# THE PROSECUTION OF CORPORATIONS AND CORPORATE OFFICERS FOR ENVIRONMENTAL CRIMES: LIMITING ONE'S EXPOSURE FOR ENVIRONMENTAL CRIMINAL LIABILITY

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## I. INTRODUCTION

In recent decades, the discovery of long-term environmental damage caused by years of virtually unregulated waste disposal has given rise to comprehensive schemes of governmental control designed to clean up and protect the environment.[1] Many of the statutes and regulations relating to the environment contain provisions for criminal enforcement and penalties.[2] Such

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1. *E.g.*, Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601–9675 (1989 & Supp. 1991) (CERCLA); Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §§ 6901–6992k (1982 & Supp. 1991) (RCRA); Clean Water Act, as amended, 33 U.S.C. §§ 1251–1387 (1987 & Supp. 1991) (CWA); Clean Air Act, as amended, 42 U.S.C. §§ 7401–7671q (1989 & Supp. 1991) (CAA); Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. §§ 136–136y (1992) (FIFRA); Toxic Substance Control Act, as amended, 15 U.S.C. §§ 2601–2671 (1982 & Supp. 1991) (TSCA); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–11050 (1989)(EPCRA).

2. *E.g.*, 42 U.S.C. § 9603(b) (1989) (CERCLA, fines and imprisonment for failure to comply with reporting requirements); 42 U.S.C. §§ 6928(d) & (e) (1982 & Supp. 1991) (RCRA, fines and imprisonment for improper generation, treatment, storage, disposal, and transportation of hazardous waste, and knowing endangerment); 33 U.S.C. § 1319 (Supp. 1991) (CWA, fines and imprisonment for knowing and negligent violations, knowing endangerment, and false statements); 42 U.S.C. § 7413(c) (Supp. 1991) (CAA, fines and imprisonment for violations, including violations of reporting requirements and knowing or negligent releases); 7 U.S.C. § 136l(b) (1992) (FIFRA, fines and imprisonment for misuse of pesticides); 15 U.S.C. § 2615(b)(1982) (TSCA, fines and imprisonment for knowing or willful violations); 42 U.S.C. § 11045 (1989) (EPCRA, fines and imprisonment for failure to provide required notices).

criminal provisions affect both individuals and corporations, mandating substantial fines for both and, in some cases, jail terms for individuals.[3]

The federal government has demonstrated its willingness to prosecute individuals and corporations under these provisions.[4] Since 1982, individuals have received prison sentences and probation totalling 261 and 785 years, respectively, for committing environmental crimes.[5] Numerous federal agencies, including the Environmental Protection Agency (EPA), Federal Bureau of Investigation (FBI), Department of Customs, Secret Service, and the Treasury Department, have agents assigned to investigate environmental crimes. These agencies make referrals to the United States Department of Justice (DOJ), which coordinates case filings and investigations.

The decision about whether to prosecute an environmental crime is based upon DOJ prosecutorial discretion.[6] The exercise of this discretion is aided by a 1991 DOJ Guidance Document, designed to "give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases...."[7] This guidance document encourages voluntary disclosure of violations, cooperation with the government, use of internal environmental audits, and rapid remediation of harm caused by violations.[8] There are no guarantees, however, that polluters can avoid prosecution even with the highest level of disclosure and cooperation.[9]

This Article describes circumstances under which corporations and their officers and agents can be held liable for environmental crimes, including the *mens rea* requirements for various offenses. Section II of the Article discusses statutes and case law imposing criminal liability for environmental offenses, focusing in particular on the Resource Conservation and Recovery

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3. *See, e.g.,* sources cited *supra* note 2.

4. *See, e.g.,* United States v. Boldt, 929 F.2d 35 (1st Cir. 1991) (CWA, jail sentence); United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991) (RCRA & CERCLA; *see infra* notes 68–78 and accompanying text); United States v. Wells Metal Finishing, Inc., 922 F.2d 54 (1st Cir. 1991) (CWA, jail sentence and fine); United States v. Rutana, 932 F.2d 1155 (6th Cir. 1991) *cert. denied,* 111 S. Ct. 300 (1991) (CWA, jail sentence); United States v. Buckley, 934 F.2d 84 (6th Cir. 1991) (CAA & CERCLA); United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991) (CWA); United States v. Bogas, 920 F.2d 363 (6th Cir. 1990) (CERCLA); United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989) (CWA, *see infra* notes 31–33 and accompanying text); United States v. Carr, 880 F.2d 1550 (2nd Cir. 1989) (CERCLA, *see infra* note 41 and accompanying text); United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied,* 493 U.S. 1083 (1990) (RCRA, *see infra* notes 83–86 and accompanying text); United States v. Alley, 755 F. Supp. 771 (N.D. Ill. 1990) (CWA); United States v. Frezzo Bros., Inc., 546 F. Supp. 713 (E.D. Penn. 1982) (CWA, *see infra* notes 29, 30 and accompanying text); United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd,* 578 F.2d 259 (9th Cir. 1978) (FIFRA and Migratory Bird Treaty Act); United States Environmental Protection Agency, Office of Enforcement, *Enforcement Accomplishments Report, FY 1991,* (LE–133), 300–R92–008, April 1992 [hereinafter *Enforcement Report*]; *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator,* U.S. Department of Justice, July 1, 1991 [hereinafter *DOJ Guidance Document*].

5. *Enforcement Report, supra* note 4, at 3–3.

6. *E.g.,* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). *See also DOJ Guidance Document, supra* note 4.

7. *DOJ Guidance Document, supra* note 4, at 1.

8. *Id.* at 1–2.

9. *See DOJ Guidance Document, supra* note 4.

Act of 1976, as amended (RCRA).[10] Section III briefly discusses the effect of the new Federal Sentencing Guidelines on those convicted of environmental crimes.[11] Finally, Section IV contains a practical checklist for limiting one's exposure to environmental criminal liability.

