate well
2 with the township officials who were trying to intervene
3 and resolve the issue. In fact, they made statements to
4 the press without advising the township officials, which
5 greatly angered the township officials because they were
6 caught in the middle of the controversy with
7 communications being delivered to the public which they
8 had no part in.

9 Q. What year was this?

10 A. This was in 1988, last fall and winter.

11 Q. Who were the people in that regional office
12 with whom you were dealing?

13 A. Well, Mr. Gonshur was the Regional Director.
14 I don't remember all the names of the individuals in the
15 departments. I'm sorry.

16 Q. Did you have contact with Mr. Rao Kona?

17 A. Yes. Yes, he was one of them. I believe he
18 was the Air Quality man.

19 Q. That's correct.

20 A. Yes. And a Carol Kurtz. Once the issue
21 came to a head, we did begin to get some good
22 responsiveness, and lately we've been accorded a great
23 deal of responsiveness in our desire to have an input into
24 the process which would control the hospital and pose
25 restrictions on their further operation. They've been

1 very cooperative over that.

2 Q. But if I understand your testimony
3 correctly, however, over a long period of time initially
4 there was not much of a response from DER?

5 A. No, I would characterize it best as a
6 bureaucratic response and what that implies.

7 Q. All right.

8 REPRESENTATIVE MCHALE: Mr. Chairman, the
9 only comment that I would make is that during that
10 investigation in 1982, 1983, a focus of the criticism
11 which I personally raised and which the committee echoed
12 had to do with the regional office of DER located in
13 Norristown. Witness after witness appeared before the
14 Conservation Committee reciting the same kinds of
15 inefficiencies and bureaucratic delay that the Doctor has
16 recounted to us, along with the last few members. Back
17 then when one would be critical of DER, and specifically
18 the Norristown regional office, that criticism was
19 dismissed all too often as mere partisanship.

20 The point that I would make is that it's
21 about time to stop treating environmental protection in a
22 partisan manner and that had we taken a bipartisan
23 approach to an inadequate bureaucracy within DER in 1983,
24 perhaps the problems experienced by the Doctor and his
25 group in 1988 might not have occurred. We weren't tough

1 enough in that office in 1983, and I think we reaped the
2 unfortunate consequences of that inaction in 1988.

3 Thank you, Mr. Chairman.

4 CHAIRMAN CALTAGIRONE: Are there further
5 questions?

6 (No response.)

7 CHAIRMAN CALTAGIRONE: Thank you, Doctor.

8 DR. RENTHAL: Thank you very much.

9 CHAIRMAN CALTAGIRONE: We'll next hear from
10 William L. Heffley, Chief Chemist, NGK Metals, Inc.

11 MR. HEFFLEY: My name is William Heffley,
12 and I'm a chemist by profession, and I'd like to thank the
13 chairman for having me to testify.

14 What I read in House Bill No. 1175 I think
15 has some application to what happens to whistleblowers in
16 the State of Pennsylvania. I became a whistleblower and
17 the things that have happened to me I believe could be
18 addressed by House Bill 1175.

19 Until January 16, 1989, when I was put on
20 paid leave by the company and suspended, I was a
21 laboratory supervisor of a plant in Temple, Pennsylvania.
22 In early December 1988, in my capacity as laboratory
23 supervisor, I became aware of certain violations by the
24 company of their waste treatment permit, which were
25 alarming to me both as to the number and to the magnitude

1 over a period of months. I confronted a company official,
2 and what he admitted was shocking to me, as it confirmed
3 some of my worst fears and suspicions. I was left with a
4 dilemma, like all whistle blowers are, I suppose, because
5 while conditions got worse at the plant, I debated my
6 options, and should I come forward, there were certain
7 penalties I was afraid I was going to pay. But I knew
8 also that if I delayed, I also, along with one other
9 laboratory person who also knew the truth, could be
10 prosecuted as accessories if the company should be caught.
11 I considered that if I came forward, I would likely lose
12 my job, and I had been with the company for 29 years. I
13 knew I faced the prospect of moving away from the area
14 where I was born. I also considered my personal safety,
15 and this was no small consideration, as I was to learn
16 shortly.

17 The deciding factor was that I believed that
18 the land, streams, and rivers of this Commonwealth and
19 this country do not really belong to us, to the company,
20 at all but they really belong to Almighty God, and that I
21 was in a position and was responsible to stop the abuse if
22 I could.

23 Accordingly, on December 27, 1988, I took
24 what evidence I felt I needed and I met with the
25 Department of Environmental Resources. Between December

1 27, 1988 and January 16, 1989, the local newspaper
2 interviewed me and began to cover the story. It was in
3 this time period also that I had a threat on my life, and
4 only a tip from a friend at the plant prevented a serious
5 incident.

6 In early January, the Office of the Attorney
7 General contacted me and informed me that they were taking
8 over the case. They also asked me to accompany a search
9 and seize raid on the company's plant on January 23, 1989,
10 which I agreed to do. I accompanied the Attorney
11 General's group into the plant, assisted only by supplying
12 information, as evidence and files were taken during the
13 all-day search. Despite some apprehension on my part, the
14 day was without incident, except for the admonitions from
15 the copy personnel department and the company lawyers that
16 I didn't really belong inside the plant at all.

17 After January 24, I had some contact with
18 the Office of Attorney General. I wrote letters
19 expressing my willingness to cooperate in any manner, and
20 occasionally I supplied information that I thought might
21 be useful. The company lawyers, meanwhile, began
22 scheduling interrogations of me, saying that they needed
23 my help to get to the bottom of the situation. It soon
24 became obvious to me, however, that their intent went far
25 beyond the search for information.

1 I would like to submit at this time letters
2 from my lawyer dealing with the intent of the
3 interrogations. I would especially like to call your
4 attention to my lawyer's letter of April 17, 1989, where
5 my lawyer states, and I quote, "I will continue to
6 represent your interest to make sure that the company does
7 not do anything to try and terminate you when you have
8 done nothing inconsistent with your duties as their
9 employee," end of quote. His concern, as I was to learn,
10 was well-founded, for in April, the company lawyer
11 scheduled a deposition which lasted five hours and
12 produced a 167 page transcript. I brought the transcript
13 with me for inspection, if you would like.

14 The purpose of the interrogation, I think,
15 can be summed up by my lawyer's statement in reply to a
16 company lawyer. "I believe it's a loaded question in
17 reference to trying to form a basis as to coming up with
18 criteria to possibly do something that would be
19 detrimental to Mr. Heffley in reference to his employment
20 at the company, and therefore at this moment in time,
21 unless you and I have an opportunity to discuss legally
22 the ramifications of that question, I'm not going to allow
23 him to answer that question at this time."

24 I think the point I'm making is that one of
25 the things that happens to whistle blowers is that they

1 are subjected to company interrogation, which in itself
2 may be okay, because the company lawyers are trying to get
3 information, supposedly, but it goes far beyond that, and
4 I was concerned about the violations on my rights, and I
5 went to the Attorney General's Office, and I finally got a
6 short phone call from a deputy attorney from the Attorney
7 General's Office which simply said, and I quote, "We
8 cannot help you."

9 I ran up a \$1,300 legal bill for my
10 representations during interrogations and depositions,
11 which the company refused to pay, though they paid all
12 legal expenses for other company employees involved in the
13 case. The answer to my request from a company lawyer was,
14 and I quote, "We're not going to pay because you did not
15 need a lawyer," end quote.

16 I took the matter of the bill to the Office
17 of the Attorney General in April, and their reply, which
18 came in the last several days, was that they were not
19 allowed to do anything for me in regard to my lawyer's
20 bill under existing Pennsylvania law. I think possibly
21 this is something else that could be addressed by the
22 legislation, House Bill No. 1175.

23 I would like at this time to submit two
24 letters from the Office of Attorney General regarding
25 legal expenses I incurred. I would also like to submit a

1 letter from company attorneys which may furnish a clue as
2 to why I needed legal representation in the first place.

3 I contacted various State and Federal
4 Representatives. State Senator Michael O'Pake wrote
5 numerous letters on my behalf, and I would think also on
6 behalf of the public interest, their health and welfare.
7 I would like to call your attention to his letter of July
8 17th, which I will also submit, where he expresses concern
9 about the delay in the Commonwealth moving the case
10 forward. The case is now in its eighth month. U.S.
11 Senator Heinz, in numerous letters, represented my
12 concerns and his own as to the progress of the case and
13 the matter of my legal expenses. U.S. Congressman Yatron
14 did much for me, advising me and submitting my complaint
15 to the U.S. Department of Labor in order to protect my
16 rights under Federal whistle blower laws.

17 The point I want to make here is that U.S.
18 Congressman Yatron told me that the only protection I had
19 was under Federal whistle blower laws, and that may be
20 something else that could be addressed, because of U.S.
21 Congressman Yatron's efforts, I now have a hearing coming
22 up before a Federal administrative law judge, at which the
23 transcript I mentioned should receive a thorough review.

24 I would like to submit examples of letters
25 from my Representatives at this time, including

1 Representative Angstadt's letters.

2 My relationship with DER has been good.
3 They asked me to attend a meeting in the beginning with
4 DER officials and the Pennsylvania Fish Commission. DER
5 officials have been accessible. I have had two written
6 updates from DER on their part in this case. The last
7 one, on July 21, was far more factual and detailed than I
8 had a right to expect. I would like to submit these
9 letters and updates from DER.

10 One of my concerns expressed to DER and the
11 Office of Attorney General was that the two agencies did
12 not seem to be cooperating in the investigation. One DER
13 official told me that a serious violation of the company
14 should be addressed promptly, but he said DER could not
15 move because certain analytical evidence held by the
16 Office of Attorney General could not be released by the
17 Attorney General, and thus it wasn't available to DER.
18 Keith Welks, Chief Counsel of DER, addressed these
19 concerns well in a letter of March 14, 1989. He admitted
20 that there could be problems in this area. He also
21 remarked that it is regrettable that whistle blowers like
22 myself are not fully apprised of various aspects of the
23 investigation. I would like also to submit a copy of his
24 letter.

25 The Pennsylvania Fish Commission has been

1 very much involved in the investigation, and they have
2 been also most cooperative and accessible to me. Their
3 investigator, Bob Perry, has shown much sensitivity to the
4 concerns of a person such as myself who is a whistle
5 blower. This concern is evident also at the top, where
6 Edward Miller, Executive Director of the Fish Commission,
7 and Dennis Guise, Chief Counsel of the Fish Commission,
8 have recently written letters expressing the seriousness
9 of the case and their frustration at the long delay in
10 bringing the case to completion. John Rayburn,
11 environmentalist working with the Berks County
12 commissioners, has done much background investigation, has
13 done a thorough job in evaluating the damage to the
14 environment by certain company practices. The Sierra Club
15 of Berks County has shown their deep concern about the
16 environment, have carried their concerns to State and
17 Federal agencies and Representatives. They have resolved
18 to back me 100 percent, and you don't know how good that
19 made me feel. I'd like to submit examples of their
20 letters and concern.

21 The point I'm trying to make is that with
22 all the problems I have encountered as a whistle blower, I
23 have also encountered many people in all walks of life who
24 really do care. I haven't mentioned the newspapers for
25 fear of jeopardizing their stories, but I know of quite a

1 few who are, at this moment, digging into the case. But
2 there is much to be done, and I hope to point out in
3 reference to another matter that has until very recently
4 escaped public scrutiny.

