

# SURVEY OF FEDERAL AND STATE ENVIRONMENTAL CRIME LEGISLATION

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## I. A CORPORATION AND ITS EMPLOYEES ARE NOT IMMUNE FROM CRIMINAL ENVIRONMENTAL PROSECUTION

The threat of criminal environmental enforcement is dramatically increasing against both corporations and their employees.<sup>1</sup> Many of these prosecutions involve otherwise upstanding businessmen who emphatically deny any criminal conduct.<sup>2</sup> Individuals, however, need not have an evil mind nor act in bad faith in order to be subject to environmental prosecution. In the past decade, Congress has modified or enacted a thicket of environmental provisions, all with strong criminal provisions.<sup>3</sup> Courts construe these criminal statutes very broadly, thereby increasing the threat of criminal conviction.<sup>4</sup> The first step in avoiding environmental criminal liability is to realize that no person or entity is beyond the reach of these laws.<sup>5</sup>

The impetus behind newly-enacted environmental legislation is the public's growing perception that corporate polluters fail to follow accepted waste disposal practices in order to increase profit.<sup>6</sup> The Exxon Valdez oil spill, Love

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1. Judson W. Starr, *Avoiding The Government's Tough New Criminal Enforcement Of Environmental Laws*, 1989 ABA SEC. LITIG.: DEF. ENVT'L. CRIMES 13, 14 (discussing the "criminal prosecution of unwary businessmen"). "The key to staying out of jail is first and foremost to recognize the reality of the threat." *Id.* at 17. See generally *DOJ Official Announces New Emphasis on the Prosecution of Environmental Crime*, 37 BUS. CRIME COMMENTARY 6 (Nov. 1990).

2. Starr, *supra* note 1, at 17. In one case, a well-known New England company president was indicted at the same time he was nominated for "Businessman of the Year." *Id.*

3. See, e.g., 42 U.S.C. §§ 6901-6992k (1983) (statutory changes to RCRA amount to fine-tuning except for major revisions to the criminal provisions); 42 U.S.C. §§ 9601-9675 (1983) (enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)).

4. *Criminal Enforcement of Environmental Laws Seeks Deterrence Amid Need For Increased Coordination, Training, Public Awareness*, 17 ENV'T REP. (BNA) 800, 804 (Sept. 26, 1986) [hereinafter *Deterrence and Public Awareness*] (Maryland's success rate in prosecuting environmental crimes exceeds 80%).

5. Starr, *supra* note 1, at 18.

6. *Texas: Environmentalists, State Officials Urge Criminal Penalties, Prison Terms for Polluters*, 21 ENV'T REP. (BNA) 1152, 1153 (Oct. 12, 1990). See also *Deterrence and Public Awareness*, *supra* note 4, at 806. A poll disclosed that American people believe only

Canal, Bhopal, and other tragedies that yield shocking headlines, coupled with an increased public awareness concerning environmental degradation, all contribute to increased outrage against polluters.<sup>7</sup> In the past, environmental crimes were rarely prosecuted, and when they were, corporate fines rather than individual imprisonment usually resulted. This is no longer the case.

The United States government continues to amass resources to prosecute these new environmental crimes.<sup>8</sup> Both the Environmental Protection Agency (EPA) and the Federal Bureau of Investigation have increased the number of criminal investigators available to investigate environmental crimes.<sup>9</sup> Investigators refer cases to the Environmental Crimes Unit, a subgroup of the Department of Justice, to determine whether a case warrants prosecution.<sup>10</sup>

The effects of the EPA's increased personnel and enforcement budget are self-evident.<sup>11</sup> The number of indictments obtained for environmental violations in 1985 and 1986 was double that of 1983 to 1984.<sup>12</sup> During this same time period, guilty pleas and convictions increased by 300% criminal fines collected increased by 600%, and jail time imposed increased by a dramatic 1300%.<sup>13</sup>

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murder and similar violent crimes are more serious than environmental crimes. In fact, environmental crimes rank seventh in over-all importance. *Id.*

7. Thea Dunmire, *A Misguided Approach to Worker Safety*, CRIM. JUST., Summer 1988 at 11, 12. See generally Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311 (1990).

8. See Starr, *supra* note 1, at 14-15.

9. *Id.* at 15. In 1986, the EPA employed 97 full-time staff people for criminal enforcement, and former Administrator Thomas hoped to increase resources an additional 50% by 1988. *Deterrence and Public Awareness*, *supra* note 4, at 804.

10. Starr, *supra* note 1, at 20 (Environmental Crimes Unit, formed in 1982, develops policies, trains, and counsels the EPA; it recently has become a permanent section in the Department of Justice). Disgruntled employees are the primary source of information for prosecutors. *Id.*

11. 1990 was an especially productive year for enforcement of environmental laws. See *EPA Continues to Exceed Previous Numbers in Civil, Criminal Cases, Penalty Assessments*, 21 ENV'T REP. (BNA) 1534 (Dec. 7, 1990). The EPA referred 65 criminal cases to the DOJ, charged over 100 people and corporations, and obtained sentences totaling over 745 months of imprisonment and \$30 million in fines. *Id.* During fiscal 1990, the DOJ achieved a 95% conviction rate, and over one-half of the individuals convicted received jail time. *1990 Record Year for Criminal Enforcement of Environmental Violators*, *Justice Announces*, 21 ENV'T REP. (BNA) 1397 (Nov. 23, 1990).

12. James J. Mollenkamp & Stephen J. Owens, *Criminal Enforcement of Environmental Laws: Trans World Airlines—A Case Study and Suggestions for Defending Allegations of Criminal Conduct*, 1989 A.B.A. SEC. LITIG.: THE DEFENSE OF ENVTL. CRIMES, 103, 106. Courts and prosecutors give many reasons for the increase in criminal enforcement including: "Some people thought the [EPA] would look strong if it got a criminal program going." Barry Meier, *Dirty Job, Against Heavy Odds, the EPA Tries to Convict Polluters and Dumpers*, WALL ST. J., Jan. 7, 1985, at 1 (quoting an EPA official). Regardless of the reasons, the future indicates the numbers of prosecutions will only increase. See, e.g., *Habicht Predicts 'Billions of Dollars' in Waste Site Cleanups Over Next Five Years*, 17 ENV'T REP. (BNA) 1261, 1262 (Nov. 28, 1986) (increased CERCLA prosecutions); *U.S. Industry in Midst of Profound Change in Management of Hazardous Waste, Florio Says*, 17 ENV'T REP. (BNA) 1919, 1920 (Mar. 20, 1987) (increased RCRA prosecutions).

13. Mollenkamp & Owens, *supra* note 12, at 106. Between 1982 and 1989, federal courts have imposed over 250 years of accumulated jail time, of which defendants have served a total of nearly 75 years in federal penitentiaries. Companies have forfeited over \$20 million to

The EPA will consider several factors, including the elements of the offense and whether the conduct consisted of knowing or willful behavior, before charging a company or its employees with an environmental crime.<sup>14</sup> The EPA also considers the impact on the government's ability to perform its regulatory function,<sup>15</sup> the extent of environmental harm or harm to public health,<sup>16</sup> specific company or industry patterns and practices,<sup>17</sup> and the deterrent effect of prosecution.<sup>18</sup> The Justice Department also considers whether the business is relatively new to the industry, a factor which would warrant lenient treatment. Other considerations include previous contact with state and federal regulators, the company's policy for adherence to environmental laws and any past violations.<sup>19</sup>

Deterrence is the government's primary rationale for its intensive criminal enforcement of environmental laws.<sup>20</sup> Government officials believe that the threat of individual prosecution and incarceration will deter corporate officials.<sup>21</sup> Likewise, prosecutors believe the result of bad publicity, stigma, and loss of good will to both corporations and their officials from the threat of criminal prosecution will increase deterrence.<sup>22</sup> Thus, because environmental prosecutions will continue to increase in the foreseeable future under an array of frequently technical federal and state provisions, familiarity with the regulatory scheme and knowledge of ways to avoid the criminal courts are all but essential.

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the federal treasury in criminal fines, not including unaccounted damages like loss of good will, loss of federal contracting, loss of state or local licenses, and SEC or stockholder problems. Starr, *supra* note 1, at 16.