## II. CRIMINAL LIABILITY OF INDIVIDUALS AND CORPORATIONS

Corporate and individual liability for environmental crimes, while a relatively new phenomenon, has its genesis in established legal doctrine. For example, the origin of corporate officer liability is generally traced to *United States v. Dotterweich*.[12] Corporate, as opposed to individual, liability for environmental crimes first appeared in the mid–1980s.[13] Increasingly, courts levy criminal penalties against both corporations and their officers, employees, and agents under a variety of environmental statutes.[14] To appreciate this trend and to avoid becoming a part of it, corporate officers and employees must understand both the relevant environmental statutes and the theories under which violators are prosecuted.

### *A. Under the Clean Water Act and Other Environmental Statutes*

#### *1. Clean Water Act*

Congress enacted the Federal Water Pollution Control Act, or "Clean Water Act" (CWA) as it is commonly known, in 1948.[15] It contains a comprehensive system designed to prevent and control water pollution.[16] Among other things, the CWA regulates the discharge of pollutants into surface water.[17] Statutes and regulations set forth performance standards.[18] The CWA is enforced through civil, criminal, and administrative penalties.[19]

The CWA includes criminal penalties for knowing and negligent violations,[20] as well as knowing endangerment,[21] and false statements.[22] In addition, under the CWA liability attaches directly to a "responsible corporate officer."[23] Penalties for individuals range from fines of $2,500 and prison terms of

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10. 42 U.S.C. §§ 6901–6992k (1982 & Supp. 1991).

11. For a more thorough treatment of the Federal Sentencing Guidelines, *see* Mr. Ed Novak's article in this Symposium.

12. 320 U.S. 277 (1943). *See infra* notes 49–52 and accompanying text for additional discussion of *Dotterweich* and its influence on modern corporate officer liability.

13. *See, e.g.*, United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986).

14. *See* sources cited *supra* note 4.

15. *See* 33 U.S.C. §§ 1251–1387 (1987 & Supp. 1991).

16. *Id.* The regulations implementing the CWA are found throughout Title 40 of the Code of Federal Regulations.

17. *See* 33 U.S.C. § 1311 (1987 & Supp. 1991).

18. *See* 33 U.S.C. §§ 1316 & 1317 (1987 & Supp. 1991) and implementing regulations.

19. *See* 33 U.S.C. § 1319 (1987 & Supp. 1991).

20. 33 U.S.C. §§ 1319(c)(1) & (2) (Supp. 1991).

21. 33 U.S.C. § 1319(c)(3) (Supp. 1991). Knowing endangerment occurs when a violator knowingly places another person "in imminent danger of death or serious bodily injury" through the violation. *Id.*

22. 33 U.S.C. § 1319(c)(4) (Supp. 1991).

23. 33 U.S.C. § 1319(c)(6) (Supp. 1991).

not more than a year for negligent violations,[24] to $250,000 fines and fifteen-year prison terms for knowing endangerment.[25] Corporations can be fined up to one million dollars for violating the CWA's knowing endangerment provisions.[26] A "person" subject to CWA criminal penalties includes a "responsible corporate officer."[27]

The cases show a sobering trend toward strict criminal penalties for even minor CWA violations.[28] One of the early criminal cases brought under the CWA held that a defendant need not specifically intend to violate the CWA for conviction.[29] Rather, defendants need only act willfully or negligently and intend to do the acts for which they were convicted.[30] In a later case, the First Circuit upheld substantial fines and a suspended jail sentence for a corporation's failure to obtain a wetlands permit.[31] Arguably, the defendants' activities resulted in the loss or adverse modification of less than one acre of wetlands,[32] and these "wetlands" consisted of nothing more than a small plot of raw land

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24. 33 U.S.C. § 1319(c)(1).
25. 33 U.S.C. § 1319(c)(3).
26. *Id.*
27. 33 U.S.C. § 1319(c)(6).
28. *See, e.g., Alley*, 755 F. Supp. at 771; *Marathon Dev.*, 867 F.2d at 96. *See generally, e.g., Enforcement Report, supra* note 4, § IV.
29. United States v. Frezzo Bros., 461 F. Supp. at 266, *aff'd*, 602 F.2d 1123 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), *pet. for post-conviction relief dismissed*, 491 F. Supp. 1339 (E.D. Penn 1980), *rev'd*, 642 F.2d 59 (3rd Cir. 1981), *on remand, request for collateral relief denied*, 546 F. Supp. 713, 720 (E.D. Penn. 1982), *aff'd*, 703 F.2d 63 (3rd Cir. 1983).
30. *Frezzo Bros.*, 546 F. Supp. at 720. The Frezzo Brothers made and sold a compost for growing mushrooms. *Id.* at 721. The compost was created by combining horse and poultry manure, straw, corn cobs, cocoa shells, gypsum, and water and allowing those ingredients to ferment. *Id.* The fermentation process took place outside on concrete slabs known as wharves. *Id.* Some runoff from the wharves was captured in a holding tank. *Id.* at 722. A separate storm water run-off system handled rain water, which was ultimately deposited into the Delaware River. *Id.*

The defendants were charged with six counts of willfully or negligently discharging pollutants into navigable waters without a permit when runoff from the compost wharves made its way into the storm water system. *Id.* at 714, 722. In order to convict, the jury was required only to find that: (1) the defendants discharged a pollutant; (2) the defendants' discharge of the pollutant was done willfully or negligently; (3) the defendants did not have a permit to discharge the pollutant. *Id.*

The defendants were convicted on all six counts. Each individual was fined $25,000.00 and sentenced to 30 days in jail. *Id.* at 715. The corporation was fined $50,000.00. *Id.* The defendants challenged the convictions on a number of grounds, *id.*, each of which failed, *Frezzo Bros.*, 703 F.2d at 63.
31. *Marathon Dev.*, 867 F.2d at 96. *Marathon Dev.* is an infamous wetlands case. Marathon bulldozed approximately five acres of federally-protected wetlands. *Id.* at 97. Marathon had been in communication with the Army Corps of Engineers, the agency that administers wetlands permits. *Id.* Although Marathon might have been able to obtain the appropriate permits, it did not do so. *Id.* at 98.