5 I want to state emphatically that this
6 matter is not now the subject of the current investigating
7 by the Office of Attorney General. It's a completely
8 unrelated matter. The company I work for has a very
9 serious ground water problem. Even as long ago as when I
10 was first employed, and that was back in the 1960's, I
11 heard stories about a farm which was adjacent to the plant
12 where the crops mysteriously did not appear to grow due to
13 alleged contamination from the company's soil and ground
14 water. I was told the company simply bought the farm and
15 but their fence around the property.

16 Then I heard stories about private wells
17 outside the company property which became contaminated
18 with a certain pollutant common to the company's soil and
19 ground water, and it was alleged that the pollutant had
20 migrated into the private wells. I was told that the
21 company solved this problem by simply paying to have these
22 people with the contaminated wells put on public or city
23 water.

24 If I had any doubts about the ground water
25 contamination, they were removed about 10 years ago. The

1 company had to drill four deep monitoring wells which my
2 laboratory was required to sample and analyze every three
3 months. Reports were required to be sent to DER and EPA.
4 We found certain toxic contaminants in alarming
5 quantities, including the ones alleged to have migrated
6 from the plant into the surrounding areas and drinking
7 water. Some of the things we found are suspected
8 carcinogens. Some have limits as low as parts per billion
9 quantities.

10 It was just recently that a government
11 official confirmed that a toxic material and suspected
12 carcinogen common to company ground water was found in a
13 township drinking water well at a housing development
14 quite a distance from the plant. I know of one reporter
15 at least who has confirmed the presence of that toxic
16 contaminant in the township drinking water well, and he
17 told me that the township authority has been pumping that
18 well down for several years, as the well is out of service
19 and they have not been able to get this toxic material out
20 of the well because it keeps leaking into the well. The
21 same government official I mentioned previously told me
22 that toxicity tests taken on company soil as late as the
23 fall of 1988 failed miserably, which is his word, for
24 another toxic material which has a limit in drinking water
25 well down in the parts per billion range. This toxic

1 material is also present in the monitoring well samples at
2 the plant.

3 The presence of the contaminants as it
4 continued unabated and in monitoring wells throughout the
5 10 years since sampling began. Reports of the analysis of
6 these monitoring wells have remained in government files
7 for these 10 years without drawing much attention.
8 Despite the serious implications of the gross
9 contamination they show, the very nature of these
10 contaminants in the ground water and the characteristics
11 of the soil where they are found makes migration of these
12 contaminants beyond the borders of the plant a distinct
13 possibility. When one adds the evidence that the ground
14 water may already have moved, and contained in the fact
15 that toxic materials common to the ground water at the
16 plant have been found far beyond the plant boundaries, an
17 early study and remedial action would seem to have been
18 indicated. Yet, it was not until last fall after a
19 10-year moratorium that EPA moved in and brought about a
20 consent order with the company to begin a two-year study.
21 It should be remembered that it is a two-year study, and
22 any excavation, treatment of ground water, or other
23 remedial action is more than a year and a half away at
24 least.

25 While it is true that there are certain

1 aspects of the onsite ground water contamination at this
2 company that may be currently under investigation by the
3 Attorney General's Office, I believe there's a vital
4 question begging for an answer. It would seem to me that
5 it fit concerned to be addressed in regard to the proposed
6 legislation, House Bill 1175, is how a situation such as
7 gross contamination of ground water, which has the
8 suggestion at least of criminal activities, can remain
9 beyond the Attorney General's knowledge and jurisdiction
10 for so long.

11 I would like to respectfully suggest that
12 the committee take up the following considerations: That
13 whistle blowers be granted some sort of financial relief
14 in cases such as mine, lest they be subject to be harassed
15 by company lawyers forced to personally pay our legal
16 expenses which are really incurred in the public interest.
17 I would like to submit a recent letter from Gregory Abeln,
18 Chief Deputy of the Environmental Crimes Section of the
19 Attorney General's Office, and ask that special
20 consideration be given to his statement, and I quote,
21 "Pennsylvania has not adopted the Federal whistle blower
22 provision but allows for reimbursement of legal fees," end
23 of quote. I would suggest that this be remedied.

24 I also suggest that the concerns of whistle
25 blowers beyond the financial aspects also be considered.

1 Anyone who chooses to take the risk associated with coming
2 forward and blowing the whistle should also be entitled to
3 be kept abreast of the progress and the investigation of
4 the case.

5 I believe also that there is another
6 legitimate concern of whistleblowers, and that is the
7 matter of legal counsel or advice. Perhaps some
8 modification of State law or inclusion of some provision
9 in House Bill No. 1175 would allow attorneys from the
10 Attorney General's Office to at least consult with a
11 counsel for the whistle blower, which I understand is now
12 also forbidden by State law.

13 I would also suggest that the Attorney
14 General be given whatever legal and statutory provisions
15 he needs to expedite and bring to successful conclusion
16 cases such as the one that I'm involved in within a
17 reasonable matter of time. The company case is now in its
18 eighth month, and I feel that this is too long a delay in
19 concluding a case that has such an overriding public
20 interest. In this aspect, I would support the Attorney
21 General's request for the resources, the personnel, the
22 staff people, to expedite cases such as this. I would
23 also suggest that cases such as ground water contamination
24 by a company which suggests possible criminal activities
25 be referred to the Office of Attorney General promptly for

1 his consideration as a matter of routine. In my limited
2 experience, local authorities and agencies do not
3 apparently have either the inclination or the resources to
4 handle matters of this magnitude.

5 I would also suggest that procedures be
6 established for better communication between DER and OAG,
7 and especially in fact of the provisions of Bill 11/5,
8 which would seem to give the Attorney General more power.
9 I would certainly want to retain the cooperation and
10 establish cooperation where it has not existed.

11 And I'd like to say that there have been
12 many negative things happen to me in these past eight
13 months, but there have also been positive things, and to
14 show you how far the concerns of Pennsylvania have reached
15 in environmental matters, I'd like to say that about a
16 month ago I received a personal letter of support from Dr.
17 Elizabeth Morgan, written from a jail cell in Washington,
18 D.C. I'm sure most of you know who she is because her
19 story has been widely carried on the wire services. I was
20 deeply moved because despite all her problems, she made
21 the effort to write me a letter of support and
22 encouragement and to write a letter as well, a letter of
23 concern, to Senator Specter, whom she knows personally.

24 I would like to conclude my testimony by
25 quoting from a personal letter I received from a member of

1 the Sierra Club. She writes, and I quote, "The story that
2 you told concerning the pollution by the company is one
3 that has to be brought to everyone's attention. It was
4 both shocking and frightening to find out that such
5 careless treatment of toxic materials occurs and that
6 environmental authorities are so slow to stop it.
7 Certainly, if there were more people like you, the world
8 would be a safer place," end of quote.

9 I trust that the Judiciary Committee and
10 their careful attention to the legislation before it,
11 House Bill 1175, and the Attorney General's expeditious
12 handling of the case with which I'm involved will send a
13 clear message to Pam, who is the writer of the letter, and
14 to others that the Commonwealth is prepared to deal
15 accordingly with environmental issues, and those persons
16 who choose to ignore the environmental laws of this State
17 will be dealt with accordingly.

18 Thank you. William Heffley.

19 CHAIRMAN CALTAGIRONE: Thank you.

20 Are there any questions?

21 (No response.)

22 CHAIRMAN CALTAGIRONE: Thank you

23 MR. HEFFLEY: Thank you.

24 CHAIRMAN CALTAGIRONE: Keith E. Welks, Chief
25 Counsel, Department of Environmental Resources.

1 MR. WELKS: Good afternoon. I'm joined by
2 Ron Ramsey, also from DER. He's in our Office of Public
3 liaison.

4 I'd say at the outset that it's something of
5 a mixed blessing to appear this late in the hearing. I
6 certainly have the benefit of the wisdom of those who went
7 before me; by the same token, other commitments arise for
8 people and I know that some have departed. I appreciate
9 how many have remained. I do have to note that my wife
10 just left saying that she was unwilling to wait any longer
11 to hear me speak, so I don't offer that as any guidance
12 for you, but I simply note that she was here until two
13 minutes ago.

14 Mr. Chairman and members of the committee,
15 my name is Keith Welks. I am presently the Chief Counsel
16 of the Department of Environmental Resources. From
17 approximately October of 1980 until July of 1987 I worked
18 for Roy Zimmerman as Attorney In Charge of the Toxic Waste
19 Investigation and Prosecution Unit, a joint DER-Office of
20 Attorney General task force to prosecute environmental
21 crimes. This effort continues under the new name that
22 General Preate has recently given to it, the Environmental
23 Crimes Section.

24 I want to thank you for this opportunity to
25 testify about the process by which prosecutions for

1 environmental crimes are brought in Pennsylvania and about
2 the relationship between the DER and the Office of
3 Attorney General in this field.

4 It was recognized from the very outset, a
5 decade ago, that a successful prosecutive effort in the
6 environmental area demanded the closest possible working
7 relationship between members of a traditional law
8 enforcement office and members of an environmental
9 regulatory agency. Indeed, the original 1980 application
10 to the Law Enforcement Assistance Agency of the United
11 States Department of Justice for seed money to start the
12 toxic waste unit described a formal, cooperative
13 relationship between the Office of Attorney General and
14 the DER. A formal review team comprising representatives
15 of each agency was contemplated in order to make critical
16 decisions about original allegations and about
17 investigative strategies.

18 In practice, in the year since then, the
19 referral process has become progressively more streamlined
20 and efficient. Matters of a criminal nature uncovered by
21 regular DER program staff are routinely and rapidly
22 transmitted to the Environmental Crimes Section for
23 investigation. DER staff are generally under directions
24 not to proceed further in a case once it has been sent to
25 the task force. It is also not uncommon for matters

1 discovered initially by the Environmental Crimes Section
2 to be forwarded to DER for official referral back to ECS
3 for criminal work-up. Task force members are based in
4 several DER offices around the State, and personal
5 relationships between these specialists and regular DER
6 staff are informal, close, and direct.

7 I want to take a minute here and depart from
8 my prepared testimony to perhaps try and crystallize or
9 clarify exactly how the Environmental Crimes Section is
10 organized. There was some discussion about it earlier.
11 It is not obvious to me that it is pellucid yet to the
12 committee, and I would hope to clarify that.

13 As originally envisioned and as presently
14 constituted, the Environmental Crimes Section is a
15 two-agency task force with members of each agency assigned
16 on generally a full-time basis to work within a unified
17 chain of command reporting to the attorney in charge, who
18 is presently Greg Abeln, Chief Deputy Attorney General.
19 What that means in practice is that there are special
20 agents from the Attorney General's Bureau of Criminal
21 Investigation, as well as Deputy Attorneys General from
22 the Prosecution Section who work for Mr. Abeln. In
23 addition, there are members of the DER Solid Waste
24 Investigation staff or inspection staff who are in a chain
25 of command ultimately from Mr. Abeln. There are also a

1 number of lawyers nominally assigned to my office who are
2 made special Deputy Attorneys General by General Preate to
3 prosecute cases for Mr. Abein with the auspices of that
4 task force effort.