14. *Historical Trends and Current Enforcement Profiles for Federal Environmental Prosecutions*, 1989 A.B.A. SEC. LITIG.: THE DEFENSE OF ENVTL. CRIMES 1, 4 [hereinafter *Environmental Prosecutions*] (incorporating EPA Assistant Administrator's memorandum).

15. *Id.* at 5. The EPA's regulatory function relies upon complete and accurate voluntary reporting from the regulated community. Falsified or concealed information, whether intentional or otherwise, makes the self-regulatory aspect of federal environmental laws inapposite. *Id.*

16. *Id.* at 5-6. Prosecutors can look to either the duration of the harm or the toxicity or amount of pollutants involved. *Id.*

17. *Id.* at 6. The government considers a company's historical record, as well as competitors' abilities to comply with environmental laws. *Id.*

18. *Id.* The deterrent effect is considered because deterrence is the primary goal of environmental law; however, deterrence is not a prerequisite for prosecution. See Barbara H. Doerr, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. DET. L. REV. 659, 665 n.43 (1985) (media coverage and possible legal precedent also considered).

19. *Habicht Says Increased Criminal Prosecutions Reflect Tough Public Attitude Toward Polluters*, 18 ENV'T REP. (BNA) 584, 584 (June 12, 1987).

20. See generally *Deterrence and Public Awareness*, *supra* note 4, at 802; Note, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1235 (1979) [hereinafter *Regulating Corporate Behavior*].

21. For example, former EPA Administrator Lee Thomas stated: "There's no question in my mind that if a corporate executive knows that he will be held accountable, he will be sure that within his organization there is compliance with environmental regulations." *Thomas Emphasizes Training, Coordination in EPA's Approach to Criminal Enforcement*, 17 ENV'T REP. (BNA) 732, 733 (Sep. 19, 1992).

22. See Dunmire, *supra* note 7, at 11.

## II. INDIVIDUAL AND CORPORATE CRIMINAL LIABILITY: CRIMINAL CONVICTION FOR MISMANAGEMENT

Juries often convict both a corporation and its employees for the same offense; "corporate and individual criminal liability are complementary, not mutually exclusive."<sup>23</sup> Joint criminal liability effectuates the deterrence especially desired in "public welfare" crimes such as environmental offenses.<sup>24</sup>

### A. *Theories of Corporate Liability*

Generally, one does not think of a corporation as a violator of criminal laws because it can neither form the requisite mental state nor be imprisoned. Despite this, the law has subjected corporations to strict liability offenses for many decades.<sup>25</sup> Corporate liability for crimes involving a *mens rea* element is a product of the 20th century.<sup>26</sup> Increasing regulatory compliance is the rationale behind removing corporate immunity for crimes involving scienter. In analyzing the Sherman Act, the Ninth Circuit stated:

With such important public interests at stake, it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the [law].<sup>27</sup>

Because courts have held antitrust violations to be "public interest" offenses, environmental issues are *a fortiori* in the public interest.<sup>28</sup> Courts identify the two theories for establishing a corporate *mens rea* as the doctrine of "respondeat superior" and the "collective knowledge" doctrine.

#### 1. *Respondeat Superior*

Courts derive the doctrine of respondeat superior, historically applied to all corporate crimes, from general agency principles.<sup>29</sup> This doctrine employs a two-part test. First, an agent must commit a crime within the scope of his or her employment. Second, the employee must act with intent to benefit the corporation.<sup>30</sup> Both prongs of this test must be satisfied to hold a corporation criminally liable.

Respondeat superior requires the government to prove that at least one corporate agent acted with the requisite state of mind.<sup>31</sup> This agent may be

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23. *Regulating Corporate Behavior*, *supra* note 20, at 1244.

24. *Environmental Prosecutions*, *supra* note 14, at 43.

25. See, e.g., *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339 (1854).

26. *Regulating Corporate Behavior*, *supra* note 20, at 1246 n.12.

27. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

28. *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6, 8 (E.D. Ark. 1978).

29. See generally *RESTATEMENT (SECOND) OF AGENCY* § 219 (1958).

30. See *Standard Oil Co. v. United States*, 307 F.2d 120, 126-29 (5th Cir. 1962); *Apex Oil Co. v. United States*, 530 F.2d 1291, 1294-95 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976).

31. *Regulating Corporate Behavior*, *supra* note 20, at 1247.

any employee,<sup>32</sup> not just a responsible officer.<sup>33</sup> In fact, a "corporation may be criminally bound by the acts of subordinate, even menial, employees."<sup>34</sup> Although any employee can bind the company, the employee must act for the employer's benefit. The government need not identify the particular employee, it only needs to prove that an employee possessed the requisite mental state.<sup>35</sup> To impute an employee's actions to the corporation when the employee acts for personal gain, rather than on the corporation's behalf, would "disregard every accepted notion of respondeat superior."<sup>36</sup>

## 2. *Collective Knowledge Doctrine*

A second theory of corporate *mens rea* is the collective knowledge doctrine. Under this theory, courts sum the knowledge of a corporation's employees to create one large corporate state of mind. For example, in *United States v. Bank of New England*,<sup>37</sup> the First Circuit Court of Appeals rationalized that a corporation consists of employees operating within the scope of employment. The court imputed the knowledge of each employee to the corporation.<sup>38</sup> In doing so, the court aggregated each employee's mental state into one corporate state of mind.<sup>39</sup> The collective knowledge doctrine makes it much easier to argue that the corporation had the requisite mental state. Federal prosecutors have successfully argued for extension of the collective knowledge doctrine to environmental criminal cases.<sup>40</sup>

## B. *Theories of Individual Liability*

As noted earlier, deterrence is the primary rationale underlying prosecution of environmental crimes. Many argue that companies consider corporate fines as little more than a business expense.<sup>41</sup> Conversely, when personal loss of liberty is at stake, the deterrent effect dramatically increases.<sup>42</sup> The

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32. *Standard Oil*, 307 F.2d at 128 (intent to benefit the corporation is mandatory).

33. *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1158 (5th Cir. 1977).

34. *Standard Oil*, 307 F.2d at 127.

35. *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2d Cir. 1962), *cert. denied*, 371 U.S. 969 (1963).

36. *Standard Oil*, 307 F.2d at 128-29.

37. 821 F.2d 844 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987).

38. *Id.* at 856, quoting *United States v. T.I.M.E.—D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974).

39. The court asserted:

[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.

*Id.*

40. *Environmental Prosecutions*, *supra* note 14, at 51.

41. See *Deterrence and Public Awareness*, *supra* note 4, at 802. As John Lynch, Head Deputy District Attorney in Los Angeles and Chief of the Environmental Crimes/Occupational Safety and Health Division put it, "companies may continue to violate environmental laws so long as '[i]t can be considered one of the costs of doing business [and] so long as paying an administrative fine is less expensive than the costs of compliance.'" *Id.* at 801-02 (citations omitted).

42. *Deterrence and Public Awareness*, *supra* note 4, at 802. "We have had people in corporations charged with an environmental crime who say that they would pay almost any civil

possibility of imprisonment effectively deters corporate crime by decreasing the incentive to violate the law in order to increase profits.<sup>43</sup>

### *1. Responsible Corporate Officers*

In several opinions, the United States Supreme Court articulated what is now referred to as the responsible corporate officer doctrine.<sup>44</sup> In *United States v. Dotterweich*,<sup>45</sup> the government charged the president of a pharmaceutical company with violating the Federal Food, Drug and Cosmetic Act, a strict liability offense.<sup>46</sup> Despite finding that Dotterweich was removed from, and ignorant of the impropriety committed by the company's employees, the Court stated:

The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. 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 danger.<sup>47</sup>

The Court reasserted this concept in *United States v. Park*.<sup>48</sup> In *Park*, the government indicted the president of a large food chain headquartered in Philadelphia. The company's Baltimore storage facility failed to comply with health standards, and a subsequent inspection uncovered similar violations. In affirming Park's conviction, the Court stated:

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them .... [Therefore the] duty imposed ... on *responsible corporate agents* is ... the highest standard of foresight and vigilance, but ... does not require that which is objectively impossible.<sup>49</sup>

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penalty if we dropped the criminal case." *Id.* (quoting Dennis Muchnicki, Ohio Assistant Attorney General and Chief of the Environmental Enforcement Section).

