

William & Mary Environmental Law and Policy Review

Volume 17 (1992-1993)
Issue 1 *William and Mary Journal of
Environmental Law*

Article 2

October 1992

Recent Developments in Environmental Crime

Thomas M. Downs

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Environmental Law Commons](#)

Repository Citation

Thomas M. Downs, *Recent Developments in Environmental Crime*, 17 Wm. & Mary Env'tl. L. & Pol'y Rev. 1 (1992), <https://scholarship.law.wm.edu/wmelpr/vol17/iss1/2>

Copyright c 1992 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmelpr>

RECENT DEVELOPMENTS IN ENVIRONMENTAL CRIME

THOMAS M. DOWNS, ESQ.*

I. INTRODUCTION

Widespread environmental awareness has made environmental enforcement an important political issue. The political climate has fueled the desire for criminal penalties with sufficient deterrent bite to prevent environmental transgressions. Legislators and prosecutors have responded to political and electoral pressures by criminalizing environmental laws and escalating environmental prosecutions. The business community has recognized that the targets of criminal prosecution are increasingly corporate officers and managers.

This Article provides an overview of enforcement efforts at all levels of government, analyzing who is being targeted for environmental criminal prosecution, and the general environmental statutes that provide the legal framework for enforcement. It also discusses the unique characteristics of environmental crimes, namely, the erosion of the criminal intent standard. Finally, the Article addresses environmental auditing as a means of avoiding liability.

II. GROWTH IN THE NUMBER AND SEVERITY OF ENVIRONMENTAL CRIMES AND THE INCREASING AGGRESSIVENESS OF FEDERAL AND STATE PROSECUTION

A. *Federal law*

At the federal level, prohibited acts that affect the environment can result in criminal prosecution under two categories of statutory offenses. The first category involves acts which Congress has made criminally punishable under various general environmental statutes enacted in the last two decades. The second category consists of actions which can be classified as crimes under traditional criminal law provisions such as Title 18 of the United States Code ("U.S.C."). These include false statements, mail fraud, wire fraud, conspiracy, aiding and abetting, and obstruction of justice. A survey of the first category shows an unmistakable trend toward

* Thomas M. Downs, Esq. is a partner with Swidler & Berlin, Chtd. in Washington, D.C.

more criminal provisions with harsher penalties, and prosecutors apply the second category increasingly often in environmental cases.

The Environmental Protection Agency ("EPA") has primary responsibility for investigating violations of and enforcing federal environmental laws. EPA's Office of Enforcement and its National Enforcement Investigation Center carry out enforcement and investigative functions. Over the past seven years, EPA referrals of possible criminal violations of environmental laws to the Department of Justice ("DOJ") have increased by 300%, prosecutions have increased by 1000%, and convictions by 700%. In addition, the Pollution Prosecution Act of 1990 requires the EPA to hire and train additional criminal investigators in increasing numbers over the next five years.¹ The law mandates that between October 1991 and September 1992 EPA must bring the number of criminal investigators to at least seventy-two.² By October 1995, the total must be 200.³

The Department of Justice ("DOJ") has elevated the Environmental Crimes Unit to the status of a Section and expanded its size. As of July 1991 the Section had increased its staff from four environmental prosecutors to thirty four.⁴ In January 1991, Attorney General Richard Thornburgh reported that since the founding of the Environmental Crimes Section, the prosecutors had returned a total of 761 indictments, resulting in 549 convictions.⁵ This represented a quadrupling of their effort in the preceding three years and the vast majority of the convictions were obtained within two years of the announcement.⁶ The convictions resulted in over \$57 million in penalties, restitutions and forfeitures, and the imposition of more than 348 years of jail time.⁷ In 1990, the conviction rate was ninety-five percent, with fifty-five percent of convicted individuals sentenced to prison.⁸ Recently, EPA announced a record

1. Pollution Prosecution Act section 202, 42 U.S.C.A. § 4321 (1990).

2. *Id.* at § 202(a)(1).

3. *Id.* at § 202(a)(5).

4. *DOJ Plans To Issue Policy Statement on Use of Corporate Environmental Audits*, 22 Env't Rep. (BNA) No. 8 at 484 (June 21, 1991).

5. Richard Thornburgh, *Our Blue Planet: A Law Enforcement Challenge*, Keynote Address at the 1991 Department of Justice Environmental Law Enforcement Conference, New Orleans, La. (Jan. 8, 1991).

6. *Id.*

7. *Id.*

8. *1990 Record Year for Criminal Enforcement of Env'tl Violators, Justice Announces*, 21 Env't Rep. (BNA) No. 30 at 1397 (November 23, 1990).

breaking \$3 million criminal fine against United Technologies Corporation which pleaded guilty to six felony violations under Resource Conservation and Recovery Act ("RCRA").⁹

B. State and local prosecution

The vigorous nature of federal criminal enforcement should not overshadow the importance and seriousness of state and local prosecutions. Although various states have taken different approaches to environmental crime prosecutions, most are intensifying their efforts.

In New Jersey, for example, the State has made "a significant commitment of both manpower and resources to the enforcement of environmental laws and regulations."¹⁰ New Jersey has had a history of vigorous criminal enforcement against corporate environmental offenders as the state's repeated criminal indictments against Ciba Geigy and its Toms River managers¹¹ and its innovative whistle blower statute illustrate. Various departments such as the Attorney General's office, the Department of Environmental Protection ("DEP"), and the Board of Public Utilities have environmental enforcement units.¹² On January 24, 1990 the Governor of New Jersey created the Office of the State Environmental Prosecutor ("OSEP") and the State Environmental Prosecutor ("SEP") in order to centralize and coordinate the state's environmental crime efforts.¹³

In Minnesota, the Attorney General and the Pollution Control Agency Commissioner have formed the Minnesota Environmental Crimes Team ("ECT").¹⁴ That the ECT has achieved some success is evidenced by the case of *Minnesota v. Marvin Lumber & Cedar Co. d/b/a Marvin Windows*.¹⁵ Following an investigation by ECT, the defendant entered a

9. *United States v. United Technologies Corp.*, No. 2:91CR00028 (D. Conn. filed May 14, 1991).

10. *Environmental Prosecutor Appointed in New Jersey*, 20 Env't Rep. (BNA) No. 41 at 1763 (February 9, 1990).

11. *See infra* note 43.

12. *Environmental Prosecutor Appointed in New Jersey*, 20 Env't Rep. (BNA) No. 41 at 1763 (February 9, 1990).

13. Robert Hanley, *Florio Appoints A Prosecutor for Envi'l Concerns*, N.Y. TIMES at B4, Col. 5 (January 25, 1990).

14. Alan R. Mitchell, *The Minnesota Crimes Team*, NAT'L ENVTL. ENFORCEMENT J., July, 1991, at 3.

15. *Id.*

guilty plea to the crime of illegal storage of hazardous waste and agreed to pay a \$2 million fine.¹⁶

In 1991 the Minnesota legislature also broadened the definition of "knowing" for purposes of environmental crimes to provide that the knowledge of a corporate official could be established by proof that the person was a responsible corporate officer.¹⁷

The theory of "conscious avoidance" represents a new tool in the prosecution of corporate officials. In the conscious avoidance cases, the government attempts to prove an individual's involvement in the environmental crime where he deliberately closed his eyes to the obvious.¹⁸

A movement has developed toward criminal prosecution of corporate executives for manslaughter and homicide in cases where improper use of hazardous or toxic substances result in a death.¹⁹ For example, on August 28, 1991, prosecutors charged a New York businessman with second degree manslaughter saying that the defendant had paid for the illegal dumping of toxic wastes which killed another man.²⁰

Finally, lawyers have become the targets of state criminal prosecutions. In May 1991, the Solano County District Attorney's Office

16. Martin J. Moylan, *Pollution Liability: Today's Coverage Is Under Control, but Policies from Decades Past Are Returning to Haunt Many Insurers*, MINNEAPOLIS-ST. PAUL CITYBUSINESS, Vol. 8, No. 31 at 11 (Jan. 14, 1991).

17. Whether an act is knowing may be inferred from the person's conduct, from the person's familiarity with the subject . . . or from all the facts and circumstances connected with the case. Knowledge may also be established by evidence that the person took affirmative steps to shield the person from relevant knowledge. Proof of knowledge does not require that a person knew a particular act or failure to act was a violation of law or that the person had specific knowledge of the regulatory limits or testing procedures involved in a case.

MINN. STAT. § 609.671(2)(a) (1991).

18. See *United States v. Wong*, 884 F.2d 1537 (2d Cir. 1989); *United States v. Lanza*, 790 F.2d 1015, 1023-24 (2d Cir. 1986), *cert. denied*, 497 U.S. 861 (1986).

19. See *New York v. Pymm*, 563 N.E.2d 1 (N.Y. 1990), *cert. denied*, 111 S. Ct. 958 (1991); *Michigan v. Hegedus*, 443 N.W.2d 127 (MI 1989), *app. denied*, 451 N.W.2d 861 (MI 1990); *Illinois v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962, (Ill. 1989), *cert. denied by Astra v. Illinois*, 493 U.S. 809 (Ill. 1989).

