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ENVIRONMENTAL CRIME: THE USE OF CRIMINAL SANCTIONS IN ENFORCING ENVIRONMENTAL LAWS

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In fourteenth century England the Crown prescribed capital punishment for Englishmen who defied a royal proclamation on smoke abatement.[1] More than five hundred years later in the United States, a cadre of investigators and prosecutors at the United States Environmental Protection Agency (EPA) and the United States Department of Justice are actively and successfully prosecuting criminal violations of environmental laws. The United States government has yet to subject its citizens to peril of their lives for environmental violations. However, a growing emphasis on the use of criminal sanctions against environmental polluters in the last decade suggests that their liberty and their fortunes, at least, *are* at risk. The government's criminal environmental law enforcement program has garnered the attention of corporate directors and environmental attorneys who must advise their clients that violation of environmental laws may visit more than bad publicity and civil litigation on a company, its officers and employees. Jail time and substantial fines are a reality which the regulated community must recognize and prepare to confront.

This Article gives an overview of the federal government's increasing use of criminal sanctions in enforcing environmental laws. It briefly traces the historical development of criminal sanctions in environmental cases, summarizes significant provisions and standards of liability in environmental statutes, compares civil and criminal liability issues, and discusses prosecutorial and defense approaches to criminal environmental

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1. *See* Mix, *The Misdemeanor Approach to Pollution Control*, 10 ARIZ. L. REV. 90, 90 (1968).

cases. It focuses more upon a practical perspective than on a strictly scholarly look at legal issues and theories. The authors' goal is to give corporations, individuals and counsel an understanding of—and a management approach to—criminal actions in the environmental area.

I. DEVELOPMENT OF CRIMINAL ENVIRONMENTAL ENFORCEMENT

Environmental statutes generally provide for both civil and criminal enforcement. The relationship and interplay between the two methods have defined and characterized federal criminal enforcement efforts.

A. Civil Enforcement

Prior to 1981, the government's approach to judicial enforcement of environmental statutes and regulations was almost exclusively to seek civil sanctions, penalties and injunctive relief. Little thought was given to using the criminal provisions of environmental statutes or traditional criminal law.[2] From the period from EPA's creation until the mid-1970's, EPA's focus understandably was on drafting and implementing an enormously complicated body of regulations within the tight deadlines imposed by Congress.[3] Since the statutes were not generally self-implementing, there was little law to enforce until EPA's regulations were in place. Moreover, since the primary statutes then administered by EPA—the Clean Air Act[4] and the Clean Water Act[5]—contained deadlines for achieving compliance that had not yet run, there were few violations to prosecute. Thus, in the early 1970's the efforts of the attorneys at EPA and the Department of Justice, which represents EPA on environmental matters, were primarily expended either on defending challenges against EPA's promulgation of regulations or on actions against EPA for its failure to meet statutory deadlines. For these reasons, and because neither EPA nor the Department of Justice budgeted additional resources to conduct enforcement activities, enforcement played a decidedly secondary role to litigation on the compliance and validity of these regulations. The relatively few cases which these agencies did bring fo-

2. For example, only 15 criminal cases were brought between December 1972 and November 1974. *See White Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 169, 370 n.1721 (1980).

3. *See infra* note 8 and accompanying text.

4. Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982 & Supp. I 1983)) [hereinafter cited as Clean Air Act].

5. Federal Water Pollution Control (Clean Water) Act, Pub. L. No. 92-500, 86 Stat. 896 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 & Supp. I 1983)) [hereinafter cited as Clean Water Act].

cused primarily on common law nuisance theories[6] or relied on older, little-used statutes such as the Refuse Act.[7]

In 1977 a confluence of factors brought about an increased emphasis on enforcement at EPA. A new, more activist administration took over the leadership of the Agency. The statutory compliance deadlines in the Clean Air Act and the Clean Water Act arrived,[8] leaving thousands of major souces of air and water pollution in violation of statutory requirements.[9] Moreover, the congressional hearings on the reauthorization of those statutes in 1976 and 1977 made it clear that Congress was impatient with EPA's passive approach to enforcement and compliance deadlines. Finally, EPA and the Department of Justice began to budget increased resources for enforcement.