5 The purpose of my explaining this at some
6 length is to indicate that we don't simply have a
7 cooperative effort here. It's not a situation in which
8 once a month Mr. Abein and I sit down and talk about what
9 his office is going to do and what my office is going to
10 do for the following month. Rather, there is in fact a
11 formal extant partnership which has been in operation
12 since approximately 1980 exclusively for the purpose of
13 prosecuting these cases.

14 General Preate, a little earlier, attempted
15 to talk about other kinds of criminal prosecutive
16 activities that DER may undertake. At the present time,
17 to the best of my understanding, there in fact are a
18 number of assistant counsel working in my office who have
19 been made special deputies for the limited purposes of
20 handling summary prosecutions, and they handle those
21 outside the auspices of the Environmental Crimes Section.
22 Some of these may be for such matters as restaurant
23 violations, minor operational violations at landfills
24 operating past posted hours or permitted hours, blowing
25 trash, litter, and things of that sort where it is not

1 considered to be a specific significant criminal violation
2 that would go to the Environmental Crimes Section. It is
3 instead handled as a summary. Those five lawyers that
4 General Preate and Mr. Abein spoke about previously who
5 are special Deputy Attorneys General in fact are working
6 in the Environmental Crimes Section on misdemeanor and
7 felony cases at the direction of Mr. Abein, but in fact
8 what we have here in summary is an integrated working task
9 force with people, some of whom have been assigned for
10 three, four, five, and six years and even longer in these
11 positions from either DER or the Attorney General's
12 Office.

13 I apologize for that digression and hope
14 it's useful in trying to kind of sort out where people are
15 and what they're doing.

16 The reasons compelling so close a
17 relationship are not hard to discern. A successful
18 environmental investigation and prosecution generally
19 requires a variety of diverse skills: The interviewing
20 and evidenced gathering skills of law enforcement
21 officers, the sampling and related scientific expertise of
22 regulatory inspectors, the criminal litigation skills of
23 trained prosecutors, the opinion testimony of analytical
24 chemists and other experts, as well as a host of other
25 unique disciplines. The glue that has bonded these

1 diverse participants in Pennsylvania over the last decade
2 has been their sense of completely shared authority and
3 responsibility for the selection, development, and
4 prosecution of environmental crimes.

5 Moreover, environmental crimes, unlike most
6 traditional criminal violations, arise in a comprehensive
7 and finely articulated enforcement context. Environmental
8 statutes generally prohibit specified kinds of conduct and
9 then authorize administrative, civil and criminal
10 sanctions for any instance of proscribed activity. Thus,
11 a serious violation might require the selection and
12 ordering of several different remedies. The unpermitted
13 disposal of drums of waste, for example, would ordinarily
14 support both a criminal prosecution and a civil cleanup.
15 Illegal disposal of sludges from a waste water treatment
16 plant might justify a prosecution as well as
17 administrative revocation of the plant operator's
18 licenses. However, the proper sequence of such
19 governmental responses is essential to avoid various
20 technical and substantive legal pitfalls which could
21 strengthen a defendant's position. It has not been
22 uncommon for DER to delay or refrain from its preferred
23 enforcement response in deference to a request from the
24 Office of Attorney General in order to protect a pending
25 criminal investigation or prosecution. The continuous

1 communication between prosecutor and a regulator necessary
2 to ensure respect for each other's valid programmatic
3 goals is encouraged by the present partnership but would
4 be discouraged by the decoupling contemplated by the
5 proposed legislation.

6 A recent United States Supreme Court
7 decision, moreover, has made the need for the agencies to
8 recognize their community of interest even more
9 compelling. In the decision handed down this term, the
10 court ruled that a civil penalty judgment could suffice to
11 trigger the protections of the double jeopardy clause of
12 the United States Constitution. Potentially, this ruling
13 means that a civil penalty action carelessly brought could
14 bar a worthy subsequent prosecution, or that the trial of
15 criminal charges could block a substantial civil penalty
16 action. Only the closest working relationship as
17 presently exists between DER and the OAG can insure that
18 the dialogue necessary to avoid misuse of this sort
19 continues.

20 There is an elegant symmetry to the current
21 symbiotic relationship between these two agencies. Only
22 the Office of Attorney General can act as attorney for the
23 Commonwealth and prosecute environmental crimes. In order
24 to do so, however, it must receive a referral from DER.
25 In turn, DER lacks the authority to initiate prosecutions

1 directly but is able to refer cases in order ultimately to
2 trigger the filing of criminal complaints. Each agency
3 lacking a part of the key must relate to and respect the
4 desires of the other to gain entrance to the criminal
5 courts of Pennsylvania. It is therefore both good sense
6 and good law that they work closely together.

7 Nothing in my remarks should be construed in
8 any way as deprecating the value or necessity of a tough,
9 effective environmental prosecutive effort. It is an
10 essential element of a complete enforcement arsenal.
11 There is such a program extant in Pennsylvania, and DER
12 actively supports it with personnel, resources, and money.
13 The Environmental Crimes Section is working and working
14 effectively.

15 Frankly, House Bill 1175 is a solution in
16 search of a problem. Present task force effort is not in
17 need of rehabilitation. At the risk of immodesty, let me
18 tell you that it has been uncommonly successful in
19 bringing environmental predators to justice. According to
20 the most recent information available to me, the task
21 forces opened, since its inception in late 1980, over 400
22 cases for formal investigation - 191 defendants have been
23 arrested, 135 have been convicted, and my testimony now
24 needs to be amended, based on Mr. Abein's remarks a little
25 earlier today, with 16 individuals receiving jail

1 sentences. I presume Mr. Fukes was sentenced to jail
2 today.

3 Many of these cases have been of national
4 significance. For example, this unique interagency
5 partnership brought the first prosecution to successfully
6 utilize the anti-racketeering statute against a
7 businessman who was convicted of having engaged in a
8 pattern of illegal activity encompassing more than 500
9 dumping incidents. The task force also convicted a
10 western Pennsylvania waste disposal facility operator for
11 having illegally dumped hazardous wastes into the
12 Youghiogheny River. He is presently serving a sentence of
13 6 to 12 years, one of the longest ever imposed in the
14 country for an environmental violation. Major
15 corporations, such as U.S.X., Owens-Illinois, and
16 Westinghouse, have also been convicted.

17 Representatives of the task force have
18 lectured across the country about its structure and its
19 operating protocols. It is not an exaggeration to say
20 that it has been a model for emulation in a number of
21 jurisdictions.

22 In conclusion, I wish to repeat that DER
23 unequivocally endorses vigorous criminal prosecution of
24 environmental violators. The department cannot support,
25 however, change merely for the sake of change, especially

1 where the result will inevitably erode the historic and
2 essential partnership between the Department of
3 Environmental Resources and the Office of Attorney
4 General.

5 I anticipated some questions, and one that I
6 anticipated I would like to try and respond to at the
7 outset. There were a number of inquiries about the
8 Ashland investigation, and it so happens that I had some
9 role in that, and I would like to try and clarify for my
10 perspective what in fact occurred. And in this I will,
11 frankly, differ with General Preate, who was very kind to
12 me and complimentary and I will return those remarks and
13 say that I have known him for a long time and respect his
14 skills as a prosecutor. I am certainly growing to respect
15 his skills as an Attorney General more so every day. But
16 in this matter, I must say, frankly, that he and I have a
17 strong difference of opinion as to what the facts are, and
18 we have jostled on this before. At the time of the spill,
19 General Preate was not General Preate, and Governor Casey
20 directed that an inter-agency investigative effort be
21 conducted in order to develop all the facts necessary to
22 understand liability, not differentiated between civil or
23 criminal, as well as regulatory and statutory shortcomings
24 that created the Ashland spill.

25 I was asked to involve myself in that

1 effort, which I did. I was directed to take advantage of
2 such resources as I thought were necessary from the
3 executive agencies as well as elsewhere where I could
4 arrange them. I did speak to the then Executive Deputy
5 Attorney General under General Zimmerman and explained
6 this process and asked for some investigative support.
7 They were gracious enough, and I appreciate it to this day
8 very much, to make such support available. However, it
9 was also clearly understood by the Attorney General's
10 Office at that time through their management what was
11 being done, and they did not object in any fashion. They
12 did not disagree or demur from the notion that a broadly
13 based sweeping investigative effort was appropriate. And
14 the only arrangement that the Executive Deputy Attorney
15 General asked of us was that where it was determined by us
16 that criminally actionable activities had been committed,
17 that the matter be referred in the normal course, as it
18 ordinarily would, and that, of course, we agreed to do.

19 There is always a problem, needless to say,
20 in dealing with selectively excerpted portions of written
21 material, and I fear that this committee faces an instance
22 of such problem here. General Preate provided you with
23 two paragraphs from a 111-page printed report, a copy of
24 which, by the way, was submitted to every member of the
25 House of Representatives and the Senate in July of 1988,

1 but which I presume has long since been delegated to
2 doorstep activities, so I understand if no one can put
3 their hand on it now. But I do wish to bring to the
4 committee's attention a couple of passages from the
5 recommendation section of that report, since I think it
6 may place some of General Preate's extracts in a slightly
7 different perspective.

8 In the recommendation section, we talk about
9 what the task force discovered, and it reads as follows.
10 Again, and I will admit, this is excerpted in my favor,
11 but I think it balances somewhat what you've been told
12 previously. It says as follows: "Nevertheless, the
13 Pennsylvania General Assembly has articulated in a clear
14 voice a standard of criminal culpability based upon
15 negligent conduct. The legislature may have concluded
16 that it is necessary to encourage a higher standard of
17 care upon by operators of potentially polluting facilities
18 by exposing them to criminalization and accompanying
19 stigmatization for negligence. Equally, the legislature
20 may have recognized quite validly that the automatic
21 deterrent value of a reduction in a defendant's pocketbook
22 from losing commercial product might sometimes be trivial
23 compared to the environmental harm resulting from the
24 release. The General Assembly may also have intended by
25 this penalty provision to entrust to a prosecutor the

1 responsibility to identify those instances where the
2 negligence was so rampant or the consequences so far-
3 reaching that criminal prosecution was appropriate to
4 express society's manifest disapproval.

5 Ultimately, the decision to bring a criminal
6 prosecution under the Clean Streams Law must rest with the
7 appropriate prosecuting agency itself. It's there that
8 these preceding factors must be weighed, along with the
9 existing policy for sanctioning intentional discharges,
10 the consideration to be extended to Ashland for its
11 cooperation in the days and the weeks after the collapse,
12 the relative clarity or ambiguity of the voluntary
13 industry code and practices which establish the relevant
14 standard of care, the existence of civil grounds for
15 relief, the likelihood that it could be proven that the
16 failure was preventable, and numerous other factors.

17 "The task force is neither authorized nor
18 competent to perform the feat of balancing these competing
19 considerations. The task force can, however, bring to the
20 attention of the appropriate authorities its conclusion
21 that the facts developed during its investigation appear
22 to establish facial sufficiency of the elements of Clean
23 Streams Law violations. Accordingly, the task force
24 recommends that the Commonwealth ask the Pennsylvania
25 Office of Attorney General to examine this report and such

1 other evidence as it may determine is necessary in order
2 to consider whether criminal charges under the Clean
3 Streams Law should be prosecuted against Ashland Oil,
4 Inc., and the Ashland Petroleum Company."