20. *Manslaughter Charged in Waste Dumping Case*, WASH. POST, Aug. 29, 1991 at A6.

charged a San Francisco attorney and his law firm with illegally disposing of medical, radioactive, and hazardous wastes.²¹ The firm allegedly advised a bankrupt client not to remove certain wastes left in a warehouse from which the client had been evicted.²²

III. TARGETS OF ENVIRONMENTAL CRIMINAL PROSECUTION

A. Corporations and their officials

In November 1990, Justice Department officials from DOJ's Environment and Natural Resources Division stated that more corporate officials were prosecuted in the fiscal year 1990 for environmental crimes than at any time in the past.²³ Attorney General Richard Thornburgh noted that seventy-eight percent of the targets in fiscal 1990 were corporations and their top officers and that "more than half of the individuals convicted for environmental crimes [in 1990] were given prison sentences and eighty-four percent of these were actually serving real jail time."²⁴ Richard B. Stewart, then Assistant Attorney General in the Environment and Natural Resources Division, noted that "most prosecutions [were] against corporations and their top officers [averaging] fine[s] over \$181,000."²⁵ In 1990, fifty-five percent of the individuals indicted [were] given jail time with an average time served of 1.8 years.²⁶ All these figures are unprecedented for environmental crimes."²⁷

Several cases illustrate the reality of these statements. In May 1990, in *United States v. Tudor Jones, II*,²⁸ Paul Tudor Jones II, a corporate officer, entered a guilty plea to Clean Water Act charges alleging the filling of wetlands. He agreed to pay \$2 million in fines and

21. Don J. DeBenedictis, *Hazardous Advice*, ABA J., Sept. 1991, at 16.

22. *Id.*

23. *1990 Record Year for Criminal Enforcement of Envi'l Violators*, Justice Announces, 21 Env't Rep. (BNA) No. 30 at 1397 (November 23, 1990).

24. 1 Nat'l Env'tl. Watch (BNA) No. 33 (November 26, 1990).

25. *1990 Record Year for Criminal Enforcement of Envi'l Violators*, Justice Announces, 21 Env't Rep. (BNA) No. 30 at 1397 (November 23, 1990).

26. *Id.*

27. R.B. Stewart, *Criminal Environmental Enforcement*, (ALI-ABA April 11-12, 1991) at 3.

28. *Toxic Turpitude: Charges of Environmental Crime Bring Business More Fines and Prison Sentences*, WALL ST. J., Sept. 10, 1990, at A1.

restitution and drew eighteen months probation.²⁹ The fine was the largest criminal wetlands disposition ever.³⁰

The increased exposure of corporate officials to environmental criminal liability is further evident in the case of *United States v. McKiel*.³¹ Robert and Scott McKiel, father and son, ran Astro Circuit Corporation, as president and vice-president of operations respectively.³² Beginning in 1986, city officials had notified Astro Circuit of high toxic metals concentrations in its waste water, but the McKiels ignored the warnings.³³ In 1989, the younger McKiel was sentenced to three months in prison and two years probation after pleading guilty to violating federal water laws.³⁴ The elder McKiel pleaded guilty to similar violations and received four months in jail and two years probation.³⁵

Most prosecutions are not of small midnight dumpers but of established, legitimate businesses. In July 1991 the Aluminum Company of America ("ALCOA") agreed to pay \$7.5 million for violating New York State environmental laws at its Massena facility, including \$3.75 million in criminal fines.³⁶ An ALCOA environmental engineer and a former environmental manager also entered guilty pleas.³⁷

Similarly, International Paper Co., the largest paper mill in Maine, entered a guilty plea on July 3, 1991 to five felony counts.³⁸ Three of the felony counts involved hazardous waste violations under RCRA.³⁹ The fourth and fifth counts charged that the company had made false material statements to federal and state environmental authorities regarding hazardous waste and environmental practices at the paper mill.⁴⁰ The company agreed to pay a \$2.2 million fine.⁴¹ The fine was the largest

29. *Id.*

30. *Id.*

31. No. 89-24-N (D.C. Mass. June 29, 1989) (cited in 20 Env't Rep. (BNA) No. 10 at 520 (July 7, 1989)).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See Environmental Policy Alert, July 24, 1991, at 23.

37. *Id.*

38. 16 Toxics L. Rep. No. 9 at 279 (July 31, 1991).

39. *Id.*

40. *Id.*

41. *Id.*

ever assessed in Maine for environmental law violations and one of the largest RCRA criminal fines.⁴²

A survey of criminal defendants in environmental cases shows a number of Fortune 500 and other prominent companies such as Ciba Geigy, Exxon, Pennwalt and Union Carbide.⁴³

B. Factors influencing criminal prosecution

Various factors play a role in criminal enforcement of environmental statutes. Environmental harm or endangerment is one significant factor. Other factors include the company's economic gain by violating environmental regulations, a pattern of violations by the company, a threat to the integrity of records or the regulatory system, and the corporation's attitude concerning environmental compliance.

Recently, the DOJ elaborated on its efforts to encourage voluntary compliance.⁴⁴ Factors involved in prosecutorial decisions include the voluntary disclosure of violations, cooperation with the government on investigating violations, the use of environmental audits and other procedures to ensure compliance with applicable environmental laws and regulations, and the use of measures to remedy expeditiously and completely violations.⁴⁵

In the exercise of its prosecutorial discretion, DOJ will consider whether there was a voluntary, timely and complete disclosure of the matter under investigation.⁴⁶ A disclosure is not voluntary if a law,

42. *See id.*

43. *See, e.g.,* United States v. Pennwalt Corp., No. CR88-55T (W.D. Wa. 1988) (Tacoma plant manager and several top management officials charged with negligently causing the discharge of pollutants.); State v. Ciba Geigy, 222 N.J.Super. 343, (App. Div. 1988), *cert. granted*, 111 N.J. 574 (1988) (indictment against four middle management officials of Ciba Geigy's Toms River plant in 1987 and a second indictment charging twenty-four counts against Ciba Geigy and two officers of the company including illegal disposal of hazardous waste, appeal later dismissed by agreement among the parties).

44. U.S. Department of Justice, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator*, July 1, 1991 [hereinafter "DOJ Statement"].

45. *Id.* at 3-4.

46. 22 Env't Rep. (BNA) No. 45 at 2481 (March 6, 1992) (citing Federal Principles of Prosecution (DOJ, 1980), Comment to Part A.2 (principles set forth as guidance not as requirements); Part B.3 [hereinafter The Federal Principles]).

regulation or permit required that disclosure.⁴⁷ Rather, the disclosure must occur before a law enforcement or regulatory authority has obtained knowledge of the non-compliance.⁴⁸ DOJ also takes into consideration whether the person came forward promptly and the Department appraises the quality and quantity of the information provided.⁴⁹

Cooperation must be full, prompt and timely.⁵⁰ There will be an inquiry into the existence and scope of any regularized, intensive, and comprehensive environmental compliance program, which includes environmental audits.⁵¹ DOJ also emphasizes the need to ensure that a compliance program includes sufficient measures to identify and prevent non-compliance and to evaluate all sources of pollution.⁵²

Additional factors which DOJ finds relevant include provision for internal disciplinary action and effective compliance efforts with particular emphasis on prompt, good faith efforts to reach environmental compliance agreements with the government.⁵³ Rarely will any one of these factors be dispositive in any given case. DOJ considers and gives due weight to all relevant factors.⁵⁴

In the exercise of prosecutorial discretion with regard to a corporate official, federal and state prosecutors will consider a number of questions including the following:

1. Was the official in a position to have known about the condition or should he have known about it?
2. Was the official in a position to do something about the condition?

47. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2607(e); Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(3)-(5), as amended by the Oil Pollution Act of 1990, 33 U.S.C. § 2701-61; 40 C.F.R. 110.6, 110.10; CERCLA, 42 U.S.C. § 9603(a); 40 C.F.R. 302.6(a); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11004.

48. *See id.*

49. DOJ Statement at 3-4.

50. 22 Env't Rep. (BNA) No. 45 at 2481 (March 6, 1992).

51. DOJ Statement at 3-4.

52. *Id.* at 4.

53. *Id.* at 5-6.

54. *Id.* at 2. *See also* Federal Principles of Prosecution (U.S. Department of Justice, 1980), Comment to pt. A.2, pt B.3.

3. Did the official consciously avoid or disregard doing something about the condition?
4. Is there a connection between the condition and the conduct of the official?

IV. THE GENERAL ENVIRONMENTAL STATUTES

The number of statutes governing environmental matters has grown considerably in the past decade. The following is an overview of some of these laws as they relate to criminal enforcement. In some instances, violations of these statutes may be quite technical in nature. Criminal prosecutions frequently involve technical violations relating to reporting, recordkeeping, sampling procedures, laboratory procedures, monitoring methods and systems, labeling, retention time, and the handling of wastes.

On June 2, 1992, an environmental crimes bill (HR 5305) was introduced in the House of Representatives that would toughen criminal sanctions in a number of environmental laws.⁵⁵ Although still pending, HR 5305 would amend the following laws to add tougher penalty provisions: Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), Federal Insecticide Fungicide and Rodenticide Act, Ocean Dumping Act, Safe Drinking Water Act, Toxic Substances Control Act, and Emergency Planning and Community Right-to-Know Act.⁵⁶ Currently, only the Clean Air Act, the Clean Water Act, and the Resource Conservation Recovery Act carry the threat of jail time for "knowing endangerment."

A. *The Clean Air Act*⁵⁷

The Clean Air Act represents Congress' latest effort in environmental crimes legislation. Section 113(c) previously contained the criminal enforcement provisions of the Clean Air Act which authorized the EPA Administrator to bring an action for either a fine or confinement or both, where the defendant knowingly violated specified sections of the Clean Air Act.⁵⁸ Under section 113(c)(1) courts may impose criminal

55. 23 Env't Rep. (BNA) No. 27 at 1710 (Nov. 6, 1992).

56. 23 Env't Rep. (BNA) No. 8 at 670 (June 19, 1992).

57. 42 U.S.C. §§ 7401-7642.