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6. In Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972), the United States Supreme Court held that federal common law applied to disputes involving "air and water in their ambient or interstate aspects." Nearly a decade later, the Court decided that the enactment of the Clean Water Act, and enforcement action under it had extinguished the need for a federal common law of nuisance in the water pollution field. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

7. The Refuse Act of 1899, ch. 425, 30 Stat. 1121, 1152 (codified as amended in scattered sections of 33 U.S.C.), is a law originally enacted in the nineteenth century which makes illegal the discharge of almost any material into a navigable waterway. Given its expansive wording, the Refuse Act has the virtue of encompassing nearly all discharges, making violations generally clear-cut and relatively easy to establish. The Department of Justice's use of the Refuse Act expanded what was historically believed to be the Act's scope. *See, e.g.*, United States v. Reserve Mining Co., 498 F.2d 1073 (8th Cir. 1974) (Refuse Act utilized to prohibit industrial waste from being discharged into Lake Superior, despite company's possession of a state permit authorizing discharge under certain conditions). This approach formed the basis for many later theories of environmental enforcement. *See* Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 10,065, 10,066-67 (1985); Tripp & Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 ALB. L. REV. 60 (1970).

A Refuse Act prosecution program in the United States Attorney's Office for the Southern District of New York in 1970 utilized multiple count indictments and grand juries to indict industrial wastewater discharges. Targets were selected on the basis of the probable harm from their discharges and their lack of compliance with standards. The program resulted in a dramatic improvement in water quality in the Hudson River Basin and provided a model for later enforcement efforts. *See* Riesel, *supra*, at 10,067 n.17.

The Refuse Act still retains some vitality. The Department of Justice's "Indictments and Convictions" report for fiscal year 1985, for example, shows five convictions under the Act. U.S. Dep't of Justice, Indictments and Convictions, Fiscal Year 1985 (unpublished internal annual statistical report) (copy on file at *Loyola of Los Angeles Law Review* office). See *infra* note 32 for a summary of such figures from 1983-1986.

8. For example, the Clean Water Act contained a July 1, 1977 deadline for attaining levels which would meet the best practicable technology (BPT) standards for industrial discharges. CWA § 301, 42 U.S.C. § 1311 (1982). The Clean Air Act had similar deadlines for criteria pollutants such as particulate matter. *See, e.g.*, CAA § 14, 42 U.S.C. § 7420 (1982).

9. Failure to meet these deadlines was widespread and the state and federal governments mobilized massive resources to bring polluters into compliance.

To address the enforcement dilemma, EPA adopted its Major Source Enforcement Effort (MSEE), a program under which it sought to bring all major violating sources into compliance with the Clean Air Act and the Clean Water Act. The underlying philosophy of the MSEE program was to divide responsibility with the states and to bring as many civil judicial enforcement actions as possible, in order to deter future violations and obtain expeditious compliance with environmental statutes and regulations. In these actions the government sought civil penalties to punish past noncompliance and to remove the competitive advantage and economic incentive realized when an entity or individual disregarded the requirements of environmental statutes. The government's ability to request injunctive relief was facilitated by the fact that many violations could be proved by reports required to be filed by the polluters themselves. Since the statutes contain no scienter requirements for civil enforcement, not surprisingly the government opted primarily for civil prosecutions.[10]

B. Criminal Enforcement

Initially, criminal enforcement was completely derivative of the civil enforcement effort. As discussed above, the primary focus under the government's MSEE strategy was on obtaining compliance as quickly as possible from as many sources as possible.[11] Resources had been budgeted only for civil enforcement cases. Utilization of those resources to support criminal prosecutions knocked a hole in regional EPA budgets and upset the MSEE strategy by reducing the number of civil cases which could be brought.