5 And the report goes on to say, several pages
6 later, "In closing, it is important to repeat that the
7 task force is not a formal prosecutive agency and that it
8 did not engage in a rigid legal analysis of the criminal
9 provisions which it has discussed here. The conclusions
10 and recommendations of this report should not serve to nor
11 are intended to preclude appropriate law enforcement
12 agencies from reviewing these or additional matters that
13 they so desire."

14 This report was forwarded to then General
15 Zimmerman in July of 1988 by Governor Casey, with Governor
16 Casey's expressed referral and request for examination for
17 criminal prosecution under any statute that the would be
18 appropriate. It is my understanding that the Office of
19 Attorney General has examined this case and concluded that
20 no criminal charges are appropriate. That is a perfectly
21 acceptable prosecutorial decision. It is, however, a
22 decision that they made, not a decision that we made. We
23 referred it to them, we made evidence available, and we
24 made our files available for their consideration. They
25 have reached a prosecutive decision perfectly within their

1 discretion and authority, but it was one in which they
2 were not hampered, hamstrung, or limited by anything we
3 did.

4 And with that, I'm available for questions,
5 as the committee so wishes.

6 CHAIRMAN CALTAGIRONE: Lois.

7 REPRESENTATIVE HAGARTY: Thank you.

8 BY REPRESENTATIVE HAGARTY: (Of Mr. Welks)

9 Q. And good afternoon. I have a couple of
10 questions.

11 Your remarks are encouraging with regard to
12 the close relationship and the positive environmental
13 crime investigation once it reaches the stage of this
14 special unit. And I have no quarrel and do not believe
15 necessarily that any problem exists in this Commonwealth
16 once a prosecution begins and that this joint effort works
17 well. I don't understand though what there is about that
18 unit which is working so well, as you've described, that
19 would be destroyed or harmed in any way by giving original
20 jurisdiction to the Attorney General. And the reason I
21 say that, and I'm perplexed by your, you know, bold
22 remarks that this symbiotic relationship would somehow be
23 destroyed, is if this is in place now, why would it not be
24 that when a call came into the Attorney General that this
25 would be, it seems to me, obviously the same group that

1 the Attorney General's Office, and in fact it has
2 exercised this in the past, cannot contact DER when it
3 comes independently into possession of information that it
4 wishes to investigate and seek a referral. And in fact,
5 you heard earlier today that the Stewart Manix case, the
6 one that was displayed for you in which Mr. Manix was
7 recently sentenced to 2 1/2 to 5 years in Lancaster,
8 originated not with DER but with OSHA. And in fact,
9 General Preate identified for you the fact that that
10 referral came from OSHA to the Attorney General's Office.
11 Well, by the way, it also then went to DER, where it was
12 referred to the Attorney General's Office for criminal
13 prosecution, and that was ultimately what the Common Pleas
14 Court judge in Lancaster County determined had occurred,
15 and that is why he authorized the prosecution which
16 ultimately led to the guilty plea and the impressive
17 sentence last week.

18 So, I mean, the flip side, it seems to me,
19 of your question is, what are we accomplishing? The
20 Attorney General can get jurisdiction in at least three
21 ways presently in these kinds of cases. He can get it
22 from a referral from a district attorney, he can get it
23 from a referral from DER, he can get it by having the case
24 go into the investigating Grand Jury, and to the extent
25 that in such cases as we heard described earlier today

1 that there is some innuendo of public corruption by State
2 employees, he has independent jurisdiction to prosecute.
3 He also, by the way, has independent jurisdiction to
4 prosecute if it's a Section 911 little RICO prosecution.
5 So I can name for you 5 bases for independent prosecution.

6 Q. Well, I guess I have two question/comments
7 with regard to that.

8 A. Sure.

9 Q. First, that relationship will still be
10 necessary. What we have heard described by the Attorney
11 General's Office is the need for the technical expertise
12 of the investigators of the Department of Environmental
13 Resources which is going to continue. Secondly, and it's
14 because I come from another background that I don't
15 understand your assuery with regard to centrifugal force
16 of agencies working together but I can tell you that
17 district attorney's offices all, at least in my
18 experience, I guess all of the larger ones have their own
19 investigatory agencies, that typically in a murder case,
20 at least in Montgomery County when I was a prosecutor, all
21 murder cases are conducted jointly by the local police
22 department and the district attorney's office. There is
23 nothing in that joint jurisdiction that I can see that
24 causes -- there are typically or can typically be
25 jealousies, but there certainly isn't anything in that

1 joint jurisdiction that causes them not to work together.
2 They work together because they have to work together
3 because they care about law enforcement and because they
4 care about the right result.

5 A. May I reply to that?

6 Q. I don't see that--

7 A. May I reply?

8 Q. Yes.

9 A. Because I think that's a valuable point, and
10 you asked it earlier, I believe, of General Preate. The
11 difference between enforcement in the traditional criminal
12 context and here is that here we're dealing with a vast --
13 a far vaster range of remedies and whereas when you have a
14 coordinated investigation by the county police as well as
15 the local municipal police, their common goal is to amass
16 evidence to bring a criminal prosecution. You have no
17 similar guarantee of a common goal in an environmental
18 context. It may very well be that there is a bona fide
19 disagreement between the Attorney General's Office and DER
20 as to whether a case should be criminal at all or not or
21 whether the best way to achieve the public's end is
22 through a civil penalty action or remedial clean-up or
23 some other administrative sanction as opposed to a
24 criminal prosecution so that the necessity of there being
25 only one goal, which is a criminal prosecution, which is

1 what presumably you have in a murder context, is not at
2 all present in our context, and in fact we are juggling
3 and balancing a whole range of options.

4 You heard earlier in response to your
5 specific question an answer about what makes it criminal
6 and what makes it civil. Well, in fact, as I tried to
7 explain in my testimony, there is no clear star that
8 directs our ship on that particular issue. Conduct is
9 proscribed. You shall not dump without a permit. Okay?
10 And then if you dump without a permit, you have given rise
11 to administrative sanctions, civil sanctions, and criminal
12 sanctions, and there needs to be a basis for choosing
13 between them. There will not always be unanimity or
14 identity of how that decision should be made.

15 When you asked General Preate how he would
16 decide, he said he would look at two things - the nature,
17 and I wrote it down, the nature of the harm and, I'm
18 sorry, and -- he said the nature of the harm and the need
19 for an immediate clean-up would determine whether it
20 should be criminal or civil. Well, frankly, those are
21 issues that only DER could answer. It seems to me that
22 out of General Preate's own testimony he has said that
23 those things that would push it in one direction or
24 another are those things that are implicitly within DER's
25 purview. General Preate does not employ people who can

1 evaluate the nature and degree of harm. General Preate
2 does not employ people who can identify whether an
3 immediate clean-up is necessary or not. Those are the
4 kinds of things that presumably DER evaluates in making a
5 referral decision.

6 Q. Rather than continuing this dialogue, I have
7 one other question. You indicate that why solve a problem
8 -- we have a solution in need of a problem. I suggest to
9 you we have a problem, and if you were to tell the people
10 I think not just of Montgomery County but of the southeast
11 that we currently have an environmental agency in this
12 Commonwealth that for whom they can rely, they would be
13 surprised to hear that. That confidence does not exist in
14 southeastern Pennsylvania. It clearly does not exist in
15 Montgomery County, and it seems to me that when we have a
16 situation, and countless examples I think abound of lack
17 of activity, lack of moving forward, lack of
18 investigation, of serious environmental problems, that we
19 need another agency at least to -- and tell me if it's not
20 the Attorney General then to at least assure the public
21 that environmental crimes will be redressed and that their
22 health can be safeguarded?

23 A. I can't disagree with your frustration. Not
24 at all. Secretary Davis has taught me very effectively
25 that you don't fight the problem. You don't deny there's

1 a problem when everyone tells you there is one. But I
2 don't think the solution to what you're describing, which
3 is frustration generally with a perceived lack of
4 enforcement by DER, is to criminalize all these things so
5 that the Attorney General can handle it.

6 Q. We're not suggesting we criminalize them.
7 We're suggesting that another agency has the capability to
8 determine without a referral by that very agency upon whom
9 weakness is charged whether in fact there's criminal
10 conduct.

11 A. Well, but if there's not, then he's not
12 going to do anything either.

13 Q. We agree with that. But then we have
14 someone saying to the public, and that's the point I think
15 you're missing in all of this, is we have someone else
16 saying to the public there was not criminal conduct here.
17 At least there's an answer from another agency.

18 A. Well, he is not here and I can't speak for
19 him, but I would be surprised if General Preate would say
20 to you he is happy if this bill serves the function of
21 using him as an ombudsman for the public in those cases in
22 which criminal activity is not established, and that
23 sounds like what you're suggesting.

24 Q. I don't know. I think that he indicated the
25 citizens should know that they can call the Attorney

1 General's Office.

2 A. Obviously, I respectfully disagree. I
3 understand the frustration. I'd like to solve it another
4 way because I don't believe that sending these cases for
5 criminal investigation is necessarily responsive.

6 The Lankenau one, which, of course, is close
7 to you, and I appreciate that, in fact is one in which the
8 Attorney General's Office conducted his own inquiry and
9 concluded that there was no basis for criminal charges.
10 He certainly, if he thought there was a basis, could have
11 contacted us and said, look, I'd like to pursue this case.
12 Let's have a referral. Because we would have done that.

13 Q. I asked DER to refer it.

14 A. Well, if you did, I don't know that, because
15 in fact the Attorney General's, and I apologize for not
16 knowing that, but the Attorney General's Office in fact
17 worked with our people in gathering information.

18 Q. I did not ask the Attorney General's Office
19 once I contacted them. I asked at the meeting that we
20 held with the regional director -- I will not say I made a
21 formal request. I don't want to say that. I certainly
22 suggested that it seemed to me that the Attorney General's
23 Office was the appropriate agency to determine and it was
24 their criminal skills that were necessary to determine
25 whether in fact there was criminal conduct.

1 A. And I don't disagree with that. It is the
2 Attorney General's Office that ultimately has to make the
3 final criminal decision. In that case, we made a
4 preliminary decision and thought it shouldn't go there.
5 They made a preliminary decision which happened to be the
6 same.

7 Q. I guess the other frustration is it was not
8 until there was a newspaper expose--

9 A. Absolutely.

10 Q. --and there was serious stepping in by State
11 elected officials that the civil penalty of revoking a
12 burning permit and ultimately the stopping of all burning
13 and fines were assessed.

14 A. I can't disagree with that.

15 Q. So if you tell me you have another solution,
16 tell me what that other solution is?

17 A. May I tell you at a different time?

18 Q. Okay.

19 A. I am not prepared to give you an entire
20 reorganization of DER today.

21 Q. I mean, I would always be certainly
22 responsive to listen to a better solution to protecting
23 the environment, which is what we want to do.

24 A. Well, we're happy to discuss that.

25 Q. Thank you.

1 A. Sure. Thank you.

2 CHAIRMAN CALTAGIRONE: Paul.

3 REPRESENTATIVE McHALE: Thank you, Mr.
4 Chairman.

5 BY REPRESENTATIVE McHALE: (Of Mr. Welks)

6 Q. Mr. Welks, I'm struck by the stark contrast
7 between your rhetoric and the rhetoric of the Attorney
8 General. Though you exchange personal compliments and
9 apparently think highly of one another, your view of this
10 issue could not be more distinct.

11 On page 4 of your testimony you indicate
12 "Only the closest working relationship - as presently
13 exists - between DER and the OAG can insure that the
14 dialogue necessary to avoid miscues of this sort
15 continues.