For this failure, Marathon and its senior vice president were indicted on 25 counts of violating the Clean Water Act. *Id.* at 97. After the indictment, both the corporation and its vice president pled guilty. *Id.* at 98. In pleading guilty, the defendants admitted the conduct charged in the indictment but specifically preserved for appeal a defense that their activities were protected by a headwaters nationwide permit. *Id.* Their arguments failed and Marathon was fined $100,000. *Id.* Its vice president was fined $10,000, given a six-month suspended jail sentence and one year of probation. *Id.*
32. *Id.* at 99.

adjacent to a channelized stream.[33] Nonetheless, the defendants were indicted and penalized for violating the CWA. These cases indicate that courts will impose criminal sanctions for even *de minimus* CWA violations.

*2. CERCLA*

In addition to the CWA,[34] numerous other statutes provide criminal penalties for environmental violations.[35] Perhaps most notable is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).[36] CERCLA was enacted in 1980 and underwent extensive revision in 1986.[37] It deals primarily with reporting releases of hazardous substances and determining financial responsibility for responding to those releases.[38]

CERCLA also contains criminal penalties for individuals who fail to make required notifications.[39] The criminal penalties include fines and imprisonment for up to three years.[40] According to the Second Circuit Court of Appeals, CERCLA reporting requirements, and hence penalties for their violation, are designed to "reach a person—even if of relatively low rank—who, because he was in charge of a facility, was in a position to detect, prevent, and abate a release of hazardous substances."[41]

### *B. Under the Resource Conservation and Recovery Act*

RCRA, which was passed in 1976 and amended in 1984, created a "cradle to grave" regulatory regimen designed to ensure that hazardous wastes are disposed of properly. Generators of such waste are required under RCRA to identify their hazardous wastes, fill out manifests describing the wastes, and dispose of such wastes only in a RCRA permitted facility. RCRA contains criminal penalties for any person that knowingly stores, transports, or disposes of hazardous waste in violation of the Act.[42]

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33. *Id.*
34. Criminal provisions under RCRA are discussed *infra* part II.B.
35. *See supra* note 2.
36. 42 U.S.C. §§ 9601–9675 (1989 & Supp. 1991).
37. *See* 42 U.S.C. §§ 9601–9675. The 1986 amendments are known as the Superfund Amendments and Reauthorization Act of 1986 (SARA).
38. *See* 42 U.S.C. §§ 9601–9675.
39. 42 U.S.C. § 9603(b) (1989).
40. *Id.*
41. *Carr*, 880 F.2d at 1554. Carr was a civilian maintenance foreman at Fort Drum, supervised by army officers. *Id.* at 1551. In May of 1986, he directed several workers to dispose of waste paint in a small, man-made pit. *Id.* After paint leaked into the pit, Carr directed workers to cover up the paint cans. *Id.*

Carr was charged in a 43–count indictment, including charges under RCRA, CERCLA, and the CWA. *Id.* He was acquitted on all but the two CERCLA charges. *Id.* On those, he was given a suspended sentence and probation. *Id.*
42. Section 6928 of 42 U.S.C. provides as follows:

> (d) Criminal penalties
> Any person who—
>
> (1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subtitle [33 U.S.C. §§ 6921 *et seq.*] to a facility which does not have a permit under this subtitle [33 U.S.C. §§ 6921 *et seq.*] or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. §§ 1411 et seq.],

*1. Criminal Liability of Corporations*

In seeking to deter environmental crimes, the government has prosecuted corporations for the acts of their employees.[43] Recently, Rockwell International agreed to pay a fine of $18 million for violations of RCRA and the Clean Water Act at the Rocky Flats Nuclear Weapons Plant of the Department of Energy.[44] Under the terms of the settlement agreement, the parties agreed that, if the matter had been tried in court, the government would have been able to demonstrate a number of criminal violations under the above statutes.

*2. Direct Individual Liability*

In addition to imposing fines on corporations that are found guilty of environmental crimes, the Justice Department also seeks to impose criminal liability on individuals that are directly responsible for committing an environmental criminal act. As is the case with prosecutions of corporate officers (who may be somewhat removed from the actual criminal event), the success of the Justice Department's case against an individual directly responsible for a criminal act depends, in part, on the defendant's state of knowledge.

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

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. § 1411 et seq.]; or

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

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle;

...

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), [or] (3) ... of subsection (d) of this section who knows at that 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 fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

43. *See, e.g., Hayes Int'l,* 786 F.2d at 1501 (corporation found liable under criminal charge from act of employee); *MacDonald & Watson Waste Oil,* 933 F.2d at 42 ("A corporation may be convicted for the criminal acts of its agents, under a theory of *respondeat superior* ... where the agent is acting within the scope of employment.").

44. *See* United States v. Rockwell Int'l Corp., No.92-CR-107 (D. Colo. March 26, 1992).

In *United States v. Sellers*,[45] the defendant was charged with knowingly and willfully disposing of methylethylketone (M.E.K.), which was discovered in sixteen fifty–five gallon drums on the bank of a stream. In upholding the jury's verdict to convict the defendant, the Court stated that the prosecution had the burden to establish that the defendant knew that he was dumping waste.[46] The Court also stated that, because paint solvent waste is inherently potentially harmful to the environment, "it should have come as no surprise to [the defendant] that the disposal of that waste is regulated."[47] Thus, according to the court, a defendant that knows he is disposing of a hazardous substance can be deemed to know that the disposal of such a substance is regulated.

*3. Liability of Corporate Officers*

(a) Development of the Doctrine

The government's policy of seeking the convictions of corporate officers has its roots in earlier cases involving violations of the Federal Food, Drug and Cosmetic Act.[48] In the context of this Act, when a United States court of appeals was reluctant to find a corporate officer liable for criminal violations of the Act, the United States Supreme Court restored the verdicts of district courts, which found the defendants criminally liable as charged.