43. *Regulating Corporate Behavior*, *supra* note 20, at 1245. "The threat of a jail sentence in particular induces employees to forego even substantial corporate profits rather than risk individual criminal liability." *Id.* See Arthur L. Liman, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 630, 630-31 (1977) ("To the businessman ... prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail").

44. A scathing analysis of the responsible corporate officer doctrine is provided with great persuasiveness in Richard G. Singer, *The Myth of the Doctrine of the Responsible Corporate Officer*, TOXICS L. REP. 1378 (April 8, 1992).

45. 320 U.S. 277 (1943).

46. The jury convicted Dotterweich and acquitted his company. *Id.* at 278.

47. *Id.* at 280-81 (emphasis added) (citation omitted). See *Morissette v. United States*, 342 U.S. 246, 256 (1952) ("The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities").

48. 421 U.S. 658 (1975).

49. *Id.* at 672-73 (emphasis added).

Although the Court construed strict liability offenses in *Park* and *Dotterweich*, many courts apply the same principle to environmental crimes requiring some level of scienter.<sup>50</sup>

## 2. Direct and Indirect Actors

Two different types of corporate actors face the possibility of environmental criminal liability. The obvious targets are direct actors who physically commit illegal acts. Courts can also hold indirect actors vicariously liable.<sup>51</sup> Although direct actors are usually low-level employees, supervisors and corporate officers may become direct participants if they authorize or mandate the illegal activity.<sup>52</sup> In the case of a direct actor, prosecutors must prove the *mens rea* identified by statute. Although Congress has enacted strict liability offenses in the environmental criminal regime, the laws generally require a minimum of negligence.<sup>53</sup>

Indirect actors are usually responsible corporate officers implicated under the doctrine of respondeat superior.<sup>54</sup> Because officers and managers make company decisions, the threat of personal prosecution increases corporate regulatory compliance. As in *Park* and *Dotterweich*, the courts allow the prosecution of responsible corporate officers as indirect actors for mismanagement under the theory that they were in the best position to prevent the illegal conduct. Courts demand that these individuals apprise themselves of both the regulatory requirements and the corporation's compliance record.<sup>55</sup> Thus, the law allows conviction of corporate officials without regard to their actual state of mind or direct participation in the alleged violation.

To establish an indirect actor's criminal liability, the prosecution must show that the corporate officer had "a responsible share in the furtherance of

50. See *Little Rock Sewer Comm.*, 460 F. Supp. at 6. The Clean Water Act adopted the "responsible corporate officer" language. 33 U.S.C. § 1319(c)(6) (1982 & Supp. 1987). In a recent opinion, the Second Circuit broadly construed the doctrine and held that CERCLA's reporting requirements applied to a relatively low-level employee. *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989). In *Carr*, the defendant, a civilian, worked at a military installation managed by military officers. The defendant ordered lower level employees to cover a construction site waste spill with dirt. Some of these employees told the defendant that they thought the action was illegal. The court found that the defendant, as maintenance foreman, fulfilled the "in charge" requirement under § 103 of CERCLA. *Id.* But see *Criminal Enforcement: Jury Acquits Du Pont Of Allegations That It Violated Pollutant Discharge Permit*, 21 ENV'T REP. (BNA) 1187 (Oct. 19, 1990) (company acquitted of all remaining 55 counts in part because it was questionable whether a low-level employee's actions could criminally bind the company).

51. See generally *Environmental Prosecutions*, *supra* note 14, at 54-56.

52. *Id.* at 54. Prosecutors can prove participation by supervisors and managers either explicitly or by implication. See *Burns v. United States*, 286 F.2d 152, 155 (10th Cir. 1961); *Gates v. United States*, 122 F.2d 571, 579 (10th Cir. 1941), *cert. denied*, 314 U.S. 698 (1942). Prosecutors frequently prosecute direct actors under 18 U.S.C. § 1001—the false statements statute. See *United States v. Gilliland*, 312 U.S. 86 (1941); *United States v. Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).

53. See *Refuse Act of 1899*, 33 U.S.C. § 407 (1982).

54. Christopher Harris et al., *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203, 227 (1988). See *Starr*, *supra* note 1, at 16-17 ("responsible corporate officer" language used often).

55. *Environmental Prosecutions*, *supra* note 14, at 54. See *Hercules Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978).

the transaction which the statute outlaws.”<sup>56</sup> *Park* defined employees with a “responsible share” as “those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure [regulatory] compliance.”<sup>57</sup> Courts cannot allow conviction of responsible corporate officers, however, simply because of their corporate position.<sup>58</sup> Prosecutors must have some evidence to link the indirect actor to the wrongdoing.

Impossibility is the only defense available to indirect actors. To establish this defense, the corporate official must show that despite the exercise of extraordinary care, the criminal violation would still have occurred.<sup>59</sup> This defense is difficult to establish.

### III. CWA AND RCRA: THE FEDERAL GOVERNMENT’S MOST FREQUENT PROSECUTORIAL TOOLS<sup>60</sup>

#### A. *Clean Water Act (CWA)*

The objective of the CWA “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>61</sup> In 1987, Congress modified the CWA, expanding its criminal provisions.<sup>62</sup> The government frequently prosecutes individuals under the CWA because it allows for convictions based on the minimal mental state of negligence.<sup>63</sup> The CWA also provides for “knowing” violations.<sup>64</sup> The only difference between knowing and negligent violations is the potential penalty. Negligent violations have a maximum penalty of two years’ imprisonment and a \$50,000 per-day fine, and knowing violations carry a six-year, \$100,000 per-day maximum fine.<sup>65</sup>

The 1987 amendments also include a “knowing endangerment” provision.<sup>66</sup> This provision prohibits the commission of a knowing violation of the Act with knowledge that the illegality “places another person in imminent danger of death or serious bodily injury ....” An individual who violates the knowing endangerment provision faces substantial penalties.<sup>67</sup> The “knowledge” necessary for a knowing endangerment violation is a defendant’s “actual awareness or actual belief.”<sup>68</sup> No vicarious liability exists. Courts cannot attribute the knowledge possessed by others to the defendant

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56. *United States v. Park*, 421 U.S. 658, 669 (1975) (citation omitted).

57. *Id.* at 672. *See United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984) *cert. denied*, 469 U.S. 1208 (1985) (“[K]nowledge ... may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant”).

58. *Park*, 421 U.S. at 674-75.

59. *Id.* at 672-73. *See United States v. Gel Spice Co.*, 773 F.2d 427, 434-35 (2d Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986).

60. *Deterrence and Public Awareness*, *supra* note 4, at 801 (RCRA and CWA compile a majority of the criminal environmental prosecutions).

61. 33 U.S.C. § 1251(a) (1992).

62. 33 U.S.C. §§ 1251-1387 (1982 & Supp. 1987).

63. 33 U.S.C. § 1319(c)(1) (1982 & Supp. 1987).

64. 33 U.S.C. § 1319(c)(2) (1982 & Supp. 1987).

65. 33 U.S.C. §§ 1319(c)(1), (2). Congress doubles these penalties for recidivists. *Id.*

66. 33 U.S.C. § 1319(c)(3) (1982 & Supp. 1987).

