

TESTIMONY OF ATTORNEY GENERAL

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BEFORE THE HOUSE JUDICIARY COMMITTEE

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Chairman Caltagirone, Chairman Moehlmann and committee members. I'm especially pleased to be asked to testify on House Bill 1175, which provides original prosecutorial jurisdiction for the attorney general in the investigation of environmental crimes.

And I want to thank Rep. Hagarty for her sponsorship of this important legislation and for her determination to pursue a means of correcting this weakness in the Commonwealth Attorneys Act.

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

Nationally, the words Three Mile Island, "Exxon Valdez" are now indelibly imprinted on the American consciousness and especially in the Pittsburgh area, the Ashland Oil spill won't soon be forgotten.

And these are just two of the more conspicuous environmental disasters of recent years. There are many, many more which our dedicated environmental enforcement agents deal with every day, and, I am very much concerned there may be even more which are not being dealt with.

Like so many other areas of law enforcement, the environmental field is becoming increasingly difficult and complex, as waste producers, faced with the closing of disposal sites, are forced into new -- and usually more expensive -- ways of getting rid of their unwanted material.

Too often, what we get as a result are hypodermic needles washing up on our beaches at Erie, battery acid fouling our streams at Lancaster and oil polluting our rivers -- the Delaware, the Schuylkill, the Monongahela and the Ohio.

Experience in the enforcement of drug laws in recent years has taught that we need not only more manpower but more effective enforcement tools. The same is true of environmental law enforcement. Whether pursuing drug dealers or midnight dumpers, we must be ever alert and vigilant to protect our beautiful state.

What we must do to accomplish this is to maximize the resources of manpower, equipment and money we now have so we can bring violators swiftly to justice.

Frankly, our ability to bring these violators to justice is impaired by current limitations in the Commonwealth Attorneys Act.

Therefore I must speak out in support of House Bill 1175, which would give to the Office of Attorney General original jurisdiction to investigate and prosecute environmental polluters.

Now let me give you some concrete examples of how the lack of original jurisdiction can cripple enforcement.

In 1987, the Environmental Crimes Section of my office attempted to prosecute a Lancaster County battery recycler who was discharging battery acid onto a college athletic field and contaminating ground water. The case was referred to the Attorney General's Office by federal Occupational Safety and Health investigators who had found that this business also was subjecting its employees to lead poisoning.

A Lancaster County Common Pleas Court judge dismissed all charges on the grounds that we had not received a formal referral from the Department of Environmental Resources to investigate and prosecute the case. It was a purely technical matter, but it nearly ruined a prosecution.

Fortunately, we were able to persuade the judge to re-open the case, and the president of the company recently was sentenced to two and a half to five years in jail and fined \$100,000.

If the Attorney General had had original jurisdiction in that case, there would have been no dismissal of the charges. The case would have been judged on its merits, and the defendant would have had no technicality to hide behind.

I mentioned the Ashland Oil spill a few minutes ago. This was one of the nation's worst inland oil spills. It involved the rupture of a large storage tank, allowing 700,000 gallons of oil to pour into the Monongahela River, the source of drinking water for part of Pittsburgh's suburbs.

As a result of the Ashland spill, the General Assembly moved quickly to protect the public and the environment from further such accidents by approving legislation which tightly regulates aboveground and underground storage tanks.

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

Here are two quotes from that report:

1 -- "Thus, the Task Force concludes that neither Ashland nor its employees acted with the degree of recklessness which the law requires to support a criminal prosecution in which reckless conduct is an element."

2 -- "The Task Force does not recommend consideration of criminal charges against Skinner Tank Company. While the tank builder may indeed have civil liability for a discharge resulting from its failure to comply with API-650, the culpability is too attenuated to warrant prosecution."

Fortunately, the federal government made a successful prosecution of the case.

These cases are relatively rare, but they do occur. Just lately, we had another example. It was discovered last November that Lankenau Hospital in Montgomery County had been burning infectious and pathological waste in violation of environmental laws.