In *United States v. Dotterweich*,[49] the president of a company was charged with shipping misbranded drugs in interstate commerce and also with shipping an adulterated drug.[50] Although the court of appeals reversed the defendant's conviction, the Supreme Court agreed with the guilty verdict handed down by the federal district court jury, stating that "[t]he purposes of [the Act] thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self protection."[51] In reversing the court of appeals, the Supreme Court also noted that, while enforcement of the Act might cause hardship, in the Court's view, Congress had elected to place the hardship "upon those who have at least the opportunity of informing themselves of the existence of [regulatory requirements] ... rather than to throw the hazard on the innocent public who are wholly helpless."[52]

In *United States v. Park*,[53] the government prosecuted the president of a national retail food chain[54] for holding food shipped in interstate commerce in a building where it was exposed to rodent contamination. In reinstating the jury's guilty verdict, which the court of appeals reversed, the United States

45. 926 F.2d 410 (5th Cir. 1991).
46. *Id.* at 414.
47. *Id.* at 417.
48. *See* 21 U.S.C. §§ 301–394 (1984 & Supp. 1991).
49. 320 U.S. 277 (1943).
50. *Id.* at 278.
51. *Id.* at 280.
52. *Id.* at 285.
53. 421 U.S. 658 (1975).
54. The chain employed approximately 36,000 employees and consisted of 874 retail outlets.

Supreme Court noted that "the Act punishes 'neglect where the law requires care, or inaction where it imposes a duty.'"[55]

(b) Prosecutions of Corporate Officers Under RCRA

While the original application of corporate officer liability had a simple beginning, Congress enacted a more complex scheme for prosecution under RCRA. Under the Act, an individual is criminally liable for three types of activity. First, the individual is liable under RCRA if he or she *knowingly transports*[56] hazardous waste to a facility that does not have a RCRA permit. Second, an individual is liable for *knowingly treating, storing or disposing*[57] of hazardous waste without a RCRA permit. Finally, RCRA allows prosecution of individuals who *"knowingly endanger"*[58] another person. This section discusses each of these environmental crimes and concludes that most courts are willing to impose liability even when the defendant does not have actual knowledge of the applicable federal laws or regulations.

*(i) Liability for Knowingly Transporting Hazardous Waste to a Facility that Does Not Have a Permit*[59]

Courts discussing RCRA's prohibition against knowingly transporting hazardous waste to a facility that does not have a permit have indicated that the level of knowledge required for prosecution is quite low, and that such knowledge can be inferred from circumstantial evidence. Courts have rejected, however, arguments that corporate officers can be liable under a conclusive presumption of actual knowledge.

In *United States v. Hayes International Corp.*,[60] an airplane refurbishing company and one of its employees were charged with knowingly transporting hazardous waste to a facility that did not have a RCRA permit. In this case, the defendants had arranged for the disposal of approximately 600 drums of paint and solvents that were subsequently discovered at seven illegal disposal sites.[61] Noting that the degree of knowledge necessary for conviction under RCRA was the principal issue in the case, the court stated that, in order to convict the defendant under Section 6928(d)(1), the jury must find that the defendant knew the contents of the waste in question and that the disposal site did not have a RCRA permit.[62] With respect to "knowing" the permit status of a disposal site, the court stated that "a defendant acts knowingly if he willfully fails to determine the permit status of the facility."[63] In doing so; the court rejected the defendants' arguments that they were not liable for a "knowing" violation of the statute because they had simply misunderstood the applicable regulations and did not "know" that the disposal site did not have a RCRA permit.[64]

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55. *Id.* at 671 (quoting Morissette v. United States, 342 U.S. 246, 255 (1952)).
56. *See infra* notes 59–75 and accompanying text.
57. *See infra* notes 76–95 and accompanying text.
58. *See infra* notes 96–104 and accompanying text.
59. *See* 42 U.S.C. § 6928(d)(1) (Supp. 1991).
60. 786 F.2d at 1499.
61. *Id.* at 1501.
62. *Id.* at 1505.
63. *Id.* at 1504.
64. *Id.* at 1501, 1505.

In a recent Ninth Circuit case, the court concurred with the *Hayes International Corp.* court's ruling that, to be criminally liable, a defendant must know that the disposal site did not have a RCRA permit.[65] According to the court in *United States v. Speach*,[66] such a knowledge requirement does not place an undue burden of proof on the government, which may establish that a defendant knew that a disposal site did not have a permit through circumstantial evidence.[67] It is significant that, under the above cases, a defendant that acts from a good faith belief that a disposal site has the proper RCRA permit (but has been misled in this regard by the recipient of the waste) would not be found criminally liable under §6928(d)(1).

One issue that has been hotly contested in the courts is whether a defendant's mere status as a responsible corporate officer should result in the imposition of criminal liability on the defendant for the actions of the company in question, irrespective of whether the defendant knew about the alleged infraction. In *United States v. MacDonald & Watson Waste Oil Co.*,[68] the president and owner of MacDonald & Watson Waste Oil Co. was charged with knowingly transporting and causing the transportion of hazardous waste (toluene and soil contaminated with toluene) to a facility that did not have a RCRA permit. In the district court below, the prosecution attempted to cast a broad net of criminal liability over corporate officers by arguing that, although the government had no direct evidence that the defendant actually knew that the hazardous wastes in question were scheduled to be disposed of in his facility, any such failure to demonstrate the defendant's actual knowledge of the shipments in question was not relevant to his criminal responsibility under RCRA for the shipments.[69] According to the government, the defendant was guilty of violating RCRA because, as a responsible corporate officer, the defendant was in a position to ensure compliance with RCRA's provisions and did not do so.[70] As part of its case, the government had shown that, on two earlier occasions, the defendant was warned by an environmental consultant that other loads of toluene containing soil had been received at the defendant's facility from other customers. Thus, in the government's view, the defendant's mere status as a responsible corporate officer rendered him guilty of violating RCRA's prohibition against knowingly transporting hazardous wastes to a facility that does not have a RCRA permit.