In the MSEE phase, EPA measured success quantitatively. The relatively greater public visibility and deterrent value of criminal prosecutions were not persuasive in a program whose success was evaluated by the percentage of violators brought into compliance. Moreover, criminal prosecution was within the province of the United States Attorney and the Criminal Division of the Justice Department. Criminal environmental cases were not a priority of those entities nor of the Federal Bureau of

10. According to internal statistics from its Environmental Enforcement Section, the Department of Justice filed 358 civil enforcement suits on behalf of EPA from 1977 to 1980. During the same period it negotiated more than 77 civil judicial consent decrees requiring compliance with the applicable statutory and regulatory scheme. From 1981 to 1985 the government filed 852 civil enforcement actions and entered into 599 judicial consent decrees. Telephone interview with David Buente, Chief, Envtl. Enforcement Section, Land & Natural Resources Div., U.S. Dep't of Justice (Feb. 14, 1986) [hereinafter cited as Buente Telephone Interview].

11. *See supra* text preceding note 10.

Investigation, the primary general investigative law enforcement agency which works hand in glove with local United States Attorneys in the investigation and prosecution of criminal cases.[12]

The absence of a focused criminal enforcement program resulted in the development of criminal cases largely by happenstance: When compliance efforts revealed particularly outrageous or especially culpable behavior; when the entity involved declined to cooperate; or when the circumstances aroused unusual vigilance on the part of enforcement authorities.[13] Interagency tensions developed because of this difference in approaches: In some cases EPA would refer cases to Department of Justice as civil matters only to have the Department of Justice deem them as criminal matters. This forced EPA to devote its scarce resources to supporting a complex criminal investigation and prosecution when it believed that greater compliance would be achieved by focusing on more easily documented, less resource-intensive civil actions. The result was few EPA criminal referrals to the Department of Justice, poor quality and quantity of technical support for such referrals, and little criminal enforcement.

Even while it lacked the resources to undertake a meaningful criminal program, the government did recognize the necessity of a criminal component in its enforcement program. On June 16, 1976, prompted largely by a perceived need to press for criminal sanctions in enforcing the Clean Air Act, EPA issued the first extensive Agency guidelines for proceeding in criminal cases[14] and acknowledged the need for greater vigor in the pursuit of such sanctions.[15] However, the existing inspectors

12. To illustrate how the lack of investigative resources hampered criminal enforcement in this period, in one case during Mr. Ramsey's tenure at the Department of Justice, an Assistant United States Attorney investigating possible interstate movement of hazardous materials was forced to rely on two EPA technicians trailing a tanker truck in their own car.

One reason for this investigative problem is that the FBI jealously guards its role as the Nation's criminal law enforcement agency and resists the development of criminal enforcement capacities at other federal agencies. The Department of Justice similarly insists that it should be the government's lawyer, rather than encouraging procedures that would permit federal agencies such as EPA to bring criminal enforcement actions on its own.

13. One prominent example is a situation which involved mushroom growers in Chester County, Pennsylvania. The mushroom processors deliberately channelled sewage into a creek and ignored repeated warnings from state and county officials. Criminal charges were brought because of the egregiousness of the violations, the obvious intent of the parties to conceal their illegal acts and the dedication of a county employee who was the government's primary investigator. *See* United States v. Oxford Royal Mushroom Prod., Inc., 487 F. Supp. 852 (E.D. Pa. 1980); *see also* United States v. Frezzo Bros., Inc., 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1129 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

14. *See* Office of Criminal Enforcement, Envtl. Protection Agency, Criminal Enforcement Strategy (Draft 1985) [hereinafter cited as Criminal Enforcement Strategy].

15. *Id.* at 8.

and investigators were technically oriented persons whose focus was to bring violators into compliance through cooperation and negotiation. They were not trained criminal investigators and were not comfortable with the notion that air and water pollution could be another type of "white collar" crime.