Rep. Hagarty will tell you more about this later, but I just want to say that when she contacted my office to ask for an investigation we had to reluctantly tell her that we first needed a referral from DER. I think that experience was significant in leading her to the introduction of House Bill 1175.

In the Ashland and Lancaster County cases, we were lucky. We cannot always expect another branch of government to pick up the ball when we are hamstrung by technicalities and we cannot expect to always be as successfully persuasive as we were in the Lancaster County case.

In the Lankenau case, the hospital subsequently was ordered by DER to pay a civil fine for its violation -- but only after years of illegal burning. Even the hospital president expressed concern that the matter went undetected for so long.

House Bill 1175 would eliminate these delays and would go a long way toward providing quicker, more effective enforcement of environmental laws.

The underlying basis for this legislation is to protect the environment through improved law enforcement. I believe H.B. 1175 will accomplish that goal in the following ways:

1. Giving the Office of Attorney General original jurisdiction puts criminal investigators on the scene of the suspected violation immediately, greatly improving the chances of a successful prosecution.

It is axiomatic in law enforcement that the sooner the investigators reach the scene of the suspected crime, the greater the chances of solving that crime. The vast majority of crimes are solved within 48 hours of the time they are committed.

2. Original jurisdiction vested in the Office of Attorney General will allow trained criminal prosecutors and investigators to decide whether criminal charges should be brought or whether a civil remedy should be pursued.

People trained in criminal law and criminal investigations should make this important decision. It is not a decision for the technicians. The matters we're dealing with are too important. There can be little doubt in anyone's mind that the threat of criminal punishment, including imprisonment, will grab the attention of the polluter much more effectively than will the possibility of a civil fine. A civil fine is a momentary penalty. The criminal sanction is imprisonment, and imprisonment cannot be passed onto the consumer.

3. House Bill 1175 insures that the best people will be involved in the investigation and prosecution of environmental crimes.

If we're going to talk about maximizing our resources, then let's do it. My office can have not only Environmental Crimes Section investigators on the scene of a suspected violation immediately, but we can augment their efforts by sending in additional agents from the Bureau of Criminal Investigation, if needed, and we also have trained criminal prosecutors here in Harrisburg and in our field offices. In addition, my office can tap the powers of the statewide investigating grand jury, which can subpoena important financial and other records which are often critical to a prosecution. These are resources we now are too often precluded from using, and it just doesn't make sense.

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

4. Giving the Office of Attorney General original jurisdiction insures objectivity in the decision-making process.

As things stand now, there are times when the decision of whether to proceed criminally or civilly in an environmental case can raise the possibility of a conflict of interest. A perfect example occurred just the other day when City Councilman Joan Specter of Philadelphia asked me to investigate the report that two Philadelphia city prisons were discharging raw sewage into Pennypack Creek and, according to the Philadelphia Inquirer, had been doing it for at least the past two years.

A DER technician apparently responded to a complaint in 1987 and did nothing about it because at the time of his visit to the scene, the pump didn't happen to be running. And, worse, according to the Inquirer, he didn't investigate further because no further complaints were received. Hardly an example of investigative tenacity.

Unfortunately, my response to the councilwoman was that I could not investigate and that I could not even, as she had suggested, ask DER to ask me to investigate. The law is strict on these matters and courts have interpreted it strictly. The referral must come from the state agency to my office and must come only after the agency has investigated and determined that involvement by the Attorney General is warranted.

Here is a member of Philadelphia City Council talking about a severe threat to the public health and safety caused by an agency of government and asking my office to look into possible charges of malfeasance in office or dereliction of duty by public officials and I have to tell her that before moving a muscle I need a referral from DER.

It's just not right for DER to be making decisions of this kind, especially in cases where its own personnel may be involved.

5. House Bill 1175 will enable public officials and individual citizens to report crimes directly to the Office of Attorney General as they do in the consumer protection area.