58. See Daniel Riesel, *Criminal Prosecution and the Regulation of Hazardous Substances*, 21 Chemical Waste Litigation Rep., No. 6 at 964, 967 (May 1991).

liability upon defendants for violating air pollution control requirements of applicable state implementation plans, federal standards of performance for new stationary sources,⁵⁹ hazardous air pollutant standards,⁶⁰ certain nonferrous smelter orders,⁶¹ or requirements relating to Section 120 noncompliance penalties.⁶² The criminal provision stated that the first offense constituted a misdemeanor with subsequent offenses constituting felonies and a doubling of fines and prison terms for repeat offenders.⁶³ Section 113(c)(1) stated in pertinent part:

If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or both.⁶⁴

Criminal liability under section 113(c)(2) results from "knowingly" making any false statement, representation, or certification in a document filed or required to be maintained under the Act and for falsifying, tampering with, or knowingly rendering inaccurate any monitoring device or method.⁶⁵

1. The Clean Air Act Amendments of 1990

a. In general

Section 113(c) of the Clean Air Act, in both the pre-1990 and amended version, imposed criminal liability on "any person" who knowingly violated almost any of the statute's prohibitions or requirements.⁶⁶ The term "person" encompassed both individuals and corporations, partnerships and business organizations.⁶⁷ Notwithstanding that section 113(c) continued to apply broadly to "any person" after the

59. 42 U.S.C. § 7413(c)(1)(A).

60. 42 U.S.C. § 7413(c)(1)(C).

61. 42 U.S.C. § 7413(c)(1)(C).

62. 42 U.S.C. § 7413(c)(1)(B),(D).

63. 42 U.S.C. § 7413(c)(1).

64. *Id.*

65. 42 U.S.C. § 7413(c)(2).

66. § 113(a)(1), (3), (c)(1), 42 U.S.C. §§ 7413(a)(1), (3), (c)(1).

67. 42 U.S.C. § 7413(c)(3).

1990 amendments, the amendments increased the scope of the provisions which would attract criminal penalties and enhanced the severity of those penalties.⁶⁸ With one exception,⁶⁹ the law increased all of the violations from misdemeanors to felonies, with corresponding increases in the maximum fines and jail terms.

b. Violation of emission restrictions

Section 113(c)(1) states that any person who violates any requirement or prohibition of an applicable air quality implementation plan or virtually any substantive provision of the Act,⁷⁰ is subject to a fine of up to \$250,000 or a prison term of up to five years, or both.⁷¹ An organizational defendant is currently subject to a fine of up to \$500,000.

c. False statements

Section 113(c)(2) provides that any person who knowingly makes any false material statement or omission in, or fails to file or maintain any document required under the Act, or who tampers with the monitoring equipment, is subject to a fine of up to \$250,000 or a prison term of up to two years.⁷²

d. Negligent endangerment

Perhaps the most important new provision added by the 1990 Amendments is section 113(c)(4) concerning negligent endangerment. That provision imposes a fine of up to \$100,000 and/or a prison term of up to one year on any person who negligently releases any hazardous air pollutant, or any "extremely hazardous substance" listed in the EPA

68. 42 U.S.C. § 7413(c)(1-5).

69. The exception is the penalty under § 113(c)(4) for negligent endangerment. See *infra* p.12-13.

70. Criminal penalties could be triggered for knowing violations of the following: implementation plans; section 113(a) orders; section 111(e) (New Source Performance Standards); section 112 (hazardous emissions); section 129 (solid waste combustion); section 114 (inspections); section 165(a) (preconstruction requirements); section 167 Prevention of Significant Deterioration of Air Quality ("PSD"); section 303 (emergency orders); sections 502(a) and 503(c) (permits); or, any provision relating to acid deposition control or stratospheric ozone control.

71. 42 U.S.C. § 7413(c)(1).

72. 42 U.S.C. § 7413(c)(2).

regulations, and thereby negligently places another person in "imminent danger of death or serious bodily injury."⁷³

Although this provision is the only Clean Air Act criminal violation that is a misdemeanor, the provision represents an extraordinary expansion of criminal liability by imposing such liability on negligent acts and omissions. While some limitation may be placed on its applicability through the limiting phrase "imminent danger of death or substantial bodily injury," the potential reach of this provision is enormous. The Act may reach anyone with responsibility for ensuring environmental compliance.

Some commentators have criticized the negligent endangerment provision of the 1990 Clean Air Act Amendments as being representative of a trend that "see[s] our economic power base thoughtlessly eroded by governmental policies in environmental and criminal law that are needlessly hostile and punitive toward American industry."⁷⁴

e. Knowing endangerment

Another new criminal provision is section 113(c)(5) which imposes a fine of up to \$250,000 or a prison term of up to fifteen years, or both, on any person who knowingly releases any hazardous air pollutant, or any extremely hazardous substance, knowing that doing so places another person in imminent danger of death or serious bodily injury.⁷⁵ An organization convicted under this provision may pay up to \$1 million per violation in fines. Second offenses are subject to twice the maximum fine and imprisonment.⁷⁶

The scope of section 113(c)(5) is limited, applying only to persons with actual knowledge.⁷⁷ In determining whether a defendant possessed actual knowledge that his violation placed another person in imminent danger of death or serious bodily injury, the amendments provide that the defendant is responsible only for actual awareness or actual belief possessed and that knowledge possessed by a person other than the defendant cannot be attributed to the defendant.⁷⁸ Circumstantial

73. 42 U.S.C. § 7413(c)(2).

74. George C. Freeman, Jr., Speech presented at the Clean Air Act Seminar in Washington, D.C. 1 (January 23, 1991) (transcript available in law library of Hunton & Williams, Richmond, Virginia.).

75. 42 U.S.C. § 7413(c)(5).

76. *Id.*

77. 42 U.S.C. § 7413(c)(5)(B).

78. *Id.*

evidence, however, can prove a defendant's possession of actual knowledge.⁷⁹

f. Failure to pay fees

A new section, 113(c)(3), makes the knowing failure to pay any fee owed to the United States under the Act a misdemeanor.⁸⁰ A knowing failure to pay any fee owed to the United States under Title I, III, IV, or V, therefore, is punishable by a fine of up to \$250,000 or a prison term of up to one year, or both.⁸¹ Organizations are now subject to a fine of up to \$500,000; and penalties double for repeat offenders.

g. Increased prosecutions against corporations and corporate officers and employees under these provisions

Some prosecutions occurred even under the pre-amendment Clean Air Act. In *United States v. DAR Construction, Inc.*,⁸² for example, a corporation and its foreman were charged with asbestos-related violations. The foreman received a sentence of ninety days in jail and three years probation.⁸³ The corporation paid over \$50,000 in fines.⁸⁴ Similarly in *United States v. Import Certification Laboratories, Inc.*,⁸⁵ a company's president and employees were convicted of filing false reports. The Department of Justice and EPA have predicted that criminal prosecutions will increase further under the 1990 amendments.⁸⁶

B. The Clean Water Act

1. Original Clean Water Act criminal provisions

The criminal provisions of the original Clean Water Act were contained in section 309(c).⁸⁷ Section 309(c)(1) of the Clean Water Act provided misdemeanor penalties of up to one year of imprisonment and a

79. *Id.*

80. 42 U.S.C. § 7413(c)(3).

81. *Id.*

82. 20 Env't Rep. (BNA) No. 1 at 21 (May 5, 1989).

83. *Id.*

84. *Id.*

85. 18 Env't Rep. (BNA) No. 37 at 1993 (Jan. 8, 1988).

86. *More Prosecutions Under New Air Bill Predicted by Justice Department, EPA*, 21 Env't Rep. (BNA) No. 9 at 421 (June 29, 1990).

87. 33 U.S.C. § 1319(c).

\$25,000 fine for "willful" or "negligent" violation of effluent limitations prescribed by the Act, or of conditions or limitations in National Pollutant Discharge Elimination System ("NPDES") permits issued by the Administrator or a state in a section 404 permit.⁸⁸ The same act became felonious where committed "after a first conviction."⁸⁹

Section 309(c)(2) of the original Clean Water Act established misdemeanor penalties of up to six months imprisonment and a \$10,000 fine for knowing falsification of records and for tampering with monitoring devices "required to be maintained" under the Act.⁹⁰

2. *Water Quality Act of 1987*⁹¹

In the Water Quality Act of 1987, Congress added new breadth to the scope of criminal liability. The penalties for a negligent violation of effluent limitations or violations of conditions or limitations in permits remained the same under the terms of an amended section 309(c)(1).⁹² An amended section 309(c)(2) elevated to felony status the knowing violation of permits or standards.⁹³ In addition, the knowing violation section provides criminal penalties for introducing into any publicly owned treatment works ("POTW") any pollutant or hazardous substance which the discharger knew or reasonably should have known could cause personal injury or possible damage or which would cause a POTW to violate its permit limits.⁹⁴

88. Section 309(c)(1), 33 U.S.C. § 1319(c)(1); section 404, 33 U.S.C. § 1344.

89. 33 U.S.C. § 1319(c)(1).

90. Section 309(c)(2), Federal Water Pollution Control Act (1948).

91. 33 U.S.C. § 1245a-1414a.

92. (1) Negligent violations. Any person who (A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 . . . or (B) negligently introduces into a sewer system or into a publicly owned treatment works . . . shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both

33 U.S.C. § 1319(c)(1).

93. Section 309(c)(2), 33 U.S.C. § 1319(c)(2).

94. (2) Knowing violations. Any person who (A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title . . . or (B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage . . . shall be punished by a fine

The Act also provided for the crime of "knowing endangerment" under section 312(c)(3).⁹⁵ That provision provided in pertinent part:

Any person who knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title . . . and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall upon conviction be subject to a fine of not more than \$250,000 or imprisonment for not more than 15 years or both⁹⁶

The enactment of a knowing endangerment provision is symptomatic of the changes affecting environmental crime statutes. The crime involves a knowing violation of an applicable permit, statute, rule or regulation by a person "who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury."⁹⁷ The language is similar to that contained in section 3008(e) of RCRA.⁹⁸ The holding in *United States v. Borowski*⁹⁹ illustrated the reality of convictions under this provision. In *Borowski*, company officers had directed employees to pour certain chemicals into a sewer.¹⁰⁰ The owner was convicted and sentenced to two years in prison.¹⁰¹ As reported in the *Wall Street Journal*:

When he first dumped acid says former employee Jerry Kocjan, ' . . . I saw my hands were turning yellow from the acid vapors. When I showed them to Borowski, he just showed me his hands. They were yellow too.' Indeed, Mr. Borowski never seemed to realize how toxic Borjohn's chemicals were, agree former employees. Once he put his

of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both

33 U.S.C. § 1319(c)(2).

95. 33 U.S.C. § 1319(c)(3).