67. Individuals face a 15-year term and a \$250,000 fine. Corporate offenders could receive up to a \$1,000,000 fine. *Id.*

68. 33 U.S.C. § 1319(c)(3)(B)(i)(I).

but may use it as circumstantial evidence to prove the defendant's knowledge.<sup>69</sup> Finally, it is an affirmative defense if a defendant can prove by a preponderance of the evidence that the endangered individual consented to the "reasonably foreseeable hazard."<sup>70</sup>

Courts have written few opinions construing the CWA's recent modifications.<sup>71</sup> Many cases, however, interpret the CWA in its preexisting form. These earlier cases provide excellent guidance on "negligent" prosecutions under the modified CWA. For example, in *United States v. Marathon Development Corp.*,<sup>72</sup> Marathon owned several acres of land including 20 acres of federally protected wetlands on which it intended to build a shopping mall. The CWA requires a special permit before anyone can fill "wetlands." Marathon had a "headwaters nationwide permit"<sup>73</sup> and bulldozed five acres of the wetlands. The court held the headwaters nationwide permit inapplicable, and affirmed a \$100,000 corporate fine, as well as a \$10,000 fine and a six-month suspended sentence on Marathon's senior vice president.<sup>74</sup>

*Marathon* falls easily within the CWA's provisions; but other cases applying the negligence provision have more sympathetic facts. For example, in *United States v. Frezzo Bros., Inc.*,<sup>75</sup> two mushroom farmers built a storm water runoff system to catch the overflow from a holding tank containing wastewater for fertilizer. The runoff system was too small to catch all the drainage during hard rains. Indeed, during a few hard rains, the wastewater polluted a nearby creek. The Frezzo brothers each received a 30-day jail sentence and \$50,000 aggregate fine.<sup>76</sup>

The CWA also mandates immediate government notification of an oil or hazardous substance spill upon an individual's notice of the spill.<sup>77</sup> Case law emphasizes the immediacy of disclosure. In *United States v. Ashland Oil & Transportation Co.*,<sup>78</sup> Ashland discharged oil into a small creek at 7:00 p.m. Ashland, knowing that both the EPA and Coast Guard maintained a twenty-

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69. 33 U.S.C. § 1319(c)(3)(B)(i) (1982 & Supp. 1987).

70. 33 U.S.C. § 1319(c)(3)(B)(ii) (1982 & Supp. 1987).

71. In a recent case, *United States v. Wells Metal Finishing, Inc.*, 922 F.2d 54 (1st Cir. 1991), the defendant was convicted of "knowingly" discharging excessive amounts of zinc and cyanide into its waste water system. The trial court using the sentencing guidelines, enhanced the sentence to include probation for one year and a \$60,000 fine for the institutional defendant. The First Circuit upheld the sentence. *First Circuit Upholds Sentence Imposed for Criminal Clean Water Act Violations*, 21 ENV'T REP. (BNA) 1649 (Jan. 11, 1991). See also *Supreme Court Denies Pozsgai Review, Lets Criminal Wetlands Conviction Stand*, 21 ENV'T REP. (BNA) 1117 (Oct. 5, 1990) (three years' imprisonment and \$200,000 fine for covering a five-acre creek on his own property); *United States v. Ocean Spray Cranberries, Inc.*, No. 87-129MC (D. Mass.) (knowing and negligent discharge of waste water).

72. 867 F.2d 96 (1st Cir. 1989).

73. See 33 C.F.R. § 330.5(a)(26) (1982 & Supp. 1986) (authorizing activity of discharging dredged or fill material into nontidal waters above headwaters).

74. *Marathon Dev. Corp.*, 867 F.2d at 98.

75. 602 F.2d 1123 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

76. *Id.* at 1124, 1129.

77. 33 U.S.C. § 1321(b)(5) (1982 & Supp. 1987). The statute in pertinent part reads:

Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility ... immediately notify the appropriate agency of the United States Government of such discharge.

*Id.*

78. 504 F.2d 1317 (6th Cir. 1974).

four hour telephone service, did not report the spill until 10:10 a.m. the next day. This 15-hour gap did not meet the immediacy requirement.<sup>79</sup>

### ***B. Resource Conservation and Recovery Act (RCRA)***

The RCRA establishes a "cradle to grave" program for the transportation, treatment, storage, and disposal of hazardous waste.<sup>80</sup> In 1984 and 1986, Congress amended the RCRA's criminal provisions.<sup>81</sup> These changes greatly expanded the breadth of criminal activity and its penalties.<sup>82</sup> Unlike the CWA, the RCRA's criminal provisions proscribe only "knowing" violations. The RCRA does not provide for negligent violations.

Knowing violations subject an individual to a possible \$50,000 per-day fine and five-year jail term.<sup>83</sup> The RCRA also has a knowing endangerment provision which makes it a crime for any person who knowingly violates the RCRA to simultaneously "place[] another person in imminent danger of death or serious bodily injury ...."<sup>84</sup> The statute identifies maximum individual penalties of 15 years in jail and a \$250,000 fine. Corporate fines can reach one million dollars.<sup>85</sup>

At a minimum, defendants must have knowledge of their actions to "knowingly" violate the RCRA.<sup>86</sup> Defense lawyers argue that "knowingly" connotes specific intent or knowledge of one's actions and knowledge that these actions violate the law. For public welfare crimes, however, courts require only knowledge of one's actions.<sup>87</sup> In fact, courts construe the knowledge necessary for public welfare crimes liberally. The term "knowing" encompasses "willful blindness" which Congress defines as deliberate ignorance about the conditions, requirements and circumstances within which one is working.<sup>88</sup> Many courts deem knowledge and willful blindness synonymous.

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79. *Id.* at 1320, 1330. In a recent case, Pennwalt Corporation pled guilty to a violation of 33 U.S.C. § 1321(b)(5). In January 1985, a 180,000-gallon Pennwalt storage tank ruptured and ultimately discharged its contents into a waterway. The tank contained sodium chlorate, a nonhazardous substance used in the manufacturing of pulp. Pennwalt, however, used sodium dichromate, a listed hazardous substance, in its manufacturing process. Pennwalt called the Coast Guard immediately but failed to inform them the spill contained sodium dichromate. The Coast Guard discovered this fact the next day. This case shows the importance of understanding the small details of one's business and planning for every type of scenario. *Interview, David Vance Marshall, Attorney, Davis, Wright & Jones, Seattle, Washington*, CORP. CRIME REP. 13, 13-14 (Aug. 14, 1989).

80. See generally Harris et al., *supra* note 48.

81. 42 U.S.C. § 6901-6987 (1982 & Supp. 1988).

82. 42 U.S.C. § 6928(d) (1982 & Supp. 1986).

83. *Id.* (violation of some provisions carries a maximum two-year sentence).

84. 42 U.S.C. § 6928(e).

85. *Id.*

86. Harris et al., *supra* note 54, at 216.

87. See, e.g., *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986) ("[I]t is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions."); *United States v. Flores*, 753 F.2d 1499, 1505 (9th Cir. 1985) (neither proof that the defendant knew the law nor specifically intended to violate the law is required).

88. H.R. Rep. No. 198 (Part III), 98th Cong., 2d. Sess. pt. III at 9 (1984), reprinted in 1984 U.S. C.C.A.N. 5576, 5644.

mous.<sup>89</sup> When prosecutors couple "willful blindness" with the collective knowledge theory of corporate liability, proving knowledge is quite simple.

The extent of "knowledge" the RCRA requires is a matter of substantial debate. The primary cause for the distress is § 6928(d)(2) which makes criminal:

Any person who ... *knowingly* treats, stores, or disposes of any hazardous waste ...—  
(A) without a permit ...; or  
(B) in *knowing* violation of ... such permit; or  
(C) in *knowing* violation of ... any applicable interim status regulations or standards.<sup>90</sup>

The courts have had difficulty construing this provision due to the absence of a knowledge requirement under subheading (A). Specifically, courts question whether knowledge of a facility's permit status is an element of § 6928(d)(2)(A). Three circuit courts confronted this issue and each interpreted it differently.

The Ninth Circuit Court of Appeals, in *United States v. Hoflin*,<sup>91</sup> held that knowledge of a facility's lack of a permit is not an element of § 6928(d)(2)(A). The court reasoned that it could not construe the absence of the word "knowing" as accidental. Rather, it applied a strict interpretation of the statute's plain language which makes it unnecessary for a defendant to have knowledge of a facility's lack of a permit.<sup>92</sup>

The Third Circuit Court of Appeals, in *United States v. Johnson & Towers, Inc.*,<sup>93</sup> held that a defendant must have knowledge that the waste material was hazardous and knowledge of permit status.<sup>94</sup> The court read the knowledge requirement into § 6928(d)(2)(A) rationalizing that Congress probably would not want individuals criminally prosecuted who acted unknowingly about a permit's existence.<sup>95</sup> Imposing the knowledge requirement upon all elements of the offense would make § 6928(d) a specific intent crime. The court noted, however, that proving a defendant acted knowingly is not a difficult burden. The jury can infer knowledge, even knowledge about a permit status, especially for people who hold responsible positions within the business.<sup>96</sup>

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89. See, e.g., *United States v. Aleman*, 728 F.2d 492, 494 (11th Cir. 1984) (in possession and sale of controlled substances case, jury could infer knowledge from deliberate ignorance of knowledge); *United States v. Weiner*, 578 F.2d 757, 786-87 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (insider trading).