In vacating the defendant's conviction below and remanding the matter to the trial court for a new trial, the court stated that it had "found no case, and the government cit[ed] none, where a jury was instructed that the defen-

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65. *See* United States v. Speach, No. 90-50708, 1992 WL 145064 (9th Cir. filed June 29, 1992). In an earlier opinion, which was subsequently withdrawn, the Ninth Circuit Court of Appeals had *rejected* the *Hayes Int'l* court's requirement that, to be liable, a defendant must be found to have known that the disposal site did not have an RCRA permit. *See* United States v. Speach, No. 90-50708, 1992 WL 51181 (9th Cir. Mar. 20, 1992), *opinion ordered withdrawn* May 11, 1992.

66. *Speach*, 1992 WL 145064.

67. *Id.* For example, according to the court, such knowledge may be imputed to a defendant if the defendant fails to follow proper procedures under the applicable regulations or the defendant pays "unduly low" charges for the disposal in question. *Id.*

68. 933 F.2d at 35.

69. *Id.* at 50.

70. *Id.*

dant could be convicted of a federal crime *expressly requiring knowledge as an element*, solely by reason of a conclusive, or 'mandatory' presumption of knowledge of the facts constituting the offense."[71] In discussing *United States v. Johnson & Towers, Inc.*,[72] which was relied upon by the prosecution, the court indicated that *Johnson & Towers* did not support the government's contention that the defendant's status as a responsible corporate officer should result in the imposition of criminal liability. According to the court, *Johnson & Towers* "supports only the position that knowledge of the *law* may be inferred, and does not address the knowledge of *acts*."[73]

The court concluded its discussion of this issue by noting that it agreed with other decisions which the prosecution relied upon for the proposition that a defendant's knowledge of the circumstances surrounding a prohibited act can be inferred from circumstantial evidence, including the position and responsibility of a defendant corporate officer.[74] The court also joined other courts in stating that a defendant's willful blindness to facts constituting an offense may be sufficient to establish the requisite knowledge required for conviction under RCRA. The court found, however, that the district court erred when it instructed the jury that a finding that the defendant was a responsible corporate officer would, in itself, be sufficient to conclusively establish the element of knowledge expressly required under Section 6928(d)(1).[75] Thus, although the court agreed that a defendant's knowledge of the circumstances surrounding a prohibited act can be inferred from circumstantial evidence, the court rejected the notion that a defendant could be found liable even if it was evident that the defendant did not have such knowledge.

(ii) *Liability for Knowingly Treating, Storing or Disposing of Any Hazardous Waste Without a RCRA Permit.*

Individuals can also be liable under RCRA for *knowingly treating, storing, or disposing* of hazardous wastes without a permit.[76] The circuits are not in agreement about whether criminal liability for knowingly treating, storing or disposing of hazardous waste without a permit can only be imposed where the defendant knew that his company did not have the required RCRA permit.

In *Johnson & Towers*,[77] the government charged the defendant company and two employees with violations of RCRA and other environmental statutes.[78] According to the prosecutor, waste chemicals from the company's cleaning operations (which included methylene chloride and other hazardous wastes) were pumped from a holding tank into a trench. The defendants included a foreman and the service manager in the company's trucking department.[79]

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71. *Id.* at 53.
72. 741 F.2d 662 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). This case is discussed more fully below. *See infra* notes 77–82 and accompanying text.
73. *MacDonald & Watson Waste Oil*, 933 F.2d at 54 (emphasis supplied).
74. *Id.* (citing Stone v. United States, 113 F.2d 70, 75 (6th Cir. 1940) and United States v. Andreadis, 366 F.2d 423 (2nd Cir. 1966), *cert. denied* 385 U.S. 1001 (1967)).
75. *Id.*
76. 42 U.S.C. § 6928(d)(2)(A) (Supp. 1991).
77. 741 F.2d at 662.
78. *Id.* at 664.
79. *Id.*

Although the company employees argued that they were not "owners and operators" under RCRA, the court held that Section 6928(d)(2)(A) "covers employees as well as owners and operators of the facility who knowingly treat, store or dispose of any hazardous waste ...."[80] The court stated that, for the employees to be convicted, the jury must determine that the defendant employees knew that the company was required to have a RCRA permit and also knew that the company did not have such a permit.[81] As indicated above, the court held that knowledge may be imputed to individuals who hold responsible positions with a corporate defendant.[82]

However, other courts evaluating similar convictions declined to follow the *Johnson & Towers* reasoning. In *United States v. Hoflin*,[83] a Ninth Circuit case, the Director of Public Works for the City of Ocean Shores, Washington, was charged with disposing of hazardous waste without a RCRA permit. The Director had instructed an employee to bury paint drums at the City's sewage treatment plant.

The defendant appealed his conviction, arguing that he did not know that the City did not have the requisite RCRA permit for the disposal of such wastes and that such knowledge is an element of a crime under Section 6928(d)(2)(A). In affirming the defendant's conviction, the court of appeals declined to follow the reasoning of *Johnson & Towers, Inc.*, which had held that the term "knowingly" in subsection (2) of Section 6928 modified both subsections (A) and (B).[84] According to the court, if Congress had intended knowledge of the lack of a permit to be an element of a violation under subsection (A), it could easily have inserted "knowingly" as a modifier introducing that subsection.[85] The court also stated that, by not shielding persons who handle hazardous waste materials without informing the EPA of their activities, the court's conclusion was consistent with RCRA's goals.[86]

The court in *United States v. Baytank (Houston), Inc.*,[87] also declined to follow *Johnson & Towers, Inc.* to the extent that it would require knowledge of RCRA's regulations for a defendant to be convicted of a RCRA violation.[88] *Baytank*, however, accords with the opinion in *McDonald & Watson Waste Oil Company*. In *Baytank*, the court based the conviction of *Baytank's* executive vice president and operations manager not on the mere fact that they held positions of responsibility in the defendant corporation, but, rather, because they knew that hazardous wastes were stored on the premises.[89]

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80. *Id.* at 664–65.

81. *Id.* at 669. The court evaluated subsection (A) and (B) of § 6928 and determined the term "knowingly" applied to both subsections.

82. *Id.* at 670.

83. 880 F.2d at 1033.

84. *Id.* at 1038.

85. *Id.*

86. *Id.* at 1038–39.

