Testimony of

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INTRODUCTION

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

BACKGROUND

First, let me point out to the Committee that I am not an attorney by training, although I have been accused more than once of practicing law without a license. Secondly, by way of background, I would like to provide some context for my remarks by sharing with you some comparisons of state and federal environmental activities. According to a Report to Congress issued in April, 2001 by the Environmental Council of the States (ECOS), between 1995 and 1999, states conducted over 90 percent of the environmental enforcement actions taken by the states and EPA combined. In 1999, states collected about $92 million in penalties. In 2000, states spent $13.5 billion on environmental protection and natural resource management activities. Between 1986 and 2000, EPA funding for state environmental programs actually declined by over 4 percent. Conversely, State funding for the environment increased by 65 percent over this same period. States now spend almost twice as much as EPA on the environment. Clearly, the states play a major role in administering and enforcing the nation's environmental laws.

CORPORATE RESPONSIBILITY

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

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

LIMITATION OF ENVIRONMENTAL LAWS

With a few important exceptions, the nation's environmental laws do not "reach into" industrial processes. They set standards for air emissions or water discharges - at end of the pipe or top of the stack. Two very notable exceptions are the Resource Conservation and Recovery Act (RCRA), whose provisions are considered preventative in nature, and the Risk Management Program, Section 112(r) of the federal Clean Air Act Amendments of 1990, which requires risk management planning, hazards assessments, emergency response planning and a prevention program for extremely hazardous substances. The scope of these laws, however, is relatively limited. RCRA only applies to hazardous wastes, so tanks and containers holding chemical products or intermediates are not covered. In the later instance, extremely hazardous substances are only a small subset of chemicals in use, albeit the ones that represent the greatest potential risk of catastrophic accidents or release. By and large, the other laws do not impose requirements or standards for inspection, maintenance or repair of industrial process equipment. Their jurisdiction is limited to requirements for the use of pollution control equipment. A release or exceedance has to occur before an enforcement action can be taken. In Delaware, for example, an accident at a petroleum refinery that resulted from an explosion and the catastrophic collapse of a tank and the release of both spent and fresh sulfuric acid was not covered under any state or federal environmental program. The company admitted the tank had a history of corrosion problems. Work orders for repairs had been submitted but the work had not been initiated. The tank collapse and release killed one worker and injured eight others, caused widespread contamination at the facility, released over a million gallons of sulfuric acid contaminated with hydrocarbons to the land and water and resulted in a fish kill and other environmental damage. The spent acid is not considered a hazardous waste because it is reclaimed and reused, nor is it considered an extremely hazardous substance. The state subsequently enacted an aboveground storage tank (AST) law that will require companies to meet specific industry standards for construction, inspection, maintenance, repair and replacement of tanks containing hazardous substances. There is no federal aboveground storage tank law and only about half the states have some kind of AST requirements in place. In reviewing the compliance history of this facility, we found that approximately 70 percent of the environmental violations and releases that had occurred over the past 6 to 7 years were directly attributable to the lack of an effective maintenance and repair program for industrial process equipment. In response to this situation, the Governor took the unprecedented step of demanding that the company pay for a consultant with expertise in refinery systems and operation that would work at the direction of the

department to evaluate the effectiveness of programs to assess the mechanical integrity of the facility's systems and to recommend improvements in those programs in exchange for allowing the company to continue operating. The refinery also is required to make improvements and repairs on an approved schedule or face stipulated penalties as part of a legally enforceable agreement. There are no environmental laws or programs under which such requirements can be imposed.

RESPONSIBLE CORPORATE OFFICIAL DOCTRINE

There is a growing body of federal case law that is helping to define the Responsible Corporate Official Doctrine. In certain cases, plant managers, corporate officers or other supervisory personnel have been held personally liable for environmental violations even though they were not directly involved in making decisions that led to the violations. In United States v. Park, 421 U.S. 658 (1975), the Supreme Court held that persons who failed "to exercise the authority and supervisory responsibility reposed in them by the business organization can be held criminally accountable. . . even without proof of actual knowledge or intent, or of personal participation in the criminal act, . . ." This case law doctrine should be clarified, defined and incorporated into the nation's environmental statutes. Surely, one way to get the attention of plant managers and corporate officials is to clearly assign responsibility to them and hold them accountable for environmental violations that result from negligence. The threshold of proof should be established so that the individual would be considered negligent if they "knew or should have known" that conditions existed that could have resulted in a release or violation. Lowering the threshold of proof should be coupled with increased sanctions, including higher fines and imprisonment. A plant manager or corporate officer who knows he or she could be held personally liable and jailed in the event of a violation will be much more likely to insure that maintenance and repairs are performed and conditions are corrected to prevent the violation or release from occurring.

CHRONIC VIOLATORS AND PERMIT BARS

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

"At least 20 states have adopted some version of a permit bar or 'bad actor' provision, authorizing the environmental agency to deny an initial permit, reject a permit renewal or to disqualify a company from obtaining government contracts. In addition, a few states also have the ability to issue an order suspending or permanently revoking a permit. When such an order takes effect immediately and continues pending an appeal by the facility, it ensures that the facility bears the burden of proof and must litigate on 'its own time and dime'." ("Keeping Bad Actors Off the Stage - Some Tools for Dealing with Repeat Offenders", P. Balavander, G. Rule, S. Keiner, ECOSTATES, Spring, 2002. pg. 24-27.).

Under most federal environmental statutes and implementing regulations and guidance, a company's compliance history can be taken into account as one of several factors that may be considered in determining the level of penalty to be assessed. In most instances, however, the penalty assessed must still be within the penalty range specified for all other violations. Consideration should be given to allowing a greater range or multiple of the penalties specified

in law to be imposed for repeated violations of environmental laws. Under the federal Oil Pollution Act, penalties can be tripled if it can be shown that the release was the result of gross negligence, although gross negligence is a much higher burden of proof than simple negligence as recommended in the discussion on the Responsible Corporate Official.

OSHA WORKER SAFETY STANDARDS

Another area that might be explored is the reconciliation of OSHA Worker Protection Standards with other environmental requirements. The point of greatest integration between environmental and worker standards is the OSHA and EPA Process Safety Management (PSM) requirements. Frequently, the root cause of an incident or release that impacts worker safety is the same as that for environmental violations and releases. Some effort should be made to integrate these requirements more effectively to eliminate any duplication of effort. OSHA enforcement also needs to be better funded.

ENVIRONMENTAL MANAGEMENT SYSTEMS

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

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