16 "There is an elegant symmetry to the current
17 symbiotic relationship between the two agencies."

18 A. I knew I should have cleared this with
19 General Preate before I gave it to you.

20 Q. Well, clear it and perhaps make it
21 compatible. On page 6 of his testimony he states from a
22 rather different perspective, "In the environmental area,
23 I don't want my agents sitting on the sideline while
24 technicians in the Department of Environmental Resources
25 debate whether I should be in the case. This clumsy and

1 inefficient practice has come close to costing us
2 important cases in the past, and it will continue to do so
3 unless we change the law."

4 You indicate on page 5 of your testimony,
5 "Frankly, House Bill 1175 is a solution in search of a
6 problem." He indicates at the bottom of page 4 of his
7 testimony, "House Bill 1175 would eliminate these delays
8 and would go a long way toward providing quicker, more
9 effective enforcement of environmental laws."

10 If this is a marriage, it's not a very happy
11 one.

12 A. Well, politics are strange bedfellows.

13 Q. Well, is that what we're talking about here,
14 politics or the substance of the law?

15 A. Well, let me say to you this: I provided
16 the statistics in my testimony because I wanted to give
17 the committee some sense of how long and how large this
18 effort has been underway. Those are 400 active formal
19 case that were opened. That's lot. Starting from zero
20 and no people in 1980.

21 Q. And I'm going to move to that in just a
22 moment, if I may. You're not addressing my concern.

23 A. Well, I will, if I may.

24 Q. All right. I hope so.

25 A. The point I wanted to say to you is I've got

1 -- they've got 400 active cases. They've got 140
2 convictions. They've got 16 people in jail. I'm still
3 waiting to hear the cases that were lost because there
4 weren't immediate referrals. I heard about Ashland Oil
5 today and I disagree. I flatly disagree. I heard about
6 Lancaster Battery, but we won Lancaster Battery because
7 once the judge in Lancaster County understood how the
8 Environment Crimes Section works and it understands how
9 the referrals occur, he said, "Mr. Attorney General, you
10 have jurisdiction. Take this case to trial."

11 Representative, I'm still waiting to hear
12 what the examples of the problem are. It's that simple.

13 Q. My question is, why does the Attorney
14 General think there is a problem? I mean, you're arguing
15 vigorously in support of the status quo. He was here an
16 hour ago indicating that the status quo is clumsy and
17 inefficient. Why do we have, if you know, two such
18 dramatically different perspectives on what ought to be a
19 working relationship?

20 A. I can't answer for General Preate. I would
21 only say that I have not heard today, nor in my prior
22 discussions, what the cases are that we fumbled as a
23 result of delayed referrals, as a result of not referring.
24 There are numerous avenues of alternative referrals that
25 General Preate can pursue. There is an ongoing dialogue

1 every day between General Preate's people and DER in which
2 cases are discussed and in which if General Preate did not
3 have a case he thought he should, he could say, "Hey, do
4 you know about this case? I read about it in the papers,
5 let's get going on it." And in fact that does happen.

6 So I can't answer for you but I can only
7 tell you that I don't know what the problem is.

8 Q. All right, the point of my question was not
9 really to decide whether your perspective was correct or
10 whether the Attorney General was speaking accurately but
11 to cut through the rhetoric and point out that you have a
12 dramatic contrasting viewpoint on this issue.

13 A. Yes, sir.

14 Q. Whatever you might think of each other
15 personally.

16 A. Right.

17 Q. I'm concerned about the statistics that you
18 raise, and these are the same statistics that I attempted
19 to get from Mr. Abeln, and I appreciate the fact that he
20 may not have had them while he was sitting at the
21 microphone. I'm glad you do have them.

22 I asked Mr. Abeln, and the record should
23 indicate he's sitting in the back of the room at this
24 point, how likely it is that someone who would seriously
25 violate environmental law would go to jail for misconduct,

1 and he said very likely, and it appeared to be a fairly
2 positive picture that he was presenting. When I see the
3 hard numbers here, I'm concerned. Now, apparently you,
4 too, are pleased by these numbers. I'm not, and perhaps
5 you can explain them in a way that will address some of my
6 concerns.

7 You indicate that the task force has been in
8 operation since late 1980, is that correct?

9 A. Essentially 1981. January 1 of '81 is a
10 useful starting date.

11 Q. All right. Beginning of January of 1980.
12 Why don't you indicate the number of formal cases under
13 investigation and the number of defendants arrested and
14 the number of convictions and then you go down to the
15 bottom line, how many people have gone to jail, and using
16 the updated figure as of today, 16 people have gone to
17 jail. That's fewer than two people on average per year
18 during the period of time that the task force has been in
19 operation.

20 A. If I may, I would like to put some
21 perspective on that.

22 Q. Please do, because I find that to be a
23 virtually insignificant number, which says to criminals in
24 the field of environmental law, you may violate the law
25 impunitively, but it is statistically almost nonexistent

1 that you will go to jail for that impropriety.

2 A. As I said in a slightly different context at
3 the outset, any numbers, any specific excerpts or
4 statistics that are offered are by nature selective,
5 because you can't include all of everything. The first
6 thing I would like to say is that the 135 who have been
7 convicted represent not only corporeal individuals but
8 corporate individuals, and in fact I believe that the
9 blend is something like 60 percent/40 percent; 60 percent
10 are companies, 40 percent are individuals. So right away
11 we're dealing with a much smaller universe of potential
12 defendants who can go to jail because corporations cannot.

13 Q. That may explain your numbers, but that
14 doesn't address my concern.

15 A. Well, then the next level of question is how
16 recent has American jurisprudence started to recognize
17 environmental crime as an imprisonable offense? In fact,
18 no one in America went to jail for an environmental case,
19 with the exception perhaps of Manfred Derule, before 1982.

20 Q. The Solid Waste Management Act has criminal
21 penalties?

22 A. Yes, and that went into effect in 1980.

23 Q. That's why I've raised the issue. I'm well
24 aware of that fact. We're here a decade later and we're
25 talking about 16 people who have gone to jail?

1 A. But if you compare that to the national
2 statistics, Pennsylvania is either the first or second
3 State in terms of numbers of defendants who have been sent
4 to jail.

5 Q. That's appalling. If we're talking about 16
6 people and we're among the best of our sister
7 jurisdictions, that really says something, doesn't it?

8 A. Well, it's certainly humbling to me that you
9 see it that way. You may be right. I mean, you obviously
10 have a perspective that's valuable and valid.

11 Q. And you raise a good point, because I did
12 detect in your testimony a sense of pride, legitimate
13 pride and satisfaction with the status quo. I am not
14 satisfied with the status quo. I am very greatly
15 concerned that on average fewer than two people going to
16 jail per year is not much of a criminal deterrent to the
17 people of -- the criminal element of the State which might
18 be considering this kind of activity.

19 A. If you recall Mr. Abeln's remark, I believe
20 that if you graphed it, you would not have a flat line.
21 You would not have two per year. What you'd have is, you
22 know, one or two every other year in the beginning years
23 when we were developing cases and educating the judiciary
24 and an upward plane, and in fact Mr. Abeln said that five
25 or six of these people have been sentenced within the last

1 year to jail. So that in fact what you see is a growing
2 appreciation by the judiciary of the significance of these
3 kinds of cases and a growing sophistication by the
4 Environmental Crimes Section people.

5 I do not wish you to think that I am here to
6 say to you that everything is hunky-dory in Pennsylvania.
7 While we're working hard at it and we'd like to think that
8 we're doing more than has been done previously and they
9 are doing more in General Preate's shop and they're asking
10 for more people, I'd like to be sending more people to
11 jail and I'd like to be getting bigger penalties. But I
12 don't think that with regard to the question of the
13 referral issue we need to change the status quo. That's a
14 limited question.

15 Q. All right, I'd like to come back to that
16 question. I don't want to send a lot of people to jail.
17 I want to send those people to jail who deserve to go.

18 A. Right.

19 Q. Who are caught, prosecuted, convicted, who
20 have the necessary criminal intent to establish that they
21 have acted in a way that knowingly threatened or in fact
22 caused damage to public health and safety, and I have a
23 strong suspicion that a lot of those people are not facing
24 much of a criminal deterrent at this point in terms of the
25 likelihood of their being sent behind bars, and I don't

1 think that the number of 16 as one number of individuals
2 who have been incarcerated is a number that ought to make
3 us feel good in terms of the forceful message we're
4 sending to the criminal element in Pennsylvania which
5 might be considering the pollution of our environment.
6 That bothers me.

7 Now, secondly--

8 A. Fair enough.

9 Q. --I think that there's another factor that
10 came into play. I don't think it was just a matter of
11 educating the judiciary in the early 1980s. Our judges
12 have been able to read law for quite a long time, and the
13 criminal sanctions in the Solid Waste Management Act are
14 fairly clear. The point that I'm making, which comes back
15 to the central element of this discussion, is that the
16 only difference is from gubernatorial administration to
17 gubernatorial administration. Some governors will press
18 forcefully for the implementation of environmental law;
19 other Governors philosophically will be less enthusiastic
20 about such enforcement.

21 I like the idea of giving original
22 jurisdiction to the Attorney General's Office because it
23 creates the possibility of a check and balance so that, as
24 the Attorney General indicated earlier when he was here,
25 should you run into an administration not enthusiastic

1 about environmental protection, that frustrated citizen
2 who makes the complaint has somewhere else to go.

3 I realize that the number 16 ought not to be
4 averaged over 10 years, and I'm hopeful that most of those
5 incarcerations have been in a more recent period, showing
6 a more protective attitude, but the fact is it's an
7 average of less than two per year, and I like the idea of
8 1175 because it allows somebody another avenue of
9 approach. If we have a future Governor who doesn't care
10 about the environment, as we have had such Governors in
11 the past, I am hoping that we will at least have an
12 elected Attorney General who then, upon a citizen's
13 complaint, will pick up the ball and enforce the law. And
14 that's why I think 1175 makes sense, and I think that your
15 numbers argue very forcefully in support of 1175, not in
16 opposition to it. If all we do is send 16 people in a
17 decade to jail, that's not much of deterrent.

18 A. I'm sorry that we have not been more
19 effective by your definition. We obviously would always
20 prefer to be more effective than less. And I fully credit
21 what you're saying and I understand the frustration.

22 If I may, with all due respect, generally
23 checks and balances work best when in fact they are shared
24 across various organizations or powers of government. I
25 would suggest to you that Attorney Generals -- Attorneys

1 General can also change from time to time, and that while
2 we may have a hard-charging Quantico marine now, we may in
3 fact have someone else later. To the extent that DER
4 becomes less of an interested and active and necessary
5 player in the process, the next time we have or if we ever
6 have an Attorney General who does not see this as
7 important, you've got to re-engage DER at that point if
8 they have stopped seeing their role as essential to
9 getting tough criminal prosecutions underway.

10 Q. Thank you.

11 I'll simply close with this: In the early
12 1980s, I brought serious complaints to the attention of
13 the Norristown office of DER. Many of the people who were
14 in that office at that time are still there. I received a
15 negligible bureaucratic response to my complaints, and
16 these were complaints that involved very serious questions
17 of public health and safety. Now, as I stressed earlier
18 to the Attorney General, I see a very strong improvement
19 in recent years within DER, but I'm not naive enough to
20 think that if those same people there are in a future
21 administration, an administration less sensitive to the
22 protection of the environment than this administration,
23 some of those bureaucrats may well lapse back to their
24 former attitudes. Next time around in some future
25 administration, I'd like to be able to go to the Attorney

1 General and complain loudly about the lack of activity on
2 the part of DER. In 1983 and '84, when those same people
3 were there, they showed little concern for the protection
4 of the citizens of my district and I had no where to go.
5 That's why I think 1175 makes sense.