96. *Id.*

97. 33 U.S.C. § 1319(c)(3)(A).

98. 42 U.S.C. § 6928(e).

99. 5 Toxics L. Rep. (BNA) No. 27 at 770 (May 3, 1990).

100. *Id.*

101. *Id.*

daughter's old bicycle in a vat of the company's acid overnight to clean it up, they said. The bike partly dissolved and fell apart.¹⁰²

Section 312(c)(4) of the Water Quality Act also contains felony sanctions for anyone "who knowingly makes any false material statement in any application, record, report, plan, or other document filed or required to be maintained under this Act."¹⁰³ Penalties are a \$10,000 fine or up to two years imprisonment, or both.¹⁰⁴

C. The Resource Conservation and Recovery Act (RCRA)

1. Section 3008(d) criminal provisions

RCRA prohibits certain treatment, storage, disposal or transportation of hazardous waste and provides criminal sanctions for violations in section 3008(d).¹⁰⁵ Section 3008(d)(1-2), as recently amended, provides for felony penalties of up to five years imprisonment and fines up to \$50,000 per day for knowingly transporting hazardous waste to an unpermitted facility or for knowingly disposing of hazardous waste without a permit.¹⁰⁶

Section 3008(d)(3) provides penalties of up to two years imprisonment and fines of up to \$50,000 a day against any person who "knowingly omits material information or makes any false material statement" regarding records.¹⁰⁷ Similar penalties are imposed under section 3008(d)(4) for the knowing destruction or alteration of certain RCRA records. Any person who "knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles [such hazardous waste] . . . and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report or other document required to be maintained or filed" may be liable under the Act.¹⁰⁸

102. David Stipp, *Toxic Turpitude: Environmental Crime Can Land Executives in Prison These Days*, WALL ST. J., Sept. 10, 1990, at A1.

103. 33 U.S.C. § 1319(c)(4).

104. *Id.*

105. 42 U.S.C. § 6928(d).

106. 42 U.S.C. § 6928(d)(1-2). Previously the penalties for Section 3008(d)(1-2) had been up to two years of imprisonment and fines of up to \$50,000 per day of the violation. Section 6928(d) was amended in 1984.

107. 42 U.S.C. § 6928(d)(3).

108. 42 U.S.C. § 6928(d)(4).

A number of cases demonstrate the vigorous prosecution and stiff penalties under section 3008(d). A subsequent section of this paper, discussing the erosion of the criminal intent element in environmental criminal prosecution, contains a more complete discussion of such cases.¹⁰⁹

2. Section 3008(e): "knowing endangerment"

The 1980 amendment to RCRA, as further amended by the 1984 Hazardous and Solid Waste Act, led to the creation of the section 3008(e) which provides:

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall upon conviction be subject to a fine of not more than \$250,000 or imprisonment for not more than 15 years, or both. . . .¹¹⁰

The "special rules" of section 3008(f) define "knowing" as the term is used in section 3008(e).¹¹¹ A subsequent section of this paper will discuss how the courts have interpreted this intent element.¹¹² The effectiveness of the "knowing endangerment" offense as a serious prosecutorial tool against corporate violators cannot be doubted after *United States v. Protex Industries*.¹¹³ The corporation was convicted of knowingly endangering three employees who worked in the company's drum recycling facility and were exposed to hazardous substances.¹¹⁴ Initially, the corporation was fined \$7.63 million.¹¹⁵ All but \$440,000 of the fine was ultimately suspended, however, on the condition that the

109. See *infra* pp. 23-37 and accompanying notes.

110. Organizational defendants could incur fines of up to \$ 1 million. 42 U.S.C. § 6928(e).

111. *Id.* at § 6928(f).

112. See *infra* Part V at pp. 24 - 38.

113. 874 F.2d 740 (10th Cir. 1989).

114. *Id.* at 742.

115. 30 Air Water Pollution Rep. (BNA) No. 36 (September 14, 1992).

company pay almost \$1 million restitution and \$2.1 million in cleanup costs.

D. Comprehensive Environmental Response Compensation Liability Act

Congress added to the list of environmental crimes by enacting the Superfund Amendment and Reauthorization Act of 1986 ("SARA") which increased the penalties for criminal activities under CERCLA.¹¹⁶ CERCLA, as amended by SARA, provides for the imposition of criminal fines in accordance with the Uniform Criminal Code and imprisonment up to five years for certain recordkeeping and reporting violations.¹¹⁷ The knowing mutilation of records now constitutes a felony and the filing of false CERCLA claims is now a criminal violation.¹¹⁸

E. The Occupational Safety and Health Act (the OSH Act):¹¹⁹ Criminal Penalty Reform

The OSH Act has available only weak criminal penalties.¹²⁰ The history of criminal prosecutions under the OSH Act appears quite limited. The National Institute for Occupational Safety and Health estimates that 7,000 deaths occur in the work place yearly.¹²¹ Statistics from such organizations as the AFL-CIO put the number of work place fatalities at more than 20,000 per year.¹²² However, from 1971 through 1991, the OSH Administration referred only eighty cases to DOJ for possible criminal action. Fewer than one-third of these cases have been prosecuted.¹²³

F. The Federal Insecticide Fungicide and Rodenticide Act ("FIFRA")¹²⁴

116. 42 U.S.C. §§ 9601-9675.

117. See CERCLA section 103(d)(2), 42 U.S.C. § 9603(d)(2) (falsifying and destruction of records required to be kept pursuant to EPA regulations); SARA, section 325 (offense of falsifying or refusing emergency information under Emergency Planning & Community Right to Know Act 1986); CERCLA section 112(b)(1), 42 U.S.C. § 9612(b)(1) and 2(b)(7) (punishment of false claims knowingly submitted for reimbursement from the fund).

118. *Id.*

119. 29 U.S.C. §§ 651-78.

120. See *id.*

121. 225 Daily Labor Rep't C-1, Nov. 21, 1990 (BNA-LB).

122. *Id.*

123. 164 Daily Labor Rep't A-1, August 23, 1991 (BNA-LB).

124. 7 U.S.C. § 136-136y.

FIFRA regulates registration, branding and other aspects of insecticides and similar substances.¹²⁵ Section 14(b) of FIFRA establishes criminal penalties for knowing violation of any provision of the Act.¹²⁶ Although FIFRA penalties are more limited than those in other statutes, Congress has provided for criminal liability to be imposed vicariously upon principals without any additional required mental state, for the acts, omissions, or failures of officers, agents or employees.¹²⁷ In *United States v. Corbin Farm Service*¹²⁸ the court held that persons "using" a pesticide included persons who advised the applicator in its selection and application.¹²⁹

*G. The Toxic Substances Control Act ("TSCA")*¹³⁰

Like FIFRA, TSCA is a statutory scheme for the regulation of certain toxic substances. Its criminal enforcement provision applies to violations of section 2614 and carries misdemeanor penalties.¹³¹ The penalties include fines of up to \$25,000 per day and/or up to one year imprisonment.¹³²

H. Other federal statutes

The government has been bold and creative in its use of other, somewhat obscure statutes. For example, in the case of the Exxon Valdez spill, the government included charges based on the Migratory Bird Treaty Act¹³³ for the killing of migratory birds without a permit.¹³⁴

I. General Criminal Statutes

125. *Id.*

126. 7 U.S.C. § 1361(1)(b).

127. *Id.*

128. 444 F. Supp. 510, (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

129. *Id.* at 523.

130. 15 U.S.C. §§ 2601-71.

131. 7 U.S.C. § 2614, proscribes the failure to comply with notice and handling restrictions, the use of substances processed negligently in violation of these restrictions, the failure to maintain proper records, and the refusal to allow regulatory inspections. TSCA section 16, 15 U.S.C. § 2615(b).

132. *Id.*

133. 16 U.S.C. § 707(a).

134. *United States v. Exxon*, No. A90-015 (D. Ark. filed Feb. 27, 1990).

As federal enforcement efforts become more aggressive, prosecutors are using general criminal provisions in order to seek stiffer criminal penalties.

Typical of this trend has been the Department of Justice's use of conspiracy charges in addition to violations of federal environmental laws. In 1990, a defunct Pennsylvania drum recycling company, Metro Container Corp., its affiliate Metro-Enterprise Container Corp., the president and owner, Sidney S. Levy, and a company maintenance supervisor were charged with criminal violations of RCRA and the CWA as well as conspiracy to violate those statutes.¹³⁵ That same year, EKOTEK, a hazardous waste management company in Utah, and its president were indicted on twelve counts of conspiracy to violate the Clean Air Act, CWA, and RCRA.¹³⁶ In addition, EKOTEK was charged with mail fraud for allegedly misrepresenting to customers through the mail that it would properly and legally dispose of hazardous wastes.¹³⁷

Other Title 18 general criminal provisions which have been employed in environmental cases include false statements,¹³⁸ mail and wire fraud,¹³⁹ and aiding and abetting.¹⁴⁰

135. 21 Env't Rep. (BNA) No. 17 at 824 (August 24, 1990). Levy and his maintenance supervisor pleaded guilty to the conspiracy and hazardous waste dumping charges. Guilty pleas on the conspiracy charges were also entered on behalf of Metro Container Corp. and its affiliate. Joseph A. Slobodzian, *Firm's Owner Guilty in Dumping Case*, PHILADELPHIA INQUIRER, October 30, 1991, at B1.

