Testimony of

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

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

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

The Importance of Case Selection

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

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

YEAR TOTAL
CRIMINAL
CASES
1987 86
1988 63

1989 107
1990 85
1991 96
1992 104
1993 176
1994 151
1995 154
1996 150
1997 178
Totals 1350

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

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

Case Selection and the Importance of Integrated Enforcement

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

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

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

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

While criminal prosecutions are brought against such intentional violators, the legal standard for most environmental crimes is substantially broader. Under most of the criminal provisions, a

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

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

The Lack of Integrated Enforcement

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

When I prosecuted environmental crimes, the investigating agents and I regularly received feedback from government field inspectors asking why we were prosecuting Company X when Company Y was worse. The answer was simple. We only knew about Company X because EPA-CID or the FBI happened to get a call from a former employee of Company X, not Company Y. Criminal case selection often has resulted from happenstance of where within the government the case originated. For example, if a violation was discovered by a program inspector, it was handled administratively or civilly. If the same violation was reported to CID by a disgruntled former employee, it was then considered as a potential criminal matter, and the violation was prosecuted or declined as a criminal case. Thus, exactly the same violation could be treated entirely differently, depending on what part of the agency learned of it first. In other words, rather than pooling information and deciding on the most appropriate enforcement responses, the fact of which office obtained information about a violation - whether the criminal program or one of the regulatory programs - generally dictated how a violation was treated, that is, whether it became the subject of criminal or other enforcement action.

This has been a weakness throughout the history of the environmental program. It is not a characteristic of just this administration or any other single administration. EPA and DOJ have recognized the problem and have taken steps to correct it. Perhaps the most important step has been the formation of joint federal and state task forces. These task forces have provided channels of communication between state and local regulators, who are often enforcing

delegated federal programs, and federal prosecutors and special agents. In addition, within the various EPA regions, various individuals have worked to improve coordination, with the success of these efforts appearing to vary region to region. In 1999, the Environment and Natural Resources Division of DOJ adopted a new global settlement policy and new integrated enforcement policy to promote joint investigations, along the lines successfully used in health care fraud investigations. The prior policies had actually reinforced barriers in communications between criminal and civil prosecutors.

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

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

1. The system remains largely reactive. A reactive system does not set its own priorities nor does it coordinate with overall agency enforcement priorities.
2. There is no question EPA should be responsive to calls from the public, particularly potential whistleblowers. That is an important element of a strong enforcement program. However, while good criminal cases can result from some of these calls, there is no assurance that they are the most important cases that the government could be bringing with the resources available.
3. An integrated enforcement system allows the government to ratchet up its enforcement responses from administrative or civil to criminal. This is often good enforcement. Criminal enforcement is used where it is clearly needed - against recalcitrants who still refuse to comply following administrative or civil enforcement action. Ratcheting is also fair enforcement and conserves government resources - first bringing an administrative or civil action puts the respondent on notice and is often more than adequate to obtain compliance.

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

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

Criminal Enforcement under the Clean Air Act

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

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

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

Third, by 1990 prosecutions of Clean Water Act, RCRA and CERCLA criminal cases were already very well established. Agents and prosecutors continue to be trained in how to bring these cases, and they can use many past successes as models. It is a much more efficient use of limited government resources to bring more of these cases than to develop an entirely new area, and these same types of cases can be seen being brought again and again. By contrast, Clean Air Act prosecutions require breaking new ground with greater uncertainty of success.

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

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

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

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