6 A. I understand your position. Thank you.

7 REPRESENTATIVE MCHALE: Thank you, Mr.

8 Chairman.

9 CHAIRMAN CALTAGIRONE: Chris.

10 REPRESENTATIVE McNALLY: Thank you, Mr.

11 Chairman.

12 BY REPRESENTATIVE McNALLY: (Of Mr. Welks)

13 Q. Mr. Welks, I've been very impressed with
14 your testimony and your knowledge of our environmental
15 laws, and particularly I found helpful your description of
16 the Ashland Oil spill investigation.

17 A. Thank you.

18 Q. One question more I had in regard to the
19 Ashland Oil spill was that Mr. Preate indicated that the
20 Federal government eventually successfully prosecuted
21 someone involved in that incident, and I was wondering if
22 you might elaborate, but do you know what the offense was
23 and what the basis of that crime was?

24 A. Yes. The Federal government prosecuted
25 Ashland itself, no individuals, and they brought a

1 two-count indictment under the Federal Clean Water Act and
2 the Federal Rivers and Harbors Act, I believe it's called.
3 One of those counts sounded in strict liability, one in
4 negligence. Ashland eventually pleaded no contest to each
5 of those. The district court judge accepted those pleas
6 and ultimately imposed a penalty, I believe, of \$2.25
7 million or \$2.5 million under something called the
8 alternative sentencing guidelines which are part of the
9 Federal Criminal Code which allow a judge to impose a
10 penalty based on the economic harm caused by a particular
11 criminal incident, and the judge, using calculations that
12 I couldn't share with you today but could provide,
13 essentially tried to quantify the damage caused by the
14 Ashland spill and upwards.

15 Q. Okay. And would the conduct, eventually do
16 you think that particularly in light of the Federal
17 prosecution that a successful prosecution could have been
18 made under Pennsylvania law?

19 A. I think that's an extraordinarily difficult
20 question, and I say that not simply to be polite and
21 diplomatic, but as a former prosecutor, it's just a real
22 tough call in this particular case, because you're dealing
23 with some ambiguous industry standards, you're dealing
24 with an unintentional spill. Obviously, no one wants to
25 lose 4 million gallons of saleable product. You're

1 dealing with other things that would mitigate against a
2 successful prosecution.

3 On the other hand, based on what the task
4 force report recounts, there were substantial deviations
5 from good engineering practice in the design,
6 construction, and maintenance of the tank that conceivably
7 could have been appealing to a jury. I think it is
8 extraordinarily difficult to second-guess any
9 prosecutorial decision about the Ashland case.

10 Q. Is there something in Federal law that made
11 it easier to obtain a conviction, or more likely that a
12 conviction could have been obtained? In other words, is
13 there some way that we could amend Pennsylvania law to, in
14 light of the Ashland Oil spill, that would make a
15 conviction more easy or more likely?

16 A. If, in fact, you were to drop out the
17 negligence problem, which is the standard, the mens rea
18 standard in the Pennsylvania Clean Streams Law, then you
19 would, in fact, have a simpler prosecution because under
20 the Solid Waste Management Act, as Mr. Abein has pointed
21 out, you do not need to prove any intent. However, in
22 this particular case there was a legal problem claiming
23 that oil was a waste, so that was an issue. Where you
24 jump into the Clean Streams Law under Pennsylvania law and
25 look to make a prosecution there, you then had to deal

1 with negligence, and here is where the question of
2 negligence and what were the industry standards and were
3 the voluntary standards and did Ashland people know what
4 was going on all became very tricky.

5 If you had a pure strict liability Clean
6 Streams Law type statute in Pennsylvania which said the
7 discharge of any pollutant to the water of the
8 Commonwealth without a permit is a misdemeanor of the
9 third or second degree, then it would clearly be an easier
10 prosecution. I am not here to advocate that or not
11 advocate that. In response to your specific question,
12 yes, if you made the law easier you could always win.

13 Q. Let me conclude by saying that I found
14 myself in strong agreement with a great deal of your
15 testimony, and in particular the points that you made
16 concerning the need for a close working relationship, and
17 also I found myself to agree with you that I don't think
18 that the Attorney General intends to be a public
19 ombudsman, because I can't foresee, and I tried to
20 intimate to the Attorney General the fact that the
21 magnitude of the environmental problems in this State, or
22 really in my district alone, could occupy his office, and
23 that I think that what will happen if this legislation is
24 passed is that I'm going to be able to refer all of my
25 environmental complaints to the Attorney General, and then

1 when he doesn't do anything about it, you know, the same
2 complaint that Mrs. Specter is making about DER in
3 Philadelphia will be made about the Attorney General in
4 Homestead and Munhall and Pittsburgh. And frankly, you
5 know, as you pointed out, there has not been a single
6 instance of a fouled up environmental prosecution that's
7 been presented to us today, and to me that indicates that
8 there is not a problem. I agree that we can do better, we
9 need tougher law enforcement, but I don't think that can
10 be achieved through some kind of rhetorical back biting.

11 So I thank you for your testimony.

12 A. Thank you.

13 CHAIRMAN CALTAGIRONE: Dave.

14 REPRESENTATIVE HECKLER: Thank you, Mr.
15 Chairman.

16 BY REPRESENTATIVE HECKLER: (Of Mr. Welks)

17 Q. Mr. Welks, I'd like to commend you on your
18 candor in your analysis of the relationship between, as
19 you see it, between the Office of Attorney General and the
20 Department of Environmental Resources. I'd like to
21 explore that analysis just a bit.

22 You described that relationship as one of
23 competing agencies and spoke of a check and balance
24 relationship, and specifically as I understood it
25 described DER as a check on the power of the elected

1 Attorney General.

2 A. If I may, I know that's your assumption. I
3 didn't say that was today. I said that in the instance of
4 this bill becoming law, and there being disagreements in
5 the future, that check and balance might lapse. I have
6 not suggested that there is competition or disagreement
7 about cases that we've had with General Preate. There may
8 be disagreement about the need for this particular
9 amendment to the Commonwealth Attorneys Act.

10 Q. Well, in this five years when we commemorate
11 the 200th anniversary of the Constitution and the Bill of
12 Rights, I think we need to -- ought to be able to make the
13 distinction between structures of government and
14 particular people who inhabit them.

15 A. Fair enough.

16 Q. To the extent that everybody has been able
17 to make a lot of crazy procedures that this legislature
18 has seen fit to pass over the years work, you know, the
19 Commonwealth struggles on. That doesn't mean we can't
20 improve the structures and the relationships.

21 A. Right.

22 Q. Specifically, let's assume -- and let's
23 first of all assume an Attorney General who just wants to
24 prosecute everybody, who was bit by the bug -- Paul McHale
25 gets to be Attorney General. He obviously wants to send a

1 lot of people to jail, and he is just absolutely charging
2 off prosecuting every case--

3 REPRESENTATIVE McHALE: It's the voice of
4 Quantico again.

5 BY REPRESENTATIVE HECKLER: (Of Mr. Welks)

6 Q. Another crazy marine and he's off
7 prosecuting every case in the world, and let's say that if
8 you pick a panel of 15 experienced prosecutors or judges
9 they'd say that he was just prosecuting some cases that
10 shouldn't be prosecuted that maybe deserved some
11 administrative sanction or no sanction at all.

12 A. Right.

13 Q. Where do you or Art Davis or Governor Casey,
14 for whom you ultimately work in the structure of the
15 administrative branch of government, come by being a check
16 on the ability of Attorney General McHale to prosecute
17 people?

18 A. I think that the answer to that question
19 lies in the structure of the environmental statutes not
20 only of this State but of the Federal government and every
21 other State in the country. Environmental statutes are
22 unique in that as a general concept, they proscribe
23 conduct and then they make available the full gauntlet of
24 penalties known to the American jurisprudential system for
25 every single one of those. Literally. As Mr. Abeln said,

1 under the Solid Waste Management Act, every single dumping
2 incident, including your spilling orange juice on the
3 floor outside this room, could be prosecuted as a
4 misdemeanor under the strict reading of the law, and that
5 would get to a jury. Now, it may very well be that a jury
6 would say, we don't really want to see anyone wasting
7 their time doing this, but as a practical matter, as a
8 former prosecutor, I tell you, you would make out the
9 elements of a misdemeanor prosecution if you went outside
10 the Capitol and dumped your Kool-Aid on the ground.

11 Now, so you say to me, why is there a check
12 and balance needed? My response to you is essentially
13 that given all those other remedies in addition to the
14 criminal ones, there must be some logic behind the scheme
15 that was set up that suggests that some criteria need to
16 be imposed on the system so that we correctly identify
17 those that should be handled administratively, we
18 correctly identify those through remedial orders or
19 whatever, those that should be handled by civil penalties,
20 those that should be handled by direct action of Common
21 Pleas Court or Commonwealth Court, et cetera. And if we
22 look at the breadth of responsibility entrusted to DER, if
23 we look at the regulatory authority entrusted to DER, I
24 hesitate in these chambers to say this, if we look at the
25 size of DER compared to, for example, the size of the

1 Attorney General's Office or the Environmental Crimes
2 Section in particular, I think that you can only conclude
3 that the criminal portion of the program is an important
4 part of it, but it is not the driving part of it. There
5 are thousands and thousands of administrative and civil
6 enforcement actions taken by DER every year, and there are
7 tens taken by the Environmental Crimes Section. I don't
8 necessarily think that's wrong, but I think that's the way
9 it is.

10 And so I say to you that if your proposal,
11 your hypothetical proposal, is what's wrong with an
12 Attorney General who prosecutes every single case
13 criminally, I say first of all, that's not the system
14 we're supposed to have. I say to you secondly that given
15 that as a general proposition we stop civil and
16 administrative activity in a case when it's being
17 investigated and prosecuted criminally because of a whole
18 host of reasons that I won't bore you with but which you,
19 I'm sure, can recognize as a former prosecutor, we then
20 have an additional problem in that the interests of the
21 citizens of Pennsylvania might very well not be advanced
22 by having clean-ups or other remedial responses, or
23 cessation of illegal activity halted until a criminal
24 case plays out its process. And in fact, in some
25 instances a criminal case is not responsive to the

1 activity because you need the activity ceased and you need
2 a clean-up triggered, and in a pure fashion, that's not
3 what you get in criminal court. You can certainly argue
4 for restitution, but that's a very spongy and amorphous
5 concept that I don't think is a very good way to handle
6 the remedial nature of DER's authority.

7 So that my response to you is, you look at
8 the whole picture, you look at all the authorities that
9 are given, You look at the timeframes that are necessary
10 for different kinds of clean-ups and you come to the
11 conclusion that you've got a big program, the majority of
12 which is administrative and civil, and a smaller portion
13 percentage wise, certainly no smaller in terms of its
14 deterrent effect and its importance, but a smaller
15 percentage in terms of some hard numbers is criminal, but
16 that the criminal program doesn't drive the civil program.
17 That's not what anyone ever intended. That's my answer.

