

TESTIMONY OF KEITH WELKS, CHIEF COUNSEL,
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BEFORE THE HOUSE JUDICIARY COMMITTEE
PUBLIC HEARING ON H.B. 1175
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Mr. Chairman, members of the Committee, my name is Keith Welks. I am presently the Chief Counsel of the Department of Environmental Resources. From approximately October of 1980 until July of 1987 I worked for Roy Zimmerman as Attorney In Charge of the Toxic Waste Investigation and Prosecution Unit, a joint DER - Office of Attorney General task force to prosecute environmental crimes. This effort continues under the new name that General Preate has recently given to it, the Environmental Crimes Section.

Thank you for this opportunity to testify about the process by which prosecutions of environmental crimes are brought in Pennsylvania and about the relationship between DER and the Office of Attorney General in this field.

It was recognized from the very outset, a decade ago, that a successful prosecutive effort in the environmental area demanded the closest possible working relationship between members of a traditional law enforcement office and an environmental regulatory agency. Indeed, the original 1980 application to the Law Enforcement Assistance Agency of the U.S. Department of

Justice for "seed" money to start the Toxic Waste Unit described a formal, cooperative relationship between the Office of Attorney General and the DER. A formal review team comprising representatives of each agency was contemplated to make critical decisions about original allegations and about investigative strategies.

In practice, in the years since then, the referral process has become progressively more streamlined and efficient. Matters of a criminal nature uncovered by regular DER program staff are routinely and rapidly transmitted to the Environmental Crimes Section for investigation. DER staff are generally under directions not to proceed further in a case once it has been sent to the task force. It is also not uncommon for matters discovered initially by the Environmental Crimes Section to be forwarded to DER for official referral back for criminal work-up. Task force members are based in several DER offices around the state, and personal relationships between these specialists and regular DER staff are informal, close, and direct.

The reasons compelling so close a relationship are not hard to discern. A successful environmental investigation and prosecution generally requires a variety of diverse skills: the interviewing and evidence gathering skills of law enforcement officers, the sampling and related scientific expertise of

regulatory inspectors, the criminal litigation skills of trained prosecutors, the opinion testimony of analytical chemists and other experts, as well as a host of other unique disciplines. The glue that has bonded these diverse participants in Pennsylvania over the last decade has been their sense of completely shared authority and responsibility for the selection, development, and prosecution of environmental crimes.

Moreover, environmental crimes, unlike most traditional criminal violations, arise in a comprehensive and finely articulated enforcement context. Environmental statutes generally prohibit specified kinds of conduct and then authorize administrative, civil, and criminal sanctions for any instance of proscribed activity. Thus, a serious violation might require the selection, and ordering, of several different remedies. The unpermitted disposal of drums of waste, for example, would ordinarily support both a criminal prosecution and a civil clean-up. Illegal disposal of sludges from a wastewater treatment plant might justify a prosecution as well as administrative revocation of plant operators' licenses. However, the proper sequence of such governmental responses is essential to avoid various technical and substantive legal pitfalls which could strengthen a defendant's position. It has not been uncommon for DER to delay or refrain from its preferred enforcement response, in deference to a request from the Office

of Attorney General, in order to protect a pending criminal investigation or prosecution. The continuous communication between prosecutor and regulator necessary to insure respect for each other's valid programmatic goals is encouraged by the present partnership, but would be discouraged by the decoupling contemplated by the proposed legislation.

A recent United States Supreme Court decision, moreover, has made the need for the agencies to recognize their community of interest even more compelling. In the decision, handed down this term, the Court ruled that a civil penalty judgment could suffice to trigger the protections of the double jeopardy clause of the U.S. Constitution. Potentially, this ruling means that a civil penalty action carelessly brought could bar a worthy subsequent prosecution, or that the trial of criminal charges could block a substantial civil penalty action. Only the closest working relationship - as presently exists - between DER and the OAG can insure that the dialogue necessary to avoid miscues of this sort continues.

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

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

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

Frankly, HB 1175 is a solution in search of a problem. The present task force effort is not in need of rehabilitation. At the risk of immodesty, let me tell you that it has been uncommonly successful in bringing environmental predators to justice. According to the information available to me, the task force has opened, since its inception in late 1980, over 400 cases for formal investigation. One hundred and ninety-one defendants have been arrested; one hundred thirty-five have been convicted, with fifteen individuals receiving jail sentences. Many of these cases have been of national significance. For

example, this unique inter-agency partnership brought the first prosecution to successfully utilize an anti-racketeering statute against a businessman who was convicted of having engaged in a pattern of illegal activity encompassing more than 500 dumping incidents. The task force also convicted a western Pennsylvania waste disposal facility operator for having illegally dumped hazardous wastes into the Youghiogheny River; he is presently serving a sentence of six to twelve years, one of the longest ever imposed in the country for an environmental violation. Major corporations, such as U.S.X., Owens-Illinois, and Westinghouse, have also been convicted.

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

In conclusion, I wish to repeat that DER unequivocally endorses vigorous criminal prosecution of environmental violators. The Department cannot support, however, change merely for the sake of change, especially where the result will inevitably erode the historic and essential partnership between the Department of Environmental Resources and the Office of Attorney General.

Thank you for the opportunity to present these remarks to this Committee. I will be happy to try to answer any questions you may have.