90. 42 U.S.C. § 6928(d)(2) (1982 & Supp. 1986) (emphasis added).

91. 880 F.2d 1033 (9th Cir. 1989).

92. *Id.* at 1038-39 (declined to follow *Johnson v. Towers*). In *United States v. Speach*, No. 90-50708 (9th Cir. Mar. 20, 1992), *withdrawn*, May 11, 1992, *superseded by* 968 F.2d 795 (9th Cir. 1992), the Ninth Circuit again declined to follow *Johnson & Towers* and followed precedent established in *Hoflin*.

93. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

94. *Id.* 741 F.2d at 668-69.

95. *Id.*

96. *Id.*

The Eleventh Circuit Court of Appeals, in *United States v. Hayes International Corp.*,<sup>97</sup> required a defendant's knowledge of permit status.<sup>98</sup> The court defined knowledge as awareness "that that result is practically certain to follow from his conduct, whatever his desire may be as to that result."<sup>99</sup> The court reasoned that removing the knowledge requirement would criminalize innocent, reasonable conduct.<sup>100</sup> The court did not, however, require knowledge that the material was hazardous. As in *Johnson & Towers*, the court stated that the government's burden in proving knowledge of permit status was not difficult. Knowledge does not require certainty; instead, a juror may infer that a defendant knew or reasonably should have known that the receiving facility did not have a permit.<sup>101</sup>

In summary, courts may or may not require knowledge concerning a facility's permit status. Although courts probably will not require knowledge that the transported substance is hazardous waste, jurors can infer knowledge from a defendant's responsible position in a corporation handling hazardous substances. This alone may be sufficient to raise the inference of knowledge.

There are no reported opinions that construe the details of the RCRA's knowing endangerment provision. Congress, however, explains the basic requirements as follows:

The proposal involves a two-step inquiry. The first step involves a showing that the defendant knowingly engaged in conduct which violates certain statutory prohibitions or interim permit standards. If he did so the next inquiry is whether his knowledge at the time about the consequences of his violation satisfied one of the two "tiers" of culpability that may subject him to prosecution for felonious endangerment.

...

In [any] event, the endangerment offense depends upon a showing that a natural person actually knew that his conduct at that time placed another person in imminent danger of death or serious bodily injury.<sup>102</sup>

In *United States v. Protex Industries, Inc.*,<sup>103</sup> the Tenth Circuit Court of Appeals affirmed the first conviction under the knowing endangerment provision. Protex operated a drum recycling facility. Many of these drums carried hazardous waste. As a result of inadequate safety procedures, three employees contracted an irreversible brain disorder.<sup>104</sup>

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97. 786 F.2d 1499 (11th Cir. 1986).

98. *Id.* at 1504.

99. *Id.* quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978), quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW 196 (1972).

100. *Hayes*, 786 F.2d at 1504.

101. *Id.*

102. *Joint Explanatory Statement of the Committee of Conference*, H.R. Conf. Rep. No. 96-144, 96th Cong., 2d Sess. 5 (1980), reprinted in 1980 U.S. C.C.A.N. 5028, 5037. The "two tiers" discussed are (1) placing a person in imminent danger of death; or (2) placing a person in imminent danger of serious bodily injury.

103. 874 F.2d 740 (10th Cir. 1989).

104. *Id.* at 743-44. The first conviction of an individual as opposed to a corporation occurred in *United States v. Tumin* (S.D.N.Y.) [See *Business Crime Commentary: Environmental Law Prosecutions: Recent Federal Cases, infra* note 156]. In that case, the defendant purchased unpermitted hazardous waste for the manufacture of cocaine. Violation of a series of environmental crimes also satisfies the RICO statute.

## IV. PROSECUTION OF ENVIRONMENTAL CRIMINAL LAWS IN ARIZONA

The state of Arizona has criminal environmental statutes, but few reported decisions interpreting these laws.<sup>105</sup> The criminal division of the Arizona Attorney General's Office has obtained sixty convictions and guilty pleas since 1984 and sent four people to jail for terms as long as 120 days.<sup>106</sup> Enforcement of Arizona's environmental criminal laws will continue to increase in the near future.<sup>107</sup>

### *A. Hazardous Waste Law*

Arizona's hazardous waste laws, modeled closely after the RCRA, make it a crime for any person to intentionally or recklessly treat, store, transport or dispose of hazardous waste without authority.<sup>108</sup> It also criminalizes the transportation of hazardous waste to a facility unauthorized to receive hazardous waste.<sup>109</sup> An intentional violation subjects an individual to a possible two-and-one-half-year jail term and a \$150,000 fine. A reckless violation has a maximum 1.87-year jail term and a \$150,000 fine. Arizona's hazardous waste act also contains a criminal endangerment provision. Any person who "knowingly or recklessly manifests an extreme indifference for human life" while committing any of the above violations faces a potential ten-year jail term and \$150,000 fine.<sup>110</sup>

### *B. Clean Water Law*

Arizona modeled its criminal provisions of the water pollution laws closely after the Clean Water Act.<sup>111</sup> The provisions allow prosecution for either knowing or negligent violations. A crime occurs if any person knowingly or negligently discharges a hazardous substance without a permit, or violates a water quality standard or discharge limitation.<sup>112</sup> It is also a crime if any person fails to monitor, sample or report a discharge.<sup>113</sup> Knowing violations subject an individual to a possible two-and-one-half-year jail term and \$150,000 fine. A negligent violation carries a 1.87-year and \$150,000 ceiling. The water pollution provision also contains an endangerment provision.<sup>114</sup> Any

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105. On two occasions, courts have construed Arizona's air pollution provisions. *See* *State v. Arizona Mines Supply Co.*, 107 Ariz. 199, 484 P.2d 619 (1971); *Ashton Co., Inc. v. Jacobson*, 19 Ariz. App. 371, 507 P.2d 983 (1973) (now codified at ARIZ. REV. STAT. ANN. § 49-502). In a recent case, the Arizona Supreme Court confronted an alleged criminal violation of Arizona's hazardous waste law. *See State v. Ybarra*, 161 Ariz. 188, 777 P.2d 686 (1989). The court held a hazardous chemical report prepared by an expert retained by defense counsel was protected by the work product doctrine. *Id.*

106. Testimony of Patrick Cunningham, Chief Environmental Protection Unit, Arizona Attorney General's Office, before Environment Committee of Arizona House of Representatives, April 22, 1992.

107. *Deterrence and Public Awareness*, *supra* note 4, at 804 (Arizona enforcement program began in 1984).

108. ARIZ. REV. STAT. ANN. § 49-925(A)(3) (West Supp. 1991).

109. ARIZ. REV. STAT. ANN. § 49-925(A)(1) (West Supp. 1991).

110. ARIZ. REV. STAT. ANN. § 49-925(A) (West Supp. 1991).

111. ARIZ. REV. STAT. ANN. §§ 49-201 to -391 (West Supp. 1991).

112. ARIZ. REV. STAT. ANN. §§ 49-263(A)(1), (3)-(4), (B),(C) (1988).

113. ARIZ. REV. STAT. ANN. §§ 49-263(A)(2) (1988).

114. ARIZ. REV. STAT. ANN. § 49-263(D) (1988).

person who "knowingly or recklessly manifests an extreme indifference for human life" in violating any of the above crimes faces a maximum fourteen years' imprisonment and \$150,000 fine.<sup>115</sup>

### C. Air Quality Act

The Arizona Air Quality Act<sup>116</sup> was substantially revised in 1992. In particular, the criminal enforcement provisions were increased substantially from misdemeanors to felonies.<sup>117</sup> While most of the amendments become effective on September 1, 1993, the criminal enforcement provisions do not go into effect until November 1, 1994.