136. 21 Env't Rep. No. 9 at 423 (BNA) (June 29, 1990). EKOTEK is one of Disneyland's contractors. After EKOTEK's improper disposal of thousands of gallons of hazardous waste from Disneyland, Walt Disney Company agreed to pay a \$550,000 federal fine. *A Mickey Mouse Way to Handle Toxic Waste*, SEATTLE TIMES, July 21, 1990, at A6.

137. 21 Env't Rep. (BNA) No. 9 at 423 (June 29, 1990).

138. The false statements offense which consists of knowingly and willfully falsifying, concealing or covering up a material fact or making any false fictitious or fraudulent statements attracts fines of up to \$10,000 and/or prison terms up to five years. 18 U.S.C. § 1001. In *United States v. Rudd* the government alleged that the supplier of laboratory items falsified control data submitted to the EPA. No. 90-0630 (N.D. Cal. filed Nov. 30, 1990). See also *United States v. YWC Inc.*, No. B90-64-WWE (D. Conn. filed Dec. 5, 1990) (regarding false reports sent to EPA concerning CERCLA test results).

139. Mail and wire fraud consist of any attempt to defraud any person by sending material through the United States mail, or by wire, radio, or television. In *United States v. Gold*, 470 F. Supp. 1336-38 (N.D. Ill. 1979) false representations made to the EPA regarding FIFRA compliance using instrumentalities of interstate commerce resulted in wire fraud prosecution.

J. Federal Sentencing Guidelines: enhancement of environmental crime penalties

As a result of the Sentencing Reform Act of 1984¹⁴¹ and the promulgation of the Federal Sentencing Guidelines,¹⁴² those convicted of environmental crimes will receive harsh treatment. The purpose of the Sentencing Guidelines was to create a set of mandatory guidelines which would treat various classes of offenders consistently.¹⁴³ The Guidelines contain a mandatory range of determinate sentences for each level of federal offense and a court may depart from the Guideline range only if it finds a mitigating or aggravating factor which the Sentencing Commission did not adequately consider.¹⁴⁴ A statement of reasons must support any such departure.¹⁴⁵ In drafting the guidelines the Sentencing Commission felt that penalties imposed on environmental defendants in the past were too low when compared to those given other white collar criminals.¹⁴⁶ The Commission singled out environmental offenses as being "particularly important in light of the need for enforcement of the general regulatory scheme."¹⁴⁷

The Sentencing Guidelines abolished parole for environmental crimes defendants in order "to ensure that the sentence imposed . . . is the sentence the offender will serve."¹⁴⁸ The Guidelines severely restrict the use of probation, an outcome which had been the norm in environmental crime cases. Individuals convicted of environmental offenses are spending more time in jail.¹⁴⁹ A typical case is *United States v. Pozsgai*¹⁵⁰ in

140. See 18 U.S.C. § 2; *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

141. 18 U.S.C. §§ 3551-59, 28 U.S.C. §§ 991-98.

142. The original Sentencing Guidelines applied only to individuals. The organizational guidelines were approved by the Sentencing Commission on April 26, 1991 and became effective in 1991. The sentencing of organizations is covered in Chapter Eight of the Federal Sentencing Guidelines. 18 U.S.C. App. 4. With specific regard to the sentencing of organizations, "[i]f the offense presented a threat to the environment, an upward departure may be warranted." 18 U.S.C. App. 4 § 84C4.4.

143. Federal Sentencing Guidelines, Ch. 1, pt. A, 18 U.S.C. App. 4.

144. 18 U.S.C. § 3553(b).

145. *United States v. Bogas*, 920 F.2d 363 (6th Cir. 1990).

146. United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, ch. 1, pt. A, p. 8 (1991).

147. *Id.*

148. Starr & Kelly, *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, 20 Env't'l. L. Rep. 10096, 10100 (March 1990).

149. *Id.*

which the owner of a truck repair business was sentenced to twenty-seven months in prison for adding topsoil to his property when his property had been classified as wetland and the addition of soil was a violation of the Clean Water Act.¹⁵¹

V. EROSIONS OF CRIMINAL INTENT

A. *Environmental crimes as regulatory crimes*

Most environmental crimes defendants, whether corporate or individual, are shocked upon learning how easily the government can establish criminal liability. In large measure, such ease can be traced to the erosion of the element of criminal intent or mens rea.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.¹⁵²

[T]he cumulative effects of pollution are more dangerous and their repercussions more long-lasting and profound than any crime yet faced by a judicial system. . . . If ever there existed a situation which mandated the compromise of defendants' individual rights to achieve a greater good, this is it. . . . Pollution must be stopped. The corporate forum in which most environmental crimes occur prevents the effective use of the traditional criminal law. Strict liability

150. No. CR-88-00450 (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3d Cir.), *cert. denied*, 111 S. Ct. 48 (1990).

151. For cases illustrating jail time for environmental criminal defendants in the wake of the Sentencing Guidelines, see *United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991); *United States v. Wells*, 922 F.2d 54 (1st Cir. 1991).

152. *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

standards for convictions of corporate officers would provide the desired deterrent effect.¹⁵³

Traditional limits of the criminal law insisted that no criminal penalty can exist without personal blame, and that no basis for blame exists without a wrongful intent. This idea is expressed in the maxim, "An act does not make one guilty unless his mind is guilty."¹⁵⁴ The maxim is still valid in most contexts. Theft cannot be committed without an intent to steal. Fraud cannot be committed without an intent to cheat. Yet, for two generations or longer, another idea has stood in opposition to this old maxim, at least in the field of regulatory legislation. As the Supreme Court noted in 1943,

Such legislation dispenses with the conventional requirement for criminal conduct -- awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public good.¹⁵⁵

The principle is well entrenched now that legislatures may dispense with any requirement of criminal intent when creating regulatory offenses.¹⁵⁶ When the legislature has done so, the courts do not need to manufacture such a requirement on their own to make up for the statute's deficiency. Further, the courts have developed principles imposing vicarious criminal liability within business entities, without requiring proof of individual wrongdoing, at least when the offense is one of strict liability.

Environmental crimes are subject to these general principles of regulatory crime. Some commentators contend that the federal courts have gone further than Congress in expanding the intent requirement for environmental crimes.¹⁵⁷ The argument concludes that in substance, if not in words, the courts are evading statutory intent elements and holding

153. Robert A. Milne, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFF. L. REV. 387, 333-34 (1989).

154. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 27, at 192 (1972).

155. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

156. *See, e.g.*, CERCLA section 107, 42 U.S.C. § 9607.

]157. Milne, *supra* note 153 at 309.

corporate employees and officers strictly liable under environmental statutes that, on their face, require proof of intent.¹⁵⁸ The courts are sustaining convictions, fines, and even imprisonment, when the "criminals" are guilty of no criminal intent at all.¹⁵⁹ One author lauds this result:

The strict liability formulation relieves prosecutors of the burdensome requirement of showing that a corporate officer had actual knowledge of an environmental violation, previously the major stumbling block in this type of case. Prosecutors have thus been afforded an ideal opportunity to secure, on a regular basis, convictions of corporate officers for environmental crimes -- an opportunity which should be exploited to the fullest.¹⁶⁰

Such commentators no doubt exaggerate the current trend, but corporate managers can ill afford to ignore the basic message. Some environmental statutes, notably, the Refuse Act of 1899,¹⁶¹ do impose strict liability. In addition, general doctrines of the criminal responsibility of corporate managers put such managers at risk, despite their good faith efforts to solve environmental problems of which they become aware.¹⁶² In many instances, good faith clearly may not be enough. Some conclusions follow.

First, corporate managers (and owners and directors) are at risk of criminal prosecution as never before, despite a lack of intent to violate the law.

Second, compliance, as nearly complete as possible, is more important than ever. Ignorance will not provide a reliable defense in a subsequent criminal prosecution for environmental violations. A thorough environmental audit is often a necessary first step to securing compliance. Deliberate ignorance or "willful blindness" will provide no defense, even

158. *Id.*

159. *Id.*

160. *Id.* at 332.

161. The Rivers and Harbors Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (1899) (current version at 33 U.S.C. § 407 (1988)) [commonly referred to as The Refuse Act].

162. *See United States v. Mexico Fee and Seed Col, Inc.*, 980 F.2d 478 (8th Cir. 1992) (stating that "CERCLA is a remedial strict liability statute and its focus is on responsibility, not culpability.").

when a criminal statute requires proof of the defendant's knowledge.¹⁶³ Taking additional steps can establish, before the fact, a purpose to obey the law, not violate it. An effective preventive program will document what has been done to obtain compliance. In this way, one can make a record to negate any criminal intent, which in some form, even if a diminished one, still does exist as a necessary element for many or most environmental crimes. Prevention, even if not infallible, still can go far toward minimizing the risk.

Third, if a criminal prosecution nonetheless begins or is threatened, or if prosecution has begun before a preventive program can be implemented, defendants must utilize the intent elements of the statutes. These requirements may well hold the keys to a successful defense. Despite deep and broad public concern over the environment, juries resist convicting individuals unfairly. When a jury receives proper instructions, and when it hears sufficiently compelling evidence of a defendant's lack of wrongful intent or knowledge, a defendant can win an acquittal. Defense counsel, in the legal and factual preparation and presentation of the case, must press vigorously the point that the defendant never harbored a criminal intent, and that it is unfair and contrary to statute to punish as criminals those who never intended to do any wrong.