87. 934 F.2d 599 (5th Cir. 1991).

88. 934 F.2d at 613. In *Baytank*, the court noted that the above aspect of *Johnson & Towers* was also rejected in United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990). *See also*, United States v. Laughlin, 768 F. Supp. 957, 963–64 (N.D.N.Y. 1991) (finding the court's analysis in *Johnson & Towers* to be "unpersuasive").

89. 934 F.2d at 616.

*United States v. White* is also in accord with *MacDonald & Watson Waste Oil Company* on this issue. In *United States v. White*,[90] PureGrow, Inc. and a number of individuals associated with the defendant corporation were charged with RCRA violations for the storage of pesticide rinseates at the defendant's facility, which rinseates were subsequently sprayed on a field.[91] According to the government, the environmental safety officer of the defendant corporation was personally liable for criminal violations of RCRA because, as the responsible corporate officer, the defendant "had direct responsibility to supervise the handling of hazardous waste by PureGrow employees. He is liable for the acts of all other agents and employees of PureGrow in handling the hazardous waste at Puregrow facilities which he knew of or *should have known of*."[92]

In ruling against the government on this issue, the court rejected the prosecution's argument that the defendant was liable merely because of his status as the responsible corporate officer.[93] To be criminally liable under RCRA, a defendant must be shown to have knowingly treated, stored or disposed of a substance that the defendant knew was hazardous.[94] Thus, according to the court, to be criminally liable under Section 6928(d)(2), a defendant *must have known* the relevant facts and it is not enough that the defendant *should have known* about the improper disposal of hazardous waste.[95]

Although there has not always been unanimity among the circuits about whether a defendant must have known the relevant facts associated with an alleged violation of §6928(d)(2), in the Ninth Circuit, at this time, such knowledge is required for conviction.

(iii) *Liability for Violation of RCRA's "Knowing Endangerment" Provision.*

Finally, RCRA imposes liability on individuals who *"knowingly endanger"* other persons.[96] Under this RCRA provision, any party that violates the provisions of subsection (d) of Section 6928 who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury is criminally liable under subsection (e).[97] As the cases below indicate, the government has invoked RCRA's knowing endangerment provision to prosecute both individuals and corporations.

In *United States v. Tumin*,[98] the defendant was found guilty on two felony counts under RCRA.[99] In September, 1985, the defendant illegally dis-

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90. 766 F. Supp. 873 (E.D. Wash. 1991).
91. *Id.* at 877.
92. *Id.* at 894 (emphasis supplied).
93. In *White*, the court distinguished the elements of a criminal violation under RCRA from strict liability crimes associated with the Federal Food, Drug, and Cosmetic Act, which was the subject of concern in *Dotterweich*, 320 U.S. at 277 and *Park*, 421 U.S. at 658. *See supra* notes 48–55 and accompanying text.
94. *White*, 766 F. Supp. at 895.
95. *Id.*
96. 42 U.S.C. § 6928(e) (Supp. 1991).
97. For a description of the criminal penalties associated with a violation of § 6928(e), *see supra* note 42.
98. No. Cr. 87–488 (E.D.N.Y. Oct. 11, 1988).
99. The defendant was also found guilty in connection with a misdemeanor count under CERCLA. *Id.*

posed of three fifty-five-gallon drums of ethyl ether in a residential neighborhood. Subsequently, because the prosecution demonstrated that the defendant knew that he placed others in imminent danger of death or serious bodily injury when the above disposal was carried out, the defendant was convicted under RCRA's "knowing endangerment" statute. The defendant was also convicted of a felony for the knowing transportation of hazardous wastes to a facility that did not have a permit to receive such wastes.[100]

In *United States v. Protex*,[101] the defendant corporation operated a drum recycling facility in which used fifty-five-gallon drums were cleaned and repainted. According to the prosecution, because the defendant corporation did not maintain adequate safety provisions for its employees, the employees ran an increased risk of suffering solvent poisoning.[102]

According to the court, in denying that it was criminally liable under RCRA's knowing endangerment provisions, the defendant was arguing that Congress intended to restrict the circumstances under which a defendant may be found guilty of "knowing endangerment."[103] In rejecting the defendant's contention, the court stated that the "gist" of RCRA's "knowing endangerment" provision is that a defendant "will be criminally liable if, in violating other provisions of ... RCRA, it places others in danger of great harm and it has knowledge of that danger."[104]

Because of the added penalties associated with a violation of RCRA's knowing endangerment provisions, § 6928(e) provides the government's prosecutional arsenal with a potent weapon.

## III. FEDERAL SENTENCING GUIDELINES

The United States Sentencing Commission devised the Federal Sentencing Guidelines [hereinafter *Guidelines*] pursuant to the Sentencing Reform Act of 1984.[105] The original version of the *Guidelines* became effective November 1, 1987.[106] The *Guidelines* are contained in a book entitled FEDERAL SENTENCING GUIDELINES MANUAL. The 1992 edition contains amendments effective November 1 and 27, 1991.[107] The purpose of the *Guidelines* is to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[108]

The baseline determination under the *Guidelines* is the offense categorization. The *Guidelines* enumerate a variety of offenses including, *inter alia*, offenses against the person,[109] offenses involving drugs,[110] offenses involving

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100. *Id. See* 42 U.S.C. § 6928(d)(1) (Supp. 1991).
101. 874 F.2d 740 (10th Cir. 1989).
102. *Id.* at 742.
103. *Id.* at 744.
104. *Id.*
105. 18 U.S.C. §§ 3551–3586 (1990 and Supp. 1991).
106. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1987).
107. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1992) [hereinafter U.S.S.G.].
108. U.S.S.G., *supra* note 107, at 1.
109. U.S.S.G., *supra* note 107, at Ch.2, Pt.A.
110. U.S.S.G., *supra* note 107, at Ch.2, Pt.D.