18 Q. Well, I hear you, but the fact -- so that
19 your contention then is that by virtue of the fact that
20 we're going to have more civilly remediable problems, that
21 its appropriate that the Attorney General not -- that
22 there be a check that in fact as things stand now, if you
23 see fit not to refer a case to him, that he be foreclosed
24 from making that prosecution, from--

25 A. No, I don't. I don't. There are

1 alternative routes. That's the point. We have a finely
2 constructed system of checks and balances and if we don't
3 refer it and he feels that strongly about it, and by the
4 way, let me say that if we don't refer it after knowing
5 that he feels that strongly about it, we are clearly
6 jeopardizing this ongoing relationship which is voluntary.
7 It's a marriage. You have to understand that it's only
8 going to be in the most extreme function that we're going
9 to say, if he says this is really a criminal case we're
10 going to say drop dead. I mean, it's got to be really
11 important to us because we run a great risk. But even if
12 we say that, then there's a DA referral possible because
13 the DAs have original jurisdiction to bring any criminal
14 case in this Commonwealth, and they certainly can choose,
15 because as we all know, and we all agree, they don't have
16 the resources to deal with it, to refer it to Mr. Preate,
17 General Preate. He also, in most instances, could take it
18 not multi-county investigating Grand Jury because the
19 court decisions and the practice before that multi-county
20 investigating Grand Jury are sufficiently broad that
21 virtually any environmental case of any note whatsoever
22 about which there's going to be a disagreement of
23 substance will justify insertion into the investigating
24 Grand Jury, in which case General Preate can prosecute it.
25 So there are checks and then there are checks within those

1 checks.

2 Q. Well, now I'm really confused because if the
3 Attorney General can circumvent the provision that we're
4 proposing to change anyway, why is it that we don't just
5 change it?

6 A. Because the circumvention provisions are
7 relatively extraordinary in nature. They prevent DER from
8 being able to effectively bar or foreclose it in a given
9 specific case. However, it is highly unlikely that the
10 Attorney General would want to make a practice of taking
11 small nickel-and-dime environmental cases to the Grand
12 Jury, simply because he couldn't get them from DER. We
13 would hope that he's getting them from DER, and again, I
14 sort of fall back to my earlier testimony and say, I don't
15 know of any that he's not getting, with the exception of
16 Ashland, for example.

17 Q. Well, we'll get to that in a minute.

18 A. So that's my answer.

19 Q. For the sake of symmetry, let's take the
20 opposite hypothetical. Instead of Attorney General
21 McHale, we have a wimp who plainly doesn't care, he just
22 came from being Chief Counsel to some big chemical company
23 and he thinks that--

24 A. They're laughing because they thought you
25 were going to say Chief Counsel of some environmental

1 agency.

2 Q. --and he thinks that pollution is really not
3 much of a big deal at all. You would agree with me that
4 the public pressure technique that you described working
5 the other way a minute ago is certainly going to be
6 available. In that situation, DER isn't going to have to
7 have any formal referral -- the formal referral authority
8 that's presently in law. If you sent cases to this guy
9 and nothing happens to them, you're going to be able to
10 turn to the press, and remembering that this fellow is
11 elected, or woman, is elected for a four-year term, the
12 process by which we select the prosecutor is going to take
13 care of itself, wouldn't you agree?

14 A. One hopes that Civics 101 says that. That's
15 what we would hope.

16 Q. Okay. Now, one of the things that seems to
17 be being taken as sort of scripture here today is that
18 nobody can point to a case that was lost because of this
19 process, this procedure that's set up now. My concern,
20 and again, we've had bright people with good will,
21 yourself one of the key players, who has managed to make
22 do with the statute as it stands, one of my concerns is
23 what about the cases that haven't ever gotten -- haven't
24 ever come to your attention, to the attention of the task
25 force, to the attention of the Attorney General, as things

1 are constituted now? You have a far-flung bureaucracy, an
2 enormous number of people out there charged with the
3 responsibility simultaneously of regulating, of granting
4 permits to do certain things, and then determining whether
5 people have violated, either violated the terms of the
6 permit, as in the Lankenau Hospital case we've heard so
7 much about, or who are acting without benefit of permit.
8 How confident are you that your bureaucracy is working as
9 it should, that cases that should be at least looked at
10 for sanction and that many of us might conclude need to be
11 prosecuted criminally involve that kind of mens rea are
12 being brought to somebody's attention?

13 A. I'll give, I guess, a two-part answer, and I
14 recognize the hour and I apologize.

15 First of all, let me say to you that I'm
16 very confident that if anyone knows about them, they're
17 getting to the Attorney General's Office. The strength of
18 the structure that we presently enjoy is that the Attorney
19 General's people, including those DER people which we've
20 assigned there, which I'll lump under the role of Attorney
21 General's people, are in our regional offices across the
22 State. They are in those locations where if anyone knows
23 about it, they know about it. And, in fact, we have
24 intentionally fostered that kind of sort of
25 non-competitive, non-adversarial relationship between

1 these people. They work desk-to-desk. They borrow each
2 other resources when they're necessary, so that in fact if
3 anyone in DER knows about it, the likelihood is that the
4 Attorney General's staff will know about it in short
5 order. So even if we're not referring it, the Attorney
6 General's Office can now go back to this route that I've
7 described earlier and say, hey, you know, we heard about
8 this. Why aren't you bringing it to our attention? We
9 read about it in the papers, we heard about it at a staff
10 meeting we attended, et cetera, let's get this case over
11 for us to prosecute. Now, that's part one. I am fairly
12 confident that if anyone knows about the case, it's
13 getting to the Attorney General's Office at least at some
14 level where they can push the right buttons.

15 Part two is that this bill, if there is a
16 problem with the sort you identified, would have nothing
17 to do with it. If DER doesn't know about it, then the
18 referral question is irrelevant. If we don't have it,
19 then the -- if we don't know about it, then the AG is not
20 likely to know about it, and even if it's out there it's
21 not likely that because the AG could bring it
22 independently he becomes somehow far smarter, more
23 Solomonic in his ability to spot these violations. It
24 doesn't happen that way. All we're doing is saying, well,
25 if anyone knows about it, you can bring it, General

1 Preate. If there isn't anyone who knows about it, then
2 he's no better off than if he could bring it or couldn't
3 bring it unless he could touch his toes 10 times. It
4 doesn't matter.

5 Q. Well, recognizing the lateness of the hour,
6 I'm going to pursue this for a bit, notwithstanding your
7 permission, Mr. Chairman.

8 I'm a citizen. I see somebody dumping
9 something suspicious in the stream near my house.

10 A. Right.

11 Q. I may call the police.

12 A. Um-hum.

13 Q. I may call DER if it's during working hours.
14 How are we confident that my call is going to find its way
15 to the task force, to the folks within that very small
16 cadre within DER who are actually focussed on the
17 possibility of a criminal prosecution?

18 A. Well, if you call the police, hopefully the
19 police know where to turn, because Mr. Abeln has made a
20 very aggressive and I think intelligent outreach effort to
21 the law enforcement community generally. If you call DER,
22 then what should happen is that all the DER people in
23 Solid Waste and Water Quality are on alert, by virtue of
24 memos and staff meetings, as well as just the natural
25 publicity that has attended the Environmental Crime

1 Sections activity over the last eight or nine years of its
2 existence, and therefore they are on strict direction that
3 whenever they find anything that even smacks of
4 intentional dumping activity or reckless or willful
5 misconduct as broadly defined as they could imagine it,
6 they're supposed to kick it over to ECS. And in fact, the
7 standing operative is, the standing protocol is, refer
8 more than ECS is going to keep. They're going to send a
9 lot back because their level of criteria for a prosecution
10 is going to be a lot tougher than yours. Expect that if
11 you send 10 cases over you'll get 3 or 4 back as bad.

12 Okay? So, I mean, I can't say to you that
13 there are never any flaws or glitches in a system, but the
14 DER people, not just the small cadre but the entire
15 regional office structure, is on alert. And again,
16 General Preate has clearly implemented an intelligent step
17 by moving people into those few regional offices that
18 heretofore have not had ECS representatives there. But it
19 seems to me theoretically possible, you know, that a DER
20 person could get a call and not recognize it as anything,
21 whether for civil action or criminal action. But I
22 frankly presume that that's possible if that person called
23 a far-flung outpost of the Attorney General's office. I
24 mean, once we get down to the level of the exercise of
25 individual discretion about what a call is, there's no

1 magic whether you call someone a DER inspector or Attorney
2 General's Office Special Agent. We're always at the mercy
3 of the policeman on the beat exercising discretion wisely
4 as to what to do about a given allegation. I don't think
5 that we need an institutional change to respond to that
6 problem. We're dealing with human nature at that point.

7 Q. Well, it seems to me that we're dealing with
8 people whose job descriptions may be significantly
9 different, depending upon whether we're dealing with DER
10 or the Office of Attorney General, and I guess that's my,
11 just to finish with an observation, there are prosecutors
12 and there are bureaucrats, and I think they have different
13 missions in life. I think, quite appropriately, the check
14 and balance that I have always understood as imposed on
15 the actions of prosecutor is ultimately what a jury will
16 convict someone of and obviously what our courts deem as
17 an appropriate way of circumstances in which that
18 conviction would take place. When you describe in page 2
19 of your testimony that it is also not uncommon for matters
20 discovered initially by the ECS to be forwarded to DER for
21 official referral back for criminal work-up, that, to me,
22 is Byzantine.

23 And I must say that the testimony I've heard
24 today, while it doesn't diminish in any way my regard for
25 the commitment of DER to punish the proper people and to

1 deal overall with the environment, I can't say that it in
2 any way diminishes my enthusiasm for this bill. It seems
3 very clear to me that because only the Attorney General
4 can prosecute you're going to have to keep working
5 together, because I'm firmly convinced that you want to
6 see the bad guys in this department, in this particular
7 area, put in jail. But it certainly opens another avenue,
8 and even if it did nothing more than get rid of that
9 particular Byzantine two-step, I would think it was worth
10 the effort.

11 REPRESENTATIVE HECKLER: Thank you, Mr.
12 Chairman.

13 CHAIRMAN CALTAGIRONE: Mike.

14 REPRESENTATIVE BORTNER: Thank you, Mr.
15 Chairman.

16 BY REPRESENTATIVE BORTNER: (Of Mr. Welks)

17 Q. I'm going to be very short. A comment and a
18 question.

19 As you may have gathered from my questions
20 when the Attorney General was testifying, I share many of
21 your concerns and probably question the wisdom of the
22 legislation even more after hearing you testify, hearing
23 your testimony, which, frankly, I thought was excellent.
24 And as a former prosecutor, I think you did a good job of
25 distinguishing between the run-of-the-mill burglary case

1 and the way you've got to approach one of these
2 environmental prosecutions with the different remedies,
3 and that makes a lot of sense to me as well.

4 Like Representative McNally, I still haven't
5 heard, and I know we're back to this talking about all the
6 cases that have been tumbled, I thought there was one at
7 least which was kind of the incident that brought this
8 legislation about, and then I thought I heard you testify
9 that in the Lankenau case the Attorney General's Office
10 had looked at it and decided that it was not appropriate
11 that for criminal prosecution. Could you explain that a
12 little more?