The traditional principle that there is no crime without a criminal mind has eroded. So-called regulatory crimes may impose strict liability. The United States Supreme Court's decision in *United States v. Park*¹⁶⁴ imposed criminal liability in the absence of any clearly discernible wrongdoing, and certainly without proof of any purposeful violation of the law. Businesses subject to environmental regulation and those who operate them cannot afford to ignore the inherent risks. More than ever before, scrupulous if not perfect compliance is the only completely safe course.

At the same time, the criminal provisions of environmental laws are varied and complex, and many may ameliorate the harshness of strict liability. An environmental compliance program should conscientiously document efforts made to obtain compliance, to provide notice of potential problems, and to address and remedy problems as they arise. If criminal prosecutions begin or are threatened, a business should make every effort to establish a lack of intention to violate the law. Defendants must study the particular statutes for opportunities to defend on grounds of a lack of

163. See, e.g., *United States v. Ciampaglia*, 628 F.2d 632 (1st Cir. 1980), *cert. denied*, 449 U.S. 956 (1980).

164. 421 U.S. 658 (1975).

criminal intention. The absence of criminal intention should be emphasized at all stages: in dealings with the government to stave off criminal prosecution; in efforts to avoid indictment; in pre-trial motions and instruction requests; before the jury at trial; and, if necessary, on appeal.

Sensitivity to these issues may be critical. For example, in *United States v. Greer*,¹⁶⁵ the United States Court of Appeals for the Eleventh Circuit affirmed a conviction under RCRA and a related offense, reversing the trial judge's grant of a post-verdict motion for judgment of acquittal. The only mental elements in the judge's instructions were knowledge of the disposal of chemical waste, and knowledge "that the chemical waste had the potential to be harmful to others or to the environment, and that it was not an innocuous substance like water."¹⁶⁶ The judge never told the jury that it had to find that Greer was aware of either the need for a permit or the absence of one; yet, at least on appeal, the defense did not challenge these jury instructions.¹⁶⁷ Until the Supreme Court definitively establishes mental elements necessary for a RCRA conviction, there is little to be lost, and perhaps much to be gained, by pressing the issue.

Despite the courts' acceptance of regulatory offenses, and the legislatures' willingness to enact crimes that dispense with proof of criminal intent, the idea that a crime requires a criminal mind is deeply ingrained.¹⁶⁸ A defendant still can ask juries to see, and act on, the unfairness of convicting a person who had no awareness that what he was doing was wrong or illegal. Defense attorneys should exploit all opportunities that the relevant statute may provide, so that a lack of criminal intent can form the basis for a successful defense.

B. Responsible Corporate Officer Doctrine

To sketch out the general nature of the problem of defining the mental state necessary for conviction of environmental crime, this section discusses some important decisions.

Park was not an environmental case, but a prosecution for strict liability offenses under the federal Food, Drug and Cosmetic Act.¹⁶⁹ The

165. 850 F.2d 1447 (11th Cir. 1988).

166. *Id.* at 1450.

167. *Id.* at 1450 n.7.

168. *See, e.g.*, O. W. HOLMES, THE COMMON LAW 4 (1880) ("Even a dog distinguishes between being tripped over and being kicked.").

169. 21 U.S.C. §§ 331(k), 342(a)(3), 342(a)(4) (1988).

case establishes a far-reaching principle of criminal liability for corporate officers or employees who stand in a responsible relationship to activities of the corporation that violate the federal criminal laws, at least when those laws create strict liability crimes.

Park was president and chief executive officer of Acme Markets, Inc., a national food chain with headquarters in Philadelphia.¹⁷⁰ Rodents had infested an Acme warehouse in Baltimore, Maryland and Park was warned of the problem.¹⁷¹ He conferred with the corporation's vice president for legal affairs, and learned that the responsible Baltimore division vice president "was investigating the situation immediately and would be preparing a summary of the corrective action in reply to the [FDA's warning] letter."¹⁷² In his testimony, Park conceded that his position in the company made him ultimately responsible for "any result which occurs in our company," although he did not "believe there was anything [he] could have done more constructively than what [he] found was being done," to combat the rats in Acme's Baltimore warehouse.¹⁷³ The trial court instructed the jury that

[Park] is or could be liable under the statute, even if he did not consciously do wrong. . . . The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.¹⁷⁴

Park was convicted on five misdemeanor counts, and the Supreme Court sustained the conviction.¹⁷⁵ The government's case was sufficient, the Court said,

to warrant a finding . . . that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly

170. *Park*, 421 U.S. at 660.

171. *Id.* at 662.

172. *Id.* at 664.

173. *Id.*

174. *Id.* at 665 n.9.

175. *Id.* at 667.

to correct, the violation complained of, and that he failed to do so.¹⁷⁶

The Supreme Court held the trial court's instructions to be adequate to focus the jury's attention "on the issue of respondent's authority with respect to the conditions that formed the basis of the alleged violations."¹⁷⁷

The *Park* decision can be criticized on a number of grounds. Probably the most significant aspect of its holding is that "responsibility" for preventing or correcting a problem, by itself, provides a basis for conviction.¹⁷⁸ A defendant may hold this "responsibility" even if "he did not consciously do wrong;" presumably, a defendant may hold "responsibility," though unaware of the problem itself.¹⁷⁹ As a rule of liability within a corporate structure, this holding offers few refuges for corporate officers and managers against the risk of criminal prosecution when a problem within their general domain triggers a criminal strict liability provision.

In *United States v. Johnson & Towers*,¹⁸⁰ Hopkins and Angel, two employees of the corporation, were alleged to have managed and directed its operations involving the treatment, storage, and disposal of hazardous wastes and pollutants. They were charged individually with violating a RCRA provision, which makes liable

Any person who . . .

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either

176. *Id.* at 673-74.

177. Justice Stewart, for three dissenters, protested that *Park* had been convicted under an instruction on *Park's* "responsibility" that

had whatever meaning the jury in its unguided discretion chose to give it. The instructions, therefore, expressed nothing more than a tautology. They told the jury: 'You must find the defendant guilty if you find that he is to be held accountable for this adulterated food.' In other words: 'You must find the defendant guilty if you conclude that he is guilty.'

Id. at 679 (Stewart, J., dissenting).

178. *Id.* at 674.

179. *Id.* at 666 n.9.

180. 741 F.2d 662, 664 (3d Cir. 1984).

(A) without having obtained a permit under 6925 of this title . . . or

(B) in knowing violation of any material condition or requirement of such permit.¹⁸¹

The District Court had dismissed these counts against defendants, on the ground that RCRA criminal provisions reached only "owners and operators," and that Hopkins and Angel, as employees, therefore could not be prosecuted.¹⁸² On appeal, the Third Circuit opined that "[t]he single issue in this appeal is whether the individual defendants are subject to prosecution" under RCRA;¹⁸³ and, the court held that they were.¹⁸⁴

Despite the court's statement of "the single issue" before it, the court went on to consider another issue as well, the meaning of "knowingly" in section 6928(d).¹⁸⁵ Specifically, did the prosecution need to prove that defendants knew that there was no permit under section 6925 of RCRA?¹⁸⁶ Or did the prosecutor's proof of the defendants' knowledge need to extend only to the fact that hazardous waste was being treated, stored, or disposed?¹⁸⁷ The question is obviously critical to the issue of guilty knowledge, for it is the lack of a permit that makes otherwise legal conduct unlawful and subject to criminal prosecution.¹⁸⁸ Under the government's theory, an employee could treat, store, or dispose of hazardous substances in the erroneous belief that the company held a permit, yet be guilty of a crime if this belief proved to be wrong.¹⁸⁹ The court rejected the government's theory and, as a matter of statutory construction, held that knowledge of the absence of a permit was an element of the crime, to be proved beyond a reasonable doubt like every other element.¹⁹⁰

The court next held that "the government need prove only knowledge of the actions taken and not of the statute forbidding

181. 42 U.S.C. § 6928(d)(2).

182. 741 F.2d at 664.

183. *Id.* at 665.

184. *Id.* at 667.

185. *Id.* at 667-70.

186. *Id.* at 669.

187. *Id.* at 668.

188. *Id.*

189. *Id.* at 667.

190. *Id.* at 669.

them."¹⁹¹ Despite this statement, the court, inconsistently, said that to convict, "the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit."¹⁹² Further, the court offered some thoughts about how the prosecution might meet its burden of proving the defendant's knowledge.¹⁹³ The court could instruct the jury "that such knowledge, including that of the permit requirement, may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."¹⁹⁴

This last statement from the *Johnson & Towers* opinion has drawn substantial attention. It has been read as in effect imposing strict liability upon "those individuals who hold the requisite responsible positions,"¹⁹⁵ but this is a misreading of the court's opinion. The court meant to say only that here, as elsewhere in the criminal law where the prosecutor must prove that the defendant acted with certain knowledge, that knowledge does not necessarily need to be proved directly, by words spoken from the defendant's mouth, or written by the defendant's hand. Knowledge may be proved indirectly, or inferred, from all of the surrounding circumstances, including the defendant's conduct, so long as the jury is instructed that it is free to accept or reject the inference from circumstantial evidence, and that the prosecutor still must prove the

191. *Id.* This holding simply follows settled principles. The maxim that "ignorance of the law is no defense" covers most criminal offenses. The maxim may not apply with full force, however, for certain regulatory or similar offenses. For example, the Supreme Court has held that conviction for a "willful" violation of the tax laws requires proof that the defendant intentionally violated a known legal duty. *Cheek v. United States*, 111 S. Ct. 604 (1991). See also, *Liparota v. United States*, 471 U.S. 419 (1985) (offense of "knowingly" misusing food stamps requires proof that defendant "knew that he was acting in a manner not authorized by statute or regulations"). When, however, the defendant's conduct poses obvious risks to the public, or involves dangerous instrumentalities or the like, the prosecution ordinarily need not prove any knowledge by the defendant that his or her conduct violated the law. The inherent danger of the conduct puts the defendant on notice of the likelihood that the conduct is regulated, and such a person can remain ignorant of those regulations only at his or her peril. *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (regarding transportation of corrosive liquids). This reasoning has been applied to environmental crimes. *E.g.*, *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

192. 741 F.2d at 669.