The amendments allow prosecution for either knowing or negligent violations. The felonies primarily are class five and class six offenses. However, if any person knowingly releases into the ambient air any extremely hazardous substance, and knows at the time that he or she places another person in imminent danger of death or serious bodily injury, prosecution for a class two felony can ensue.<sup>118</sup>

The class five felonies include the operating of a pollution source without a permit, violating an emissions standard, violating an effective order of abatement, altering or modifying a performance test, and altering or modifying a monitoring device. Those offenses which constitute class six felonies include commencing construction of a pollution source without a permit, failing to maintain a monitoring device, and operating a state-regulated-only pollution source without a permit.

The Air Quality Act amendments also include two interesting and effective affirmative defenses. First, there is an affirmative defense to any prosecution for violating an emissions standard or opacity standard where the violation is reported verbally or by facsimile notification within twenty-four hours and the verbal or facsimile notification is followed with a written notification within seventy-two hours after the source first learned of the violation.<sup>119</sup> Second, there is an affirmative defense to any prosecution for operating a pollution source or commencing construction of a source without a permit when the source seeks to obtain a permit and the permitting authority advises that no permit is necessary.<sup>120</sup>

The amendments to the Act also make clear that a violation, which continues for more than one day but results from a single act or series of related acts, constitutes the commission of only one offense.<sup>121</sup> Finally, as to mental intent, the state is required to prove actual knowledge of the circumstances constituting each element of an offense where there is a knowing violation. The actual knowledge may be proved by either direct or circumstantial

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115. *Id.*

116. ARIZ. REV. STAT. ANN. §§ 49-401 to -571 (1988 & Supp. 1991) amended by Act of July 10, 1992, ch. 299, sec. 1-69, 1992 Ariz. Legis. Serv. 1619-96 (West).

117. Act of July 10, 1992, ch. 299, sec. 34, § 49-464, 1992 Ariz. Leg. Serv. 1662-65 (West) (to be codified at ARIZ. REV. STAT. ANN. § 49-464) (Act effective September 1, 1993, relevant provision effective from October 31, 1994).

118. Act of July 10, 1992, ch. 299, sec. 34, § 49-464(A).

119. Act of July 10, 1992, ch. 299, sec. 34, § 49-464(Q).

120. Act of July 10, 1992, ch. 299, sec. 34, § 49-464(R).

121. Act of July 10, 1992, ch. 299, sec. 34, § 49-464(M).

evidence but may not be inferred merely by the person's position within the business enterprise.<sup>122</sup>

## V. ENVIRONMENTAL OFFENSES UNDER THE FEDERAL SENTENCING GUIDELINES

### A. *Organizational Guidelines*

On November 1, 1991, Congress amended the Federal Sentencing Guidelines and added a new chapter that applies strictly to organizations.<sup>123</sup> Since 1987, sentencing guidelines have existed for crimes committed by individuals. According to the United States Sentencing Commission, the primary purpose of the organizational guidelines is to promote fair punishment and adequate deterrence.<sup>124</sup> The individual guidelines serve the same purposes. The organizational guidelines also identify a new goal of providing "incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."<sup>125</sup>

To achieve these three independent goals, the organizational guidelines set forth several principles. First, through restitution or remediation, organizations must remedy the harm caused by a violation. Second, courts should divest their organizations of assets "operated primarily for a criminal purposes or primarily by criminal means." Third, the fine range should reflect the seriousness of the offense and the organization's culpability.<sup>126</sup> Because courts cannot imprison an organization, the Guidelines also provide sentencing options which include notice to victims,<sup>127</sup> profit disgorgement,<sup>128</sup> restitution,<sup>129</sup> and organizational probation.<sup>130</sup>

To determine the appropriate penalty for an organization, courts first determine the base fine amount, or for individual perpetrators, the base offense level.<sup>131</sup> Courts adjust the base level either upward, to increase the penalty, or downward, depending upon "specific offense characteristics." These adjustments are called "departures." For example, judges depart upward, or increase the base level, for an RCRA violation when the conduct is "ongoing, continuous, or repetitive."<sup>132</sup> Conversely, courts decrease the base level for an offense when the violation is a "simple record keeping or reporting viola-

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122. Act of July 10, 1992, ch. 299, sec. 34 § 49-464(U).

123. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL ch. 8 (1992) [hereinafter U.S.S.G.].

124. *Id.*, intro. cmt.; *see generally*, Benson B. Weintraub & Alan J. Chaset, *Federal Sentencing Guidelines for Organizations*, THE CHAMPION, May 1992, at 6.

125. *Id.*

126. *Id.*

127. U.S.S.G. § 5F1.4 (courts may require the organization to notify unidentified victims of the offense).

128. U.S.S.G. § 8C2.9 (courts add any gain the organization received from the offense, not paid as restitution or another remedial measure, to the fine).

129. U.S.S.G. § 8B1.1 (courts may require the organization to compensate identifiable victims of the offense).

130. U.S.S.G. § 8D1.1

131. Chapter Two of the Sentencing Guidelines identifies the base offense levels for each federal crime. U.S.S.G. § 8C2.4 Environmental offenses are covered in Part G of Chapter Two.

132. U.S.S.G. § 2Q1.2 (six-level increase from eight to 14).

tion.”<sup>133</sup> The guidelines also provide for departures, either downward or upward, when a court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”<sup>134</sup>

Once a court determines the base offense level, it sets the base fines. For organizations, a judge determines the greater of the statutory fine,<sup>135</sup> the organization’s pecuniary gain from the offense, or the pecuniary loss caused by the organization.<sup>136</sup> Courts generally fine organizations at a higher rate than individuals. As a final step, courts assign a “culpability score” to measure the organization’s involvement in, or tolerance of, the misconduct.<sup>137</sup> Judges use the culpability score to determine the appropriate “fine multiplier” which ranges from a minimum of one-half to a maximum of four.<sup>138</sup> One can determine the minimum and maximum guideline fine range by multiplying the base fine by the multiplier.<sup>139</sup>

Organizations can reduce the fine multiplier through the implementation of an effective compliance program. A company with such a preventive program should receive considerable mitigation credit despite employee misconduct. The guidelines do not identify a recommended compliance program; however, they do provide substantial guidance on the types of programs considered sufficient.<sup>140</sup> To qualify for mitigation credit, the organization must show that it has “exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.”<sup>141</sup>

The Guidelines have a chapter that covers environmental offenses.<sup>142</sup> At this point, however, only the restitution and probation sections apply to organizations. The commission deferred creation of the fine matrix for environmental offenses because these crimes “can result in massive, unintended, and unforeseen consequences,” thereby requiring courts to assess staggering fines based on damage to the environment. The Valdez oil spill is an example where a court would have to fine Exxon many billions of dollars. The

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133. *Id.* Two-level reduction.

134. U.S.S.G. Ch. 8, Pt.C.4, intro. cmt.; U.S.S.G. § 5K2.0.

135. U.S.S.G. § 8C2.4(d). The offense level fine table contains 38 steps beginning at \$5,000 and increasing incrementally to \$72,500,000.

136. U.S.S.G., § 8 C2.4(a).

137. U.S.S.G. § 8C2.5. Each offender starts with five culpability points. Based upon a number of aggravating and mitigating factors courts add or subtract the points. Aggravating factors may include: (1) involvement of a high ranking organization official in the misconduct; (2) the organization committed a criminal offense within past ten years; and (3) the organization committed the offense in violation of a judicial order or injunction. Mitigating factors may include: (1) presence of an effective program to prevent and detect law violations, except where responsible compliance program officials participated in or were willfully ignorant of the offense or if after becoming aware of the offense, the organization unreasonably delays reporting the offense; and (2) self-reporting, cooperation, and acceptance of responsibility by the organization. *Id.*

138. U.S.S.G. § 8C2.6. For example, if the culpability score is zero, the minimum multiplier is 0.05 and the maximum multiplier is 0.20. If the culpability score is 10 or more, the minimum multiplier is 2.00 and the maximum is 4.00.