13 A. Well, I believe that in fact not only did I
14 say it but Representative Hagarty, in her written remarks,
15 has acknowledged this, and they're here somewhere. It is
16 my understanding that, and when I say it though, I don't
17 mean to suggest that I'm implying anything wrong or
18 clandestine about it. It's my understanding the Attorney
19 General's Office assigned an investigator to perform at
20 least a preliminary review or inquiry into the allegations
21 underlying the Lankenau case. That was done. In fact,
22 our chief investigator, who happens to be a lawyer working
23 in my office, and she answered all his questions, offered
24 to make documents available based on what we had learned
25 about the case, and basically said to him, we don't think

1 this is a criminal case. We think we have changing laws
2 and changing regulations. We think we have a permit
3 issued in 1982 when no one cared a hoot about infectious
4 and pathological waste -- whether that's right or wrong,
5 that happened to be the circumstance of the time. We're
6 now looking at, you know, this permit today and it's
7 ambiguous, it's not very clear. We've got two different
8 programs involved. We've got a hospital that's asked for
9 guidance repeatedly and gotten discrepant guidance from
10 time to time from DER. Putting all that together, it is
11 my conclusion as a DER person that this isn't a case I'd
12 refer, it's something that we're going to handle civilly
13 through penalties and through changing their permit
14 status.

15 It is my understanding that person went back
16 and basically accepted that as a valid gloss on what
17 occurred. The Attorney General's Office has not sought
18 from us a referral. They have not said, we'd like to
19 pursue this criminally further, would you give us a
20 referral? And I believe that Representative Hagarty, as I
21 said, in her prepared remarks -- I'd like to say a few
22 minutes ago but I know I've been too prolific for that --
23 some while ago said that the Attorney General's Office
24 concluded that there was no criminal liability that was
25 actionable. But that's what I'm referring to.

1 Q. Well, let me just finish by saying that,
2 again, I would like to see our prosecution of
3 environmental cases strengthened in any way that we can,
4 although even when the Attorney General was here I think
5 he admitted or agreed that generally the system is working
6 pretty well, I thought he said that, and that the two
7 agencies worked fairly well together, particularly within
8 the Environmental Crimes unit. Perhaps there is some way
9 to give some additional authority, some additional review
10 to the Attorney General or to perhaps expand that role
11 somewhat, but I would certainly hate to see that interfere
12 with what I do believe you've been very good explaining
13 and I accept as a pretty delicate balance between the way
14 that the two agencies approach these problems.

15 Thank you.

16 A. Thank you.

17 CHAIRMAN CALTAGIRONE: Paul.

18 REPRESENTATIVE McHALE: Thank you, Mr.
19 Chairman.

20 BY REPRESENTATIVE McHALE: (Of Mr. Welks)

21 Q. Just two quick observations and an
22 invitation for your comment if you think it's appropriate.

23 You indicated in speaking to Representative
24 Heckler that when it comes to environmental problems and
25 potential violations of criminal law, if someone at DER

1 knows about that situation, a referral is going to be made
2 to the Attorney General's Office, and you seem to imply in
3 your testimony that such a referral is virtually
4 automatic.

5 A. (Indicating in the affirmative.)

6 Q. Is that correct?

7 A. Yes.

8 Q. The problem that I have is I've been here
9 long enough that I've seen that that has not always been
10 the case. You and I, appointed and elected officials,
11 come and go. The bureaucracy seems to stay forever. Some
12 of the very same people in your regional office in
13 Norristown who are serving today were employed in that
14 office in 1982, 1983, and 1984. I can tell you back in
15 those days, some of those people couldn't be moved to
16 investigate a serious matter by a stick of dynamite. They
17 simply had no interest. They were bureaucratic,
18 unresponsive. I think you may have heard the testimony
19 from Dr. Renthal. He was talking about 1988, but I'm
20 talking about the same office just a few years earlier
21 where we could not persuade those officials at DER to
22 initiate an investigation leading to a civil remedy, let
23 alone a criminal remedy.

24 I stress that to you because I think that's
25 important. If I felt that from now through eternity when

1 a serious matter would come to the attention of a DER
2 official involving possible questions of criminality that
3 an appropriate referral would be made to the Attorney
4 General's Office, then I would think that there probably
5 was not a strong basis for House Bill 1175. But I watched
6 these people six years ago. I watched and listened as
7 serious matters were brought to their attention and they
8 did nothing, and there were no alternatives such as those
9 that would be provided by 1175 available to the public
10 back in that time period.

11 So I appreciate the faith you have in those
12 employees today. Some of those people may not justify
13 that faith based on their prior performance in an earlier
14 administration.

15 Secondly, and in closing, I appreciated the
16 endorsement for Attorney General that was given to me by
17 Dave Heckler. I may use that on a future piece of
18 political literature. Dave and I will have to talk about
19 that.

20 In all seriousness, I recognize that the
21 criminal law is the most severe social sanction we have,
22 particularly when we're talking about the potential for
23 incarceration. The State has the right to take away a
24 person's liberty only under the most extraordinary of
25 circumstances, and most environmental violations do not

1 rise to that level. Most environmental violations involve
2 acts of negligence where an administrative or a civil
3 remedy is the appropriate course of action.

4 But in a Commonwealth with 11 million people
5 and a criminal element that is as large as it
6 unfortunately is, it seems to me that when over a decade
7 we average 2 incarcerations per year, that its criminal
8 sanction, limited though it should be, is not being
9 employed to the extent that it should be employed.
10 Particularly if we want to send a message of deterrence.

11 Representative Bortner and I were speaking a
12 little bit earlier on this question: All too often, the
13 penalty in an environmental case does not hit home. A
14 corporate vice president, as he makes a decision involving
15 criminal mens rea, knows that it is possible that if he is
16 caught his corporation may be punished, they may lose some
17 money, they may be fined, there may be some public
18 embarrassment for the corporation, but he knows, based on
19 the statistics that you've provided to us, the likelihood
20 of his going to jail is pretty remote. I don't believe
21 that the consumers who purchase from that corporation
22 should ultimately pay the penalty for a fine that might be
23 imposed. I also don't believe that that's much of a
24 deterrent to possible criminal activity.

25 What I would like to see is a situation

1 where a corporate vice president who is deciding whether
2 or not he is going to pollute a river contemplate at that
3 time the possibility of individual accountability, i.e.
4 that he might go to jail. And that kind of accountability
5 and deterrence that arises from that accountability simply
6 is not going to exist when only two people per year on
7 average go behind bars because of criminal misconduct in
8 the field of environmental law.

9 A. I recognize the argument you're making. I
10 don't disagree with it. I would say, however, that this
11 particular bill doesn't address that, especially in terms
12 of raw numbers. I can't imagine that at most we'd be
13 talking about two or three new cases a year that the
14 Attorney General might somehow find and get that DER
15 didn't want them to have under the present structure.

16 Q. Why do you say that, just two or three?

17 A. Because he's getting virtually everything
18 now. There aren't any cases that he's disagreeing with.
19 That's why I say to you, what are the cases that he wanted
20 that he didn't get? If he had a shopping list of 50 or
21 100, then I'd know you had 100 more cases where at least
22 he was looking for a prosecution that we hadn't given him
23 the opportunity to bring, and maybe out of 50 or 100 you'd
24 have 5 or 10 or 15 more incarcerations. But there aren't
25 any cases. I mean, they know about the same cases we know

1 about. We share our information, and if we don't refer
2 it, he can say to us, why aren't you referring it? And
3 then we'll generally refer it. And if he says to us that
4 and we don't refer it, then he can have the complaint made
5 to the local DA who can say, I don't have any resources to
6 continue this fight. Let's kick it to the Attorney
7 General and he'll get it. Or he can take it to the Grand
8 Jury. I mean, this bill is not going to address your
9 problem. There aren't more cases out there that DER has
10 that it's hoarding.

11 Q. And I guess that's really what it comes down
12 to, and I'll close with this: I'm very skeptical that
13 every matter known to your regional offices involving
14 potential criminality is really being referred to the
15 Attorney General's Office when the bottom line in a
16 Commonwealth with 11 million people is that 2 people on
17 average per year go to jail. If there is a complete pass-
18 through from your regional office to the AG's office, that
19 there is no screening that takes place at the regional
20 office, the potential criminality is freely brought to the
21 attention of the Attorney General, as you state it is, I
22 become skeptical when I look at the numbers. I wouldn't
23 expect a dramatic increase in those numbers, but it would
24 not be two or three. I would expect an increase
25 significantly beyond that.

1 A. I certainly could be wrong, Representative.
2 That's not my sense of the situation. Obviously,
3 screening always occurs at some level, and it may be that
4 some of the regional offices are making the cut at the
5 wrong point. As soon as you say to someone, take a look
6 at this case and give him or give her a standard to apply,
7 they can misapply the standard. But as a general
8 proposition, what our people have been told is if it's
9 intentional, if it's sufficiently reckless that it looks
10 like it's intentional or any other circumstance where you
11 think it might be criminal, as you use that term as a
12 layperson, kick it over.

13 Q. I guess my skepticism is about six years ago
14 I saw some of those same people look at precisely that
15 kind of conduct and not only fail to take criminal action,
16 they failed to even take civil action, and for the most
17 part they failed to respond. And if that's skepticism
18 that you hear in my questioning today, that skepticism I
19 think is shared by many Pennsylvanians with regard to the
20 enforcement capability, both civil and criminal, on the
21 part of DER. I hope that I'm addressing a problem which
22 has ceased to exist. That may be the case. But when I
23 see the same faces in the regional office in Norristown
24 today that I saw there in '83 and '84, it's hard for me to
25 believe there's been such a transformation in attitude.

1 REPRESENTATIVE McHALE: Thank you, Mr.
2 Chairman.

3 MR. WELKS: I understand.

4 REPRESENTATIVE HAGARTY: Could I just ask a
5 question?

6 BY REPRESENTATIVE HAGARTY: (Of Mr. Welks)

7 Q. Would you just tell me when the last time
8 was that you were in the Norristown regional office?

9 A. I was at it?

10 Q. At it.

11 A. I was there myself at least the fall of '88,
12 I believe. No, it would have been earlier that summer.
13 Sometime in 1988.

14 Q. Let me just suggest to you that in all
15 genuine--

16 A. Constructive.

17 Q. --help to you that I don't think you -- I
18 think that the confidence that you are placing in the fact
19 that your regional offices are transmitting allegations of
20 serious environmental crimes is seriously misplaced, and I
21 think you ought personally to look at what's happening at
22 least in the regional office I'm familiar with, because
23 there is no one with whom I have talked in my very
24 beginning of this field of endeavor who has not brought
25 forth stories and wanted to sit down and talk to me about

1 what their experience was with their lack of regard for
2 their concerns.

3 A. I understand. I've read the Philadelphia
4 Inquirer stories also. I don't know how to respond to
5 that. I understand your frustration.

6 CHAIRMAN CALTAGIRONE: All right. Thank
7 you.

8 MR. WELKS: Thank you very much for your
9 attention.

10 CHAIRMAN CALTAGIRONE: That will conclude
11 the hearing today.

12 (Whereupon, the proceedings were concluded
13 at 4:55 p.m.)

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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me during the hearing of the within cause, and that this is a true and correct transcript of the same.

Ann-Marie P. Sweeney

ANN-MARIE P. SWEENEY

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Ann-Marie P. Sweeney
536 Orrs Bridge Road
Camp Hill, PA 17011