193. *Id.*

194. *Id.*

195. See Milne, *supra* note 153.

requisite guilty knowledge beyond a reasonable doubt.¹⁹⁶ The surrounding circumstances also include the defendant's position in the corporation.

This reasoning represents common sense. If the defendant's job responsibilities naturally would have made him aware both of environmental permit requirements and of the organization's compliance, then the jury might conclude that the defendant was in fact so aware. Nothing in the opinion of *Johnson & Towers* says that the defendant's "responsible position" in an organization may substitute for proof of actual knowledge; rather, the "responsible position" may constitute an element of such proof.¹⁹⁷ The court left Hopkins and Angel free to attack such proof, by their own testimony or other means, to persuade the jury that in fact they did not act with the requisite knowledge, despite holding "responsible positions."¹⁹⁸

The First Circuit, in *United States v. MacDonald & Watson Waste Oil Co.*,¹⁹⁹ reversed convictions under RCRA because the trial court's instructions on the "responsible corporate officer" doctrine confused these two notions. Instead of treating the defendant's status within a corporation as circumstantial evidence from which the jury might infer his actual knowledge, the trial court told the jury that evidence of the defendant's status could substitute for proof of actual knowledge.²⁰⁰ Such an instruction constituted error, the First Circuit said, because it improperly

196. In a series of cases, the Supreme Court has attempted to draw a line between impermissible "presumptions" and permissible "inferences." See generally *Francis v. Franklin*, 471 U.S. 307 (1985). In general, a rational "permissive inference" is constitutional, so long as the jury is clearly informed that it is free to accept or reject the "inference," and that, with or without use of an inference, it must find the defendant not guilty unless all of the elements of the offense have been proved beyond a reasonable doubt. *Id.* at 314.

197. 741 F.2d 662, 669-70 (1984).

198. In *United States v. White*, 766 F. Supp. 873 (E.D. Wash. 1991), the court refused to apply a "responsible corporate officer" doctrine that, the prosecutor argued, derived from *Johnson & Tower* and relieved the prosecution of the need to prove that the defendants had "knowingly treat[ed], store[d] or dispose[d] of any hazardous waste." The court concluded that "[n]one of the cases cited by the government supports the theory that a conviction may be had under a state of mind requirement other than that specified by Congress." 766 F. Supp. 873, 895 (E.D. Wash. 1991).

199. 933 F.2d 35 (1st Cir. 1991).

200. *Id.* at 52.

transplanted a doctrine that applies under *Park* and other cases in the strict liability field to an offense that requires proof of actual knowledge.²⁰¹

RCRA's criminal provisions, as construed in *Johnson & Towers*, still provide ample opportunity for a defense based on the defendant's lack of criminal knowledge or intent. Yet subsequent case law has contradicted the Third Circuit's interpretation of RCRA as requiring proof of knowledge of the lack of a permit, and of the requirement for one, in a prosecution under section 6928(d)(2)(A).

The Eleventh Circuit, in *United States v. Hayes International Corp.*,²⁰² reached the same conclusion as in *Johnson & Towers*, that a RCRA prosecution under section 6298(d)(2)(A) requires proof of knowledge of the lack of a permit. In the same decision, however, the court disagreed that knowledge of the need for a permit was an element of the offense.²⁰³

In its 1989 decision in *United States v. Hoflin*,²⁰⁴ the Ninth Circuit went further in excising the element of intent. The court expressly disagreed with *Johnson & Towers* and held that "knowledge of the absence of a permit is not an element of the offense defined by 42 U.S.C. § 6928(d)(2)(A)."²⁰⁵ The court also apparently dispensed with any requirement of proof that the defendant knew that a permit was required.²⁰⁶ The only intent requirement that the court recognized was the requirement that the prosecutor prove "that the defendant knew the material being disposed of was hazardous."²⁰⁷

The First and Fifth Circuits have addressed the same issues. Neither has gone as far as did the Third Circuit in *Johnson & Towers* to find criminal intent elements under RCRA, but the cases show that opportunities still exist for litigating the intent required for conviction. Yet the District Court for the Northern District of New York recently rejected both *Johnson & Towers* and *Hoflin* and held, on the government's motion in limine that the only knowledge that needs to be proved under section 6928(d)(2)(A) is the knowledge of disposal of a substance with potential for harm.²⁰⁸

201. *Id.* at 55.

202. 786 F.2d 1499 (11th Cir. 1986).

203. *Id.* at 1503-04.

204. 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

205. 880 F.2d at 1038.

206. *Id.* at 1039.

207. *Id.*

208. *United States v. Laughlin*, 768 F. Supp. 957, 960 (N.D. N.Y. 1991).

In *United States v. MacDonald & Watson Waste Oil Co.*,²⁰⁹ the First Circuit addressed the necessary intent in a RCRA prosecution under section 6928(d)(1), which prohibits the transportation of hazardous waste to an unpermitted facility, if done "knowingly." In *MacDonald & Watson Waste Oil* the court approved, in dicta, a trial court's instruction that the prosecution must prove that the defendant knew that the facility lacked a proper permit, or "willfully failed to determine" whether it had the necessary permit.²¹⁰ The First Circuit said that there was "much to be said" for requiring proof of such knowledge; but the court also stressed that the issue was not presented on appeal.²¹¹

The Fifth Circuit, in *United States v. Baytank (Houston), Inc.*,²¹² concluded in a prosecution under section 6928(d)(2)(A) that Congress' use of the term "knowingly"

means no more than that the defendant knows factually what he is doing -- storing, what is being stored, and that what is being stored factually has the potential for harm to others or the environment, and that he has no permit -- and it is not required that he know that there is a regulation which says what he is storing is hazardous under the RCRA.²¹³

On this last point, the Fifth Circuit expressly disagreed with *Johnson & Towers*, but in requiring proof of the defendant's knowledge "that he has no permit," the *Baytank* court also disagreed with the Ninth Circuit in *Hoflin*.²¹⁴

The Northern District of New York court faced similar issues in *United States v. Laughlin*.²¹⁵ The court found neither *Johnson & Towers* nor *Hoflin* persuasive and held "that the government is not required to prove that defendants in this case knew that a permit was required by law nor that they knew that [the company] did not have a permit in order to prove that defendants violated section 6928(d)(2)(A)."²¹⁶

209. 933 F.2d 35 (1st Cir. 1991).

210. *Id.* at 47.

211. *Id.* at 47.

212. 934 F.2d 599 (5th Cir. 1991).

213. *Id.* at 613.

214. *Id.* at 613.

215. 768 F. Supp. 957 (N.D. N.Y. 1991).

216. *Id.* at 966.

Not only have the expansive intent requirements for the various elements of RCRA criminal prosecutions as promulgated by the *Johnson & Tower* decision been cut back, but some courts also have accepted the responsible corporate officer doctrine which the government pressed unsuccessfully so often in cases such as *MacDonald & Watson Waste Oil Co.*²¹⁷ and *United States v. White*.²¹⁸ In *United States v. Brittain*,²¹⁹ the court convicted defendant-appellant Brittain, a sewage treatment plant supervisor, of eighteen felony counts of falsely reporting a material fact to a government agency²²⁰ and two misdemeanor counts of discharging pollutants into the water of the United States in violation of sections 301(a) and 309(c)(1) of the Clean Water Act.²²¹ At the time of the indictment section 1319(c) provided for criminal sanctions for "any person" who "willfully or negligently" violated section 1311(a) or any NPDES permit.²²² Defendant, in arguing against his convictions for discharging pollutants, claimed first that he was not a "person" as contemplated by sections 1319(c) and 1362(5) of the Clean Water Act, and second, that the government's evidence was insufficient to prove that he "willfully or negligently" discharged pollutants in violation of the city's NPDES permit.²²³

In the context of the first claim, defendant contended that an "individual" was subject to section 1319(c)'s criminal sanctions for NPDES permit violations only if he was the permittee.²²⁴ The court roundly rejected this contention for reasons of statutory construction.²²⁵ In the context of the second claim, the defendant conceded that the illegal discharges occurred but contended that the government did not present evidence linking the discharges to willful or negligent conduct on his part.²²⁶ He argued that instead, he was convicted solely by virtue of his position as director of public utilities for the City of Enid.²²⁷

217. 933 F.2d 35 (1st Cir. 1991).

218. 766 F. Supp. 873 (E.D. Wash. 1991).

219. 931 F.2d 1413 (10th Cir. 1991).

220. 18 U.S.C. § 1001.

221. 33 U.S.C. §§ 1311(a) and 1319(c)(1).

222. *United States v. Brittain*, 931 F.2d at 1418.

223. *Id.*

224. *Id.*

225. *Id.* at 1419.

226. *Id.*

227. *Id.*

The court in *Brittain* disclaimed a responsible corporate officer theory in a footnote stating, "Although defendant may have been subject to prosecution pursuant to section 1319(c) as a 'responsible corporate officer' because of his position with the City of Enid, the jury was not presented with such a theory." The court then went on to espouse an attenuated responsible corporate officer theory in another fashion stating in pertinent part:

We believe that the government met its burden in this case. The record reveals that defendant had primary operational responsibility for the treatment plant . . . and that he physically observed both of the NPDES permit violations in question. . . . The plant supervisor testified that defendant repeatedly instructed him not to report the violations to the EPA as required by the NPDES permit . . . the evidence reveals that he willfully allowed the discharges to continue unabated and unreported. Contrary to defendant's argument the jury considered more evidence than simply evidence of his position of responsibility. In this case, the jury considered evidence of specific conduct which allowed the illegal discharges to occur. As the Third Circuit has noted, 'the Government [does] not have to present evidence of someone turning on a valve or diverting wastes in order to establish a willful violation of 1311(a) and 1319(c).'²²⁸

While the defendant did appear to have actual knowledge apart from his position, the partial reliance of the court on his operational responsibility for the treatment plant indicates the impact of the responsible corporate officer theory.