139. U.S.S.G. § 8C2.7.

140. U.S.S.G. § 8A1.2, cmt. 3(k).

141. *Id.*

142. See U.S.S.G. §§ 2Q1.1–2.1.

Commission has identified a task team to study the issue and requested a report by early 1992.<sup>143</sup>

### *B. Individual Guideline Sentences for Environmental Violations*

Since Congress passed the Federal Sentencing Guidelines in 1987, courts have authored hundreds of opinions that detail the rationale for upward or downward departures. Only a few guidelines cases interpret the appropriate sentence for an environmental law conviction. The Sixth Circuit Court of Appeals provides the best example in *United States v. Rutana*,<sup>144</sup> where the defendant pled guilty to eighteen counts of knowingly discharging pollutants into the public sewer in violation of the CWA.<sup>145</sup> The potential exposure for each violation consisted of three years' imprisonment and a \$50,000 per day fine.<sup>146</sup> The presentence report indicated a base guideline offense level of eighteen<sup>147</sup> and a criminal history category of one<sup>148</sup> which required between twenty-seven and thirty-three months of imprisonment. Despite that, the district court sentenced the defendant to five years' probation, 1,000 hours of community service and a \$90,000 fine, rationalizing that the defendant owned a business that employed several people. On appeal, the court reversed, stating that the Sentencing Guidelines do not allow a sentence determination based upon socioeconomic status.<sup>149</sup>

Two other opinions provide additional excellent examples of appropriate upward and downward departures for environmental convictions. In *United States v. Sellers*,<sup>150</sup> a jury convicted the defendant of sixteen counts of improper disposal of hazardous waste under the RCRA. The district court determined each count carried a base offense level of eight. The court departed upward four levels simply because the crime involved a discharge of a hazardous substance.<sup>151</sup> The appellate court affirmed a forty-one-month sentence. Similarly, in *United States v. Bogas*,<sup>152</sup> the defendant pleaded guilty to one count of violating the Federal Comprehensive Environmental Response,

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143. ABA, NATURAL RESOURCES, ENERGY, AND ENVIRONMENTAL LAW 1991: THE YEAR IN REVIEW 159 (1992).

144. 932 F.2d 1155 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 300 (1991).

145. See Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in 33 U.S.C.).

146. *Rutana*, 932 F.2d at 1157.

147. The report's calculation was as follows:

(1) Base offense level of eight (8) for mishandling of hazardous or toxic substances under U.S.S.G. § 2Q1.2(a). (2) Increase by six (6) levels, for repetitive discharge, under U.S.S.G. § 2Q1.2(b)(1)(A). (3) Increase by four (4) levels, for disruption of a public utility, under U.S.S.G. § 2Q1.2(b)(3). (4) Increase by two (2) levels, for playing a leadership role in the activity, under U.S.S.G. § 3B1.1(c). (5) Decrease by two (2) levels, for acceptance of responsibility, under U.S.S.G. § 3E1.1(a).

*Id.*

148. Defendant had no prior offense history.

149. The Sentencing Guidelines will certainly have a dramatic impact on the length of sentences received and arguably upon the deterrent effect of these laws. *1990 Record Year for Criminal Enforcement of Environmental Violators, Justice Announces*, 21 ENV'T REP. (BNA) 1397 (Nov. 23, 1990) ("The reality for many corporate managers is they know that under the current sentencing guidelines a first time violation will lead to jail time").

150. 926 F.2d 410 (5th Cir. 1991).

151. *Id.* at 417. (citing U.S.S.G. § 2Q1.2).

152. 920 F.2d 363 (6th Cir. 1990).

Compensation And Liability Act of 1980 (CERCLA) and one count for false claims and the appellate court reversed a sentence of six months of house arrest, four years' probation and 1,000 hours of community service.<sup>153</sup> Although the base offense level was twenty-four, the district court departed downward to a base offense level of ten because it found the cleanup costs minimal. The appellate court found the sentence inadequate and remanded for a new, higher sentence.<sup>154</sup>

The lack of written opinions should not mislead a person into believing the government is ignoring the environmental laws. Far from it. Rather, prosecutors frequently charge individuals with traditional crimes such as mail fraud, wire fraud, false claims or Racketeer Influenced and Corrupt Organizations (RICO). This allows prosecutors to simplify the case for the jury while simultaneously obtaining longer sentences under the guidelines. In *United States v. Paccione*,<sup>155</sup> for example, the trial court sentenced two defendants for RICO and mail fraud violations both involving the improper disposal of medical waste.<sup>156</sup> The appellate court affirmed a sentence for each defendant of the maximum 151 months' imprisonment.<sup>157</sup> Likewise, in *United States v. Ewing*,<sup>158</sup> the district court sentenced an employee of an environmental services company to ten months' imprisonment and fined him nearly \$53,000 for submitting a false claim to the EPA regarding the company's pollution liability insurance coverage.<sup>159</sup> These cases make clear that individuals must take environmental crimes seriously, especially under the Federal Sentencing Guidelines.

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153. CERCLA is encoded at 42 U.S.C. § 9603(b) (1988).

154. 920 F.2d at 367-69. The prosecution appealed, arguing that clean-up costs amounted to \$350,000, not \$10,300 as the defendant estimated. The court remanded because (1) The base offense level was eight; (2) an upward departure for the release of hazardous pollutants increases this by four levels; (3) a two-level upward departure for the disruption of a public utility was appropriate; and (4) the court should order additional restitution to force the defendants to pay for the complete remediation plan.

155. 949 F.2d 1183 (2d Cir. 1991).

156. Violation of a series of environmental crimes satisfies the RICO statute. *United States v. Paccione*, No. SSS 89 Cr. 446 (S.D.N.Y. June 8, 1990). See *Criminal Enforcement: Two Men Receive 12-Year Sentences for Operating Illegal Staten Island Landfill*, 21 ENV'T REP. (BNA) 1151 (Oct. 12, 1990) (operation of illegal 70-acre landfill where the defendants dumped garbage, asbestos, medical, and infectious waste); *United States v. McDonald & Watson Waste Oil Co.*, No. 88 Cr. 32 (D.R.I.). See Stanley S. Arkin & Jeffrey M. Kaplan, *Environmental Law Prosecutions: Recent Federal Cases*, 26 BUSINESS CRIME COMMENTARY (1989) (conspiracy to transport hazardous waste which the defendant eventually buried in ditches).

157. *Paccione*, 949 F.2d at 1202. The district court computed a base offense level of 32, which carries a range of between 121 and 151 months' imprisonment.

158. 957 F.2d 115 (4th Cir. 1992).

159. *Id.* at 117.

## VI. DECREASING THE POSSIBILITY OF ENVIRONMENTAL CRIMINAL LIABILITY: INSTITUTION OF ENVIRONMENTAL AUDITS AND INTERNAL CORPORATE POLICIES

### A. Environmental Audits

The EPA encourages regular environmental audits in order to limit the possibility of criminal environmental liability.<sup>160</sup> "Environmental auditing is a systematic, documented, periodic and objective review ... of facility operations and practices ...."<sup>161</sup> Traditional environmental audits focus upon corporate regulatory compliance to avoid corporate criminal liability.<sup>162</sup> Assuring compliance, however, requires procedures that go well beyond traditional environmental audits.<sup>163</sup> With the prosecution of corporate officials on the rise, the use of environmental audits should also ensure individual protection.<sup>164</sup>

Advanced audits should assess the corporation as the government would. This requires a company to seek out internal conflict with environmental laws, review the company's past history of regulatory compliance, and use audit results both as an educational tool and an instrument of change.<sup>165</sup> Although one cannot rely on audits as a complete defense, they are an effective method to ensure environmental compliance. Audits place corporations on notice of additional procedures they need to implement in order to ensure regulatory compliance. If a company does not use the information derived to institute change, however, an environmental audit simply forewarns of future prosecution.<sup>166</sup>

Environmental audit systems inherently raise questions of privilege. Companies must consider these issues when they draft an audit plan. For example, companies must consider the attorney-client privilege. This privilege protects confidential communications between attorney and client, but it extends only to a narrow definition of communications.<sup>167</sup> Additionally, environmental audits may implicate the work product doctrine.<sup>168</sup> This doctrine provides unqualified protection of materials prepared "in anticipation of litigation,"<sup>169</sup> which an opposing party can pierce by a showing of substantial need

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160. 51 Fed. Reg. 25,004, 25,006 (July 9, 1986) (EPA encourages but does not mandate auditing).