public safety,[111] and offenses involving the environment.[112] Each "offense conduct" includes a base offense level (BOL).[113] The BOL is the starting point for sentence determination. The court can modify the sentence level available for each crime if certain specified offense characteristics are present.[114] The sentence is subject to further upward or downward adjustment related to the victim,[115] the offender's role in the offense,[116] obstruction,[117] multiple counts,[118] and the offender's acceptance of responsibility.[119] The court then inserts the level that results into the sentencing table and matches it with the appropriate available sentence range.[120] Once the court determines the final offense level, the structure of the *Guidelines* leaves little room for judicial discretion in sentencing, although it does permit some additional departures.[121] Sentences range from no prison term to life imprisonment.[122]

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111. U.S.S.G., *supra* note 107, at Ch.2, Pt. K.
112. U.S.S.G., *supra* note 107, at Ch.2, Pt.Q.
113. *See generally* U.S.S.G., *supra* note 107, at Ch.2.
114. *Id.*
115. U.S.S.G., *supra* note 107, at Ch.3, Pt.A.
116. U.S.S.G., *supra* note 107, at Ch.3, Pt.B.
117. U.S.S.G., *supra* note 107, at Ch.3, Pt.C.
118. U.S.S.G., *supra* note 107, at Ch.3, Pt.D.
119. U.S.S.G., *supra* note 107, at Ch.3, Pt.E.
120. U.S.S.G., *supra* note 107, at Ch.5.
121. Although the *Guidelines*, including the environmental offense category, have been in effect since November 1987, there are a limited number of cases actually applying the *Guidelines* to environmental cases. *See Rutana*, 932 F.2d at 1155. *See also Sellers*, 926 F.2d at 410; *Wells Metal Finishing*, 922 F.2d at 54; *Bogas*, 920 F.2d at 363; United States v. Moskowitz, 888 F.2d 223 (2nd Cir. 1989); United States v. Moskowitz, 883 F.2d 1142 (2nd Cir. 1989); and United States v. Paccione, 949 F.2d 1183 (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 3029 (1992).

In *Rutana*, 932 F.2d at 1155, the Sixth Circuit Court of Appeals reversed and remanded for the resentencing of John W. Rutana. Rutana plead guilty to 18 counts of knowing discharge of pollutants into a public sewer system. *Id.* Mr. Rutana was chief executive officer and part owner of Finishing Corporation of America (FCA). FCA was bankrupt at the time of the appellate decision. *Id.* at 1156. FCA discharged sulfuric and nitric acids into a pipe that led into a city sewer line and, from there, directly into the city waste water treatment plant. *Id.* In spite of repeated efforts by various authorities to have FCA cease the discharge and Rutana's evident knowledge of the efforts, "at least 18 separate instances of illegal discharges were documented during 1988." *Id.* at 1157.

Based on Rutana's lack of a criminal history and an offense level of 18, the indicated term of imprisonment, as calculated in the presentence report, was 27 to 33 months. *Id.* The calculations began with a BOL of eight for mishandling of hazardous or toxic substances. *Id. See also* U.S.S.G., *supra* note 107, § 2Q1.2(a). The court increased the offense level six levels for repetitive discharge, 932 F.2d at 1157, *see also* U.S.S.G., *supra* note 107, § 2Q1.2(b)(1)(A), four levels for disruption of a public utility, 932 F.2d at 1157, *see also* U.S.S.G., *supra* note 107, § 2Q1.2(b)(3), and two levels for playing a leadership role in the activity, 932 F.2d at 1157, *see also* U.S.S.G., *supra* note 107, § 3B1.1(c). The court then decreased the level two levels due to Rutana's acceptance of responsibility. 932 F.2d at 1157. *See also* U.S.S.G., *supra* note 107, § 3E1.1(a). Although the probation officer noted in his presentence report that no evidence was presented warranting departure from the *Guidelines*, the district court departed 12 levels downward in sentencing Rutana. 932 F.2d at 1158. The district court departed downward because Rutana owned a business that might fail if Rutana went to prison, possibly resulting in unemployment for his employees. *Id.* The district court also reduced the fine because it viewed the indicated fine as "harsh." *Id.* at 1159. The court sentenced Rutana to five years probation, 1,000 hours of community service, a $90,000 fine, and a $950 special assessment. *Id.*

Corporations are not exempt from the *Guidelines*.[123] An amendment that became effective on November 1, 1991 makes the *Guidelines* applicable to corporations as well as individuals.[124] Courts can require corporations to remedy harm stemming from criminal conduct,[125] to pay fines,[126] and to be placed on organizational probation,[127] in addition to imposing special assessments, forfeitures, and costs.[128]

## IV. LIMITING ONE'S EXPOSURE FOR ENVIRONMENTAL CRIMINAL LIABILITY

### *A. Implement Strong Internal Compliance Program*

As noted in Section I above, state and federal agencies have prosecutorial discretion. Anecdotal evidence suggests that criminal prosecutions for isolated incidents and good faith mistakes are rare. Furthermore, a company with a strong, well-enforced internal environmental compliance policy is obviously less likely to have environmental compliance problems than a company without such a policy; hence, that company is less likely to be prosecuted for environmental violations.

On July 1, 1992, the Department of Justice issued its guidance document: "Factors in Decisions on Criminal Prosecution for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator."[129] The guidance document indicates that the prosecutor should consider many factors in determining whether to prosecute. These

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The appellate court rejected the district court's departures. *Id.* The court held that the district court's actions did not comport with the three-step procedure the Sixth Circuit employs in reviewing downward departures from the *Guidelines*. *Id.* at 1158. Under United States v. Brewer, 899 F.2d 503, *cert. denied*, 111 S.Ct. 127 (6th Cir. 1990), departures are warranted only if: (1) the case is "sufficiently 'unusual' to warrant departure"; (2) the circumstances are conceptually proper and the court determines that they actually existed in the particular case; and (3) the direction and degree of departure was reasonable. *Rutana*, 932 F.2d at 1158 (quoting *Brewer*, 899 F.2d at 506). The *Rutana* court held that there was nothing special about the circumstances in this case to warrant a departure. *Rutana*, 932 F.2d at 1158. In fact, the court determined that "[t]he very nature of the crime dictates that many defendants will likely be employers, whose imprisonment may potentially impose hardship upon their employees and families." *Id.* Furthermore, the imposition of a fine the district court views as "harsh" is not an adequate reason to depart from the *Guidelines* because "[t]he guidelines have already taken fines, even large ones, into consideration." *Id.* (citing U.S.S.G., *supra* note 107, § 5E1.2(c)(3)) (specifying minimum fine of $6,000 and a maximum fine of $60,000 for offense levels 18 and 19). Additionally, the appellate court held that the district court imposed Rutana's fine on the erroneous assumption that the applicable statue required a fine for each count. *Rutana*, 932 F.2d at 1159, n. 7, 1159-60. Finally, the court commented that "the burden of persuading the sentencing court that a downward departure is warranted rests with the defendant." *Id.* at 1159 (citing *Bogas*, 920 F.2d at 369).