My office should not have to rely solely on a department of state government for referrals of possible violations. We should be able to take complaints from a member of Philadelphia City Council or from the mayor or a legislator or from the State Police or from a municipal police chief or from a citizen.

That's another way to maximize resources -- having more "eyes" and "ears" out in the field, especially in isolated areas where "midnight dumpers" do their dirty work. This concept has proven remarkably effective in protecting consumers, and if applied to the environment would have similar beneficial results.

Also, this would help build citizen confidence in government. If a citizen calls my office to complain about what looks like illegal dumping and is told "we can't do anything, call DER," that citizen probably is going to grumble about getting a bureaucratic run-around and probably isn't going to bother to call again and I don't blame him or her.

I consider environmental law enforcement too important to be subjected to delays while the arcane niceties of procedure are being discussed. I don't want us to be debating "who asked who to do what" while a polluter is destroying a water supply.

As a practical matter, the vast majority of the cases we prosecute in the environmental area are referred to us by DER investigators who work closely with the prosecutors in my Environmental Crimes Section. That section, jointly staffed by my office and DER has been a model for other states. It has grown in recent years, and we plan to expand it even more. I want to emphasize that we have a good and effective working relationship with DER.

The recently-enacted state budget provided funds to open two more regional offices, and a federal grant, administered by DER, will allow opening of a third.

My plan for better enforcement is to open these new offices in the Scranton-Wilkes-Barre area, in Meadville and in Williamsport. The idea is to have offices staffed with experienced prosecutors and criminal investigators in our more sparsely-populated counties to strengthen enforcement in the remote and isolated areas so often used by "midnight dumpers."

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

If approved, House Bill 1175 would be the first amendment to the Commonwealth Attorneys Act since its enactment in 1980.

The Legislative history shows that when the General Assembly approved the act, it envisioned a "vigorous statewide chief law enforcement officer." We need House Bill 1175 so that we can avoid having to litigate our jurisdiction every time we bring criminal charges. It is a waste of resources.

The General Assembly, in 1980, gave the Attorney General original jurisdiction to investigate and prosecute cases which relate to organized crime. You did so because you recognized that organized crime was particularly complex and that many district attorneys' offices did not possess the necessary resources to pursue such cases. The same considerations apply to environmental crimes.

These are sophisticated crimes. They involve criminal violations of a specialized, highly technical statute, the Solid Waste Management Act. Their proofs are not easy. Having myself been a district attorney with a small staff, I know that many district attorneys' offices are not equipped to handle these cases.

There also was a recognition by the Legislature in 1980 that -- and I want to emphasize this point -- that organized crime transcended county lines.

I think we are all aware of the potential for an environmental violation to transcend county lines, even state lines.

When someone illegally dumps waste oil into the Susquehanna River in Wilkes-Barre, it has the potential for affecting the people of Lancaster County. And trucks improperly hauling wastes across Interstate 80 have the potential for affecting people in several counties. Indeed, many polluters bring in their waste from "out of state."

Our goal is to protect every corner of the Commonwealth so that nowhere can environmental criminals pollute with impunity. To this end, our Environmental Crimes Section has been instructed to initiate training, to accept speaking engagements and to do everything in its power to enlist the support of other enforcement agencies in the detection of environmental violations at the local level.

The State Police, county sheriffs, municipal police and Fish and Game inspectors are constantly "in the field" where the midnight dumpings are occurring.

But even the best efforts of all these dedicated people can be nullified when a smart defense attorney takes advantage of the procedural obstacle which House Bill 1175 addresses.

This bill is badly needed. I wholeheartedly support it and I urge you to vote it out of committee and to push for its enactment by the full House.

Thank you again, Mr. Chairman, for the opportunity to testify. I will be happy to respond to any questions which committee members may have.

Before doing so, I would like to introduce Chief Deputy General Gregory B. Abeln, who heads my Environmental Crimes Section, and Chief Deputy Attorney General Robert A. Graci, who assisted in the preparation of the testimony and who has been involved in several cases challenging the prosecutorial authority of the Attorney General. They are available for questions as well.

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