161. *Id.*

162. Starr, *supra* note 1, at 21-22.

163. 51 Fed. Reg. 25,004.

164. *Id.* at 25,006 (Audits can be designed to accomplish any ... of the following: verify compliance ...; evaluate the effectiveness of environmental management systems already in place; ... assess risks from ... materials and practices[.] ... help improve ... environmental management.) *Id.*

165. Starr, *supra* note 1, at 21-22. "[E]nvironmental audits are only part of a successful environmental management program ...." 51 Fed. Reg. 25,004.

166. Starr, *supra* note 1, at 22-23. "An effective audit will include a microscopic examination into applicable environmental laws and the ways in which a corporation is or is not complying with those laws." Mollenkamp & Owens, *supra* note 12, at 120.

167. *Upjohn Co. v. United States*, 449 U.S. 383, 392-96 (1981), requires that communications consist of four elements: (1) one must seek legal advice; (2) the communication must be between attorney and client; (3) the communication must be kept confidential; and (4) the privilege must not be waived.

168. Encoded at FED. R. CRIM. P. 26 (b)(3).

169. *Hickman v. Taylor*, 329 U.S. 495 (1947). See FED. R. CRIM. P. 26(b)(3).

or undue hardship.<sup>170</sup> Companies may waive their inherent work product protections when they disclose audit reports.

Prosecutors have successfully argued that facts uncovered during an audit are not protected.<sup>171</sup> In response, the Department of Justice is developing a program to encourage environmental audits while simultaneously preventing a company from using evidentiary privileges to their advantage.<sup>172</sup> As a result, companies should take care to create an appropriate audit system that takes advantage of evidentiary privileges when possible and convinces the enforcement authorities of the company's intent to adhere to sound environmental practices.<sup>173</sup>

The EPA policy of encouraging audits would be hollow if prosecutors had free access to the reports. Therefore, the EPA announced it will not routinely request audit reports.<sup>174</sup> EPA limited its authority to request an audit report to specific situations. The EPA gave examples of when it may request information from the report. Examples include: "audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation."<sup>175</sup> In addition, these requests, rather than seeking the entire report, will focus on particularized information.<sup>176</sup>

Although the EPA's policy of not requesting audit reports provides only a qualified immunity, the EPA has made a strong statement encouraging environmental audits.<sup>177</sup> Therefore, it is highly unlikely the EPA would turn around and use these audits as a means of incriminating companies. The EPA, however, has not reduced its willingness to conduct regular inspections.<sup>178</sup>

### *B. Internal Corporate Policies*

Instituting a corporate environmental compliance policy has a major effect on whether the government will institute criminal prosecution.<sup>179</sup> As an

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170. See *United States v. Brown*, 478 F.2d 1038, 1041 (7th Cir. 1973).

171. *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984) (internal analysis of contingent tax liability not protected by the attorney client privilege).

172. See *United States v. Chevron U.S.A., Inc.*, No. 88-6681 (E.D. Pa. Oct. 16, 1989).

173. See Daniel Riesel, *Criminal Prosecution and the Regulation of Hazardous Substances*, 21 CHEM. WASTE LIT. REP. 964, 978 (May 1991).

174. 51 Fed. Reg. at 25,007.

175. *Id.* Companies cannot, however, use audit reports to shield monitoring compliance. Companies must continue to monitor records and reports as legally obligated. *Id.*

176. *Id.*

177. *Id.* at 25,006. The EPA also articulated specific goals of an environmental audit. Among these goals are: (1) to develop corporate environmental policies; (2) to train employees to work in an environmentally safe manner; (3) to communicate change in environmental laws to those implementing these laws; (4) to communicate efficiently and effectively with state and federal governments; (5) implementation of the best available technology for compliance purposes; and (6) evaluation of causes behind serious environmental incidents and establishment of procedures to avoid recurrence. *Id.* at 25,009-10.

178. *Id.* at 25,007. The EPA will inspect companies with poor environmental policies more frequently. *Id.*

179. Mollencamp & Owens, *supra* note 12, at 135-36.

example, a major national chemical company experienced three criminal investigations in one year. The alleged violations arose out of employee misconduct. Two of the investigations were dropped because the employee violated a strong company policy of complying with environmental regulations.<sup>180</sup> Therefore, prosecutors, through their inherent discretion, have identified strict company policies as a defense to the institution of corporate environmental charges when the company can prove the employee acted in an *ultra vires* manner thereby violating the policy.

Corporations, as a result, should disseminate their environmental policies to all employees. Employees should also undergo an educational program to ensure awareness of the policies and the potential consequences of violating them. Documentation of corporate policies, training of employees to implement the policies and periodic updates to the policies are all important components of ensuring the viability of this defense.<sup>181</sup>

## CONCLUSION

The cobweb of federal and state environmental laws subject each corporation, its officers and employees to potential criminal liability. Once a violation occurs, the prosecution usually has no difficulty proving that both the corporation and its employees possessed the requisite mental state to commit the offense. Broad judicial interpretations of these public welfare crimes continue to make environmental prosecution less complicated. To avoid imprisonment, embarrassment, and loss of corporate profits, the EPA and many others recommend that corporations implement environmental audits and strict compliance policies. More importantly, however, companies must realize that no one is immune from criminal liability, and corporate practices must reflect this fact.

## APPENDIX: LIST OF FEDERAL ENVIRONMENTAL CRIMES

- A. Clean Water Act (CWA): 33 U.S.C. § 1319(c) (Supp. 1992)
- B. Resource Conservation and Recovery Act (RCRA): 42 U.S.C. § 6928(d) (1983)
- C. Clean Air Act: 42 U.S.C. 7413 (Supp. 1983 & Supp. 1992);<sup>182</sup> Clean Air Act Amendments of 1990, § 701(c).
- D. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): 42 U.S.C. § 9603(b) (1983 & Supp. 1992).<sup>183</sup>
- E. Emergency Planning and Community Right-To-Know Act (EPCRA): 42 U.S.C. § 11045(b) (Supp. 1992).
- F. Toxic Substances Control Act (TSCA): 15 U.S.C. §§ 2615(b), 2614(1) (Supp. 1983).<sup>184</sup>

180. *Id.* at 135. The third case is still pending but the company is hopeful of a similar result. *Id.*

181. *Id.*

182. *See Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

183. *Carr*, 880 F.2d at 1550; *United States v. Dembsar*, No. 87 Cr. 116 (D. Colo.) (guilty plea resulting in two years' probation and \$10,000 fine).

184. *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096 (9th Cir. 1985).

G. Occupational Safety and Health Act (OSHA): 29 U.S.C. § 666(e) (1983).<sup>185</sup>

H. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA): 7 U.S.C. § 136i-1(d) (Supp. 1992).<sup>186</sup>

I. Safe Drinking Water Act: 42 U.S.C. § 300h-2(b) (1983).<sup>187</sup>

There are other federal environmental crimes, but these comprise the most important criminal provisions.

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185. *Marshall v. Barlow's, Inc.*, 429 U.S. 1347 (1977); *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975).

186. *United States v. Corbin Farm Service*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978); *United States v. Myers*, 553 F. Supp. 98 (D. Kan. 1982).

187. *United States v. Jay Woods Oil Co.*, No. 87-CR 20012 BC 12 (E.D. Mich. (1990); *Kentucky Corporation, President Indicted; First Criminal Case Under Drinking Water Act*, 21 ENV'T REP. (BNA) 1285 (Nov. 9, 1990) (indictment charges 10 counts of "wilfully constructing and operating five underground injection wells to inject fluids into an underground source of drinking water without obtaining a permit ..."; the president faces 35 years and 2.75 million dollars in fines, and the company may be fined \$5.5 million).