122. U.S.S.G., *supra* note 107, Ch.5, Pt.B.

123. *See* U.S.S.G., *supra* note 107, Ch.8. However, in the months since corporations were specifically added to the *Guidelines*, no cases have been reported applying that chapter in relation to environmental offenses or any other offenses.

124. U.S.S.G., *supra* note 107, § 8A1.1 comment (historical note).

125. U.S.S.G., *supra* note 107, Ch.8, Pt.B.

126. U.S.S.G., *supra* note 107, Ch.8, Pt.C.

127. U.S.S.G., *supra* note 107, Ch.8, Pt.D.

128. U.S.S.G., *supra* note 107, Ch.8, Pt.E.

129. *DOJ Guidance Document, supra* note 4.

factors include voluntary disclosure,[130] cooperation, preventative measures and compliance programs, pervasiveness of noncompliance, internal disciplinary action, and subsequent compliance efforts.[131] Hypotheticals set forth in the Guidance Document, however, indicate that these will be mitigating factors only, and may not result in complete avoidance of criminal prosecution.[132] Nonetheless, a strong internal compliance program may help to avoid both violation and prosecution. The following is intended as a practical checklist for establishing internal compliance procedures that may decrease the likelihood of prosecution.

Establish an internal compliance policy. This policy should be written, qualitative, and quantitative. It should include defined responsibilities, a system of accountability to specific personnel, and disciplinary action for violations.

Allocate adequate funds to the compliance policy. Disseminate the policy throughout the company and train personnel. In addition, provide regular training and refresher courses, provide incentives for compliance and disincentives for non-compliance, develop a system to deal with employee complaints, and establish a hotline for suspected violations.

Integrate the policy into the company infrastructure. Be sure to require internal compliance with the policy, correct previous reporting errors,[133] and consider environmental compliance as an element of all corporate decisions, even if that means delay or added expense. Monitor and track the compliance program. Create adequate record-keeping and tracking systems. Create and follow document retention policies. Conduct compliance audits. These may be either internal or external. If they are internal, ensure independence and be certain that the audit team is not accountable to the department it is auditing.

### *B. Responding to a Governmental Investigation*

Even with a strong internal environmental compliance policy, government investigation may occur. The way that the company responds to that investigation is critical in avoiding an indictment or proving the corporation's innocence. The following is a checklist for preparing for governmental inspection.

Establish procedures for responding to regulators and inspectors. These procedures should include policies on who should be notified of the inspection or investigation, who should speak with the inspector or investigator, to what areas the inspector or investigator should be given access, and to what documents the inspector or investigator should be given access. Establish procedures for responding to criminal investigations. These should be similar to the procedures for responding to the regulators and inspectors. Protect confidentiality of documents and information by understanding and employing work

130. Disclosure is not considered voluntary if it is already required by law, regulation, or permit. *See id.* at 3.

131. *Id.* at 2–6.

132. *Id.* at 6–14.

133. In other words, do not compound an inaccurate or fraudulent report by trying to cover it up.

product privilege,[134] attorney-client privilege,[135] and self-evaluative privilege.[136] The need to protect confidentiality of documents must be balanced against the Guidance Document's mandate for cooperation.[137]

Be prepared for parallel proceedings.[138] Follow all of the procedures set forth for criminal and civil proceedings. In addition, protect all documents and information from cross-dissemination by insisting upon grand jury subpoenas.[139]

## V. CONCLUSION

Although the courts have not yet ruled that a corporate officer's state of knowledge is irrelevant in determining criminal liability under RCRA, as the cases discussed above indicate, the threshold of knowledge resulting in conviction can be quite low. In order to limit one's exposure for environmental criminal liability, a responsible corporate officer should become actively engaged in helping ensure that the corporation is in compliance with all applicable environmental laws and regulations.

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134. *See* FED R. CIV. P. 26(b)(3); ARIZ. R. CIV. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947); Upjohn Co. v. United States, 449 U.S. 383 (1981); State *ex rel* Corbin v. Ybarra, 161 Ariz. 188, 777 P.2d 686 (1989).

135. *E.g., Upjohn*, 449 U.S. at 383; *Ybarra*, 161 Ariz. at 188, 777 P.2d at 686; ARIZ. REV. STAT. ANN. § 12–2234 (1982).

136. *See, e.g.,* Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973); Resnick v. American Dental Ass'n, 90 F.R.D. 530 (N.D. Ill. 1981). *But see, e.g.,* Ligon v. Frito–Lay, Inc., 19 Fair Empl. Prac. Cas. (BNA) 722 (N.D. Tex. 1978); EEOC v. ISC Fin. Corp., 16 Fair Empl. Prac. Cas. (BNA) 174 (W.D. Mo. 1977).

137. Under the Guidance Document, "[c]onsideration should be given to the violator's willingness to make all relevant information (including the complete results of any internal or external investigation and the names of all potential witnesses) available to government investigators and prosecutors." *DOJ Guidance Document, supra* note 4, at 3–4.

138. The term "parallel proceedings" refers to the situation in which civil or administrative actions are pursued simultaneously with criminal investigation or prosecution of the same entity.

139. Under FED. R. CRIM. P. 6(e), grand jury material may never be passed to anyone working on a parallel civil proceeding without a court order.