C. Collective knowledge doctrine

Just as the government has been making inroads into the traditional mens rea limitations on individual liability, government prosecutions of public welfare offenses appear to have weakened the respondeat superior doctrine of corporate criminal liability. Corporations have been held responsible for the collective knowledge of all of their individual agents

228. *Id.* at 1420 (citing *United States v. Frezzo Bros. Inc.*, 602 F.2d 1123, 1129 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)).

under a "collective knowledge" theory. The First Circuit stated in *United States v. Bank of New England, N.A.*²²⁹ that because modern corporations "compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components," the corporation's state of mind with regard to regulatory offenses must be the "aggregate of those components."²³⁰

VI. THE ROLE OF ENVIRONMENTAL AUDITS

In 1986 EPA issued a policy statement encouraging the use of audits to help regulated companies comply with environmental laws and identify and correct violations.²³¹ EPA enforcement policy was to consider "on a case-by-case basis," the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems.²³²

EPA enforcement settlements appear to favor environmental auditing. In addition to encouraging the development of corporate auditing programs, EPA has promoted administrative, civil and criminal settlements that require ongoing environmental audits. EPA has broad authority to negotiate an audit provision in a consent decree as part of its authority to require self-monitoring as a remedy for violators.²³³

On July 1, 1991, the Department of Justice issued a policy statement concerning environmental audits. The statement provided as follows:

It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion. This document is intended to describe the factors that the Department of Justice considers in deciding whether to bring a criminal prosecution for a violation of an environmental statute, so

229. 821 F.2d 844 856 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987).

230. *Id.*

231. See EPA, *Environmental Auditing Policy Statement*, 51 Fed. Reg. 25004 (July 9, 1986).

232. *Id.* at 25007.

233. 33 U.S.C. § 1318; 42 U.S.C. § 7414. ABA-ALI, *Envtl. Audits* (April 1991).

that such prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing and voluntary disclosure.²³⁴

The DOJ Statement was designed to encourage self-auditing by giving the regulated community a sense of certain factors which influence prosecutorial discretion.²³⁵ Environmental audits are viewed by DOJ as an important part of a larger compliance program.²³⁶

Courts have included audit requirements in sentences imposed on corporations. Attorney General Thornburgh noted in his keynote address at the 1991 Department of Justice Environmental Law Enforcement Conference²³⁷ that Unichem Corporation, in addition to being fined \$1.5 million for three felony violations under RCRA, was also sentenced to "an unspecified period of probation, during which its engineers must conduct an environmental audit . . . at its three blending facilities."²³⁸

Legislatures are also promoting environmental auditing as a compliance mechanism. In New Jersey, for example, Assembly Bill No. 1726, the Comprehensive Environmental Crimes Enforcement Act of 1991, would authorize the imposition of probation and appointment of an environmental monitor during the term of the company's probation to propose new methods of deterring recurrence of the corporation's unlawful conduct.²³⁹ The proposed federal Environmental Crimes Act of 1989 would have required a court to place an organization convicted of a felony, or repeated misdemeanors, on probation and to require that the organization pay for an audit as a condition of probation.²⁴⁰ A vigorous voluntary compliance program can serve as a mitigating factor or may persuade enforcement agencies not to prosecute.

A. *Costs and Risks of Environmental Audits*

Notwithstanding the clear benefits of environmental audits, a number of risks do exist. For example, once a violation is discovered, the company and its management may face the risk of criminal or civil

234. ABA-ALI, *Envtl. Audits* 1 (April 1991).

235. *Id.*

236. *See supra* notes 45, 51 and accompanying text.

237. *See* Thornburgh, *supra* note 5.

238. *Id.*

239. N.J. A.B. 1726 (1990) (not yet enacted).

240. H.R. 3641, 101st Cong., 1st Sess. (1989).

prosecution until and unless the violation is corrected. Another risk arises when an audit produces findings which must be reported to environmental agencies under federal, state or local reporting statutes.

B. Protection against risks involved in environmental auditing

The risks of an environmental auditing program can be minimized if certain actions are taken.

1. Action regarding voluntary disclosure and cooperation resulting from environmental auditing

With regard to the risk that voluntary disclosure will result in criminal sanctions, defendant corporations may preclude such sanctions if their disclosures and cooperation are voluntary, timely and complete as suggested by the July 1991 DOJ statement.²⁴¹ A recent case concerning defense contract auditing may be instructive. In *United States v. Rockwell International Corp.*,²⁴² a defense contractor unlawfully obtained double reimbursement for the same costs under two Air Force contracts. The contractor then prepared a misleading internal memorandum.²⁴³ In 1985, the government audited the contracts and referred the matter to the Department of Justice.²⁴⁴ In 1986, the Department of Defense ("DOD") announced a voluntary disclosure program for defense contracts.²⁴⁵ Subsequently, the contractor contacted the government and indicated that it believed violations of its business ethics had occurred.²⁴⁶ The contractor presented a report which revealed the details of the pricing.²⁴⁷ DOJ then noted its intention to seek a criminal indictment.²⁴⁸ The contractor argued that it believed the prospective indictments resulted from its "commitment to voluntary disclosure and efforts to implement a meaningful self-governance program," and went on to challenge the subsequent indictment.²⁴⁹ The government contended that the fraud became evident as a result of the government's audit conducted before the

241. See *supra* notes 46-49 and accompanying text.

242. 924 F.2d 928 (9th Cir. 1991).

243. *Id.* at 930.

244. *Id.*

245. *Id.* at 929.

246. *Id.* at 931.

247. *Id.* at 931.

248. *Id.*

249. *Id.*

voluntary disclosure program was even announced and that the contractor had no standing to assert that the government failed to follow its guidelines in administering the voluntary disclosure program.²⁵⁰ The district court agreed.²⁵¹ In affirming the district court's decision, the Ninth Circuit stated:

The Voluntary Disclosure Program was announced on July 24, 1986 in a letter to major defense contractors from the Deputy Secretary of Defense, William Howard Taft, IV. According to the letter, voluntary disclosures of wrongdoing coupled with contractor cooperation and corrective measures, would be viewed as 'strong indications of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability. [The Department of Defense] will consider such cooperation as an important factor in any decision that the department takes. . . . On July 17, 1987, the Department of Justice circulated guidelines to the office of the U.S. Attorney for use with the Voluntary Disclosure Program. . . . The . . . criteria . . . provided [] give guidance to U.S. Attorneys and do not establish any rights for corporations being reviewed under the Voluntary Disclosure Program. . . . A critical part of measuring integrity under the program is the timeliness with which contractors come forward.²⁵²

The Taft letter states:

The contractors understand the Department's view that early voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability.²⁵³

250. *Id.* at 932.

251. *Id.* at 929.

252. *Id.* at 933.

253. *Id.*

The *Rockwell* opinion should not chill corporate audit programs. Rather, it should promote voluntary, proactive compliance programs which include a responsible auditing component.

2. *Establishing and maintaining privileged information*

The auditing process may create documentation that is or should be regarded as subject to attorney-client privilege. In-house counsel often must provide business advice as well as legal advice with respect to matters under investigation and may be viewed as a business advisor rather than an attorney. For example, in *United States v. Chevron*,²⁵⁴ the court rejected a claim of attorney-client privilege and ordered production of audit reports, finding that Chevron had failed to demonstrate that its in-house counsel had been acting in a legal capacity when she participated in an audit and that the communications pertained primarily to legal assistance.

In order for an audit report to fall within the scope of the attorney-client privilege, counsel should emphasize the legal nature of the report to company employees. Before beginning the audit report, counsel should explain the privilege to employees and should stress that the information is necessary to assist the company in obtaining proper legal advice on its compliance with environmental regulations or in anticipation of enforcement proceedings. Counsel should clearly mark the final audit report as privileged. Ideally, all employees and consultants should report directly to counsel. Counsel should also limit distribution of audit reports.

Even these actions will not guarantee the success of an attorney-client privilege claim. Some courts have held that investigative reports are only privileged if prepared in anticipation of litigation,²⁵⁵ but at least one court has applied the privilege to reports prepared in an effort to avoid litigation.²⁵⁶

VII. CONCLUSION

254. 757 F. Supp. 512 (E.D. Pa. 1989).

255. *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1120 (7th Cir. 1983); *Continental Illinois Nat'l Bank & Trust Co. v. Indemnity Ins. Co.*, No. 87 C 8439, 1989 U.S. Dist. LEXIS 13004, at 10 (N.D. Ill. Oct. 30, 1989).

256. *Herbert v. Lando*, 596 F. Supp. 1178 (S.D. N.Y. 1984), *remanded on other grounds*, 568 F.2d 974 (2d Cir. 1977), *rev'd and remanded on other grounds*, 441 U.S. 153 (1979).

Environmental crime may be the crime of the 1990s. Legislators and prosecutors will continue to reflect society's concern with environmental quality and its preoccupation with finding a few visible culprits. Corporations and corporate officers will have to shoulder much of the blame. Targeting will expand to include public utilities and government agencies. The investigative and prosecutorial infrastructure will continue to grow. Many cases will involve no actual environmental harm, but will focus on technical violations which the government perceives as undermining the regulatory program. Potential harm will become as important as actual harm. New criminal responsibility doctrines will emerge and evolve making a successful defense strategy more difficult. As a result, corporations will be forced to adopt and implement strong, proactive environmental compliance programs.