Nonetheless, the Carter Administration early identified criminal enforcement as an area worthy of attention. In 1978, James W. Mooreman, Assistant Attorney General of the Justice Department's Land and Natural Resources Division, decried the willful violations of environmental laws which EPA's increased facility inspections were uncovering, and stated: "For these transgressions, the Department of Justice has begun to invoke grand jury investigations both against corporations and against individuals. The Department will prosecute criminal conduct in this area."[16]

The increased emphasis on criminal sanctions, at least at a political level, dovetailed with the efforts of the Department of Justice and EPA in attacking the issue of cleanup of hazardous waste disposal in the United States. In 1978, EPA and the Department of Justice formed a Hazardous Waste Task Force which initiated fifty-two civil actions, utilizing common law nuisance theories and the endangerment provisions of section 7003 of the Resource Conservation and Recovery Act (RCRA).[17] These civil actions revealed the potential severity of the environmental danger resulting from unscrupulous operators' illegal disposal of hazardous waste. The increased public and congressional awareness of this problem's scope placed additional pressure on the Justice Department and EPA to focus attention and resources on criminal enforcement. Several cases decided in this period illustrated the deterrent value served by seeking and obtaining jail sentences rather than civil injunctions. The criminal prosecutions of Donald Distler for disposing pesticide wastes into the Louisville, Kentucky sewer system[18] and of Robert Earl Ward and Robert Burns for their part in dumping waste oil laden with polychlorinated biphenols (PCBs) along a North Carolina roadside[19]

16. Speech by James W. Mooreman, Assistant U.S. Attorney Gen., American Law Institute-American Bar Association Conference, Washington, D.C. (Feb. 10, 1978).

17. RCRA § 7003, 42 U.S.C.A. § 6973 (West 1983 & Supp. 1985).

18. United States v. Distler, 9 ENVTL. L. REP. (ENVTL. L. INST.) 20,700 (W.D. Ky. 1979) (conviction of individual for illegally discharging pesticide wastes into Louisville sewer system, disrupting major portion of system), *aff'd*, 671 F.2d 945 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981).

19. United States v. Ward, 676 F.2d 94 (4th Cir.) (conviction of individual for illegal dumping of PCBs along roadsides in North Carolina affirmed), *cert. denied*, 459 U.S. 835 (1982).

demonstrated the need for expending additional resources in criminal enforcement.[20]

Even without budgeted resources, the government began to increase the number of criminal prosecutions. Despite the notoriety of hazardous waste cases, the absence of trained investigators and technical support staff meant that the bulk of early criminal enforcement efforts was devoted to Clean Water Act cases involving discharge monitoring reports which had been falsely certified, or other "false statement on paper" related cases.[21] Not suprisingly, given this selection process, the government was generally successful in its legal actions.[22]

In the closing months of the Carter Administration, Justice Department officials began to lay the groundwork to gain public support for increased criminal enforcement. Attorney General Benjamin Civiletti told a graduating class at Michigan Law School of the need for criminal prosecutions of environmental violators:

I propose that we put less emphasis as a society on the writing

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20. Perhaps an even greater example to environmental regulators of the need for trained and experienced criminal investigators was the unsuccessful prosecution of Velsicol Chemical Corp. and its employees for alleged environmental violations. These federal indictments were ultimately invalidated because of improprieties in the grand jury proceedings. United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979).

21. *See, e.g.*, United States v. Distler, 9 ENVTL. L. REP. (ENVTL. L. INST.) 20,700 (W.D. Ky. 1979), *aff'd*, 671 F.2d 954 (6th Cir.) (suit for dumping chemicals causing upset of publicly owned treatment work), *cert. denied*, 454 U.S. 827 (1981); United States v. Olin Corp., 465 F. Supp. 1120 (W.D.N.Y. 1979) (conviction of corporation and corporate employees for false reporting under Clean Water Act); United States v. Frezzo Bros., 461 F. Supp. 266 (E.D. Pa. 1978) (suit against mushroom growers for discharges under Clean Water Act without permit), *aff'd*, 602 F.2d 1129 (3d Cir. 1979) (remanded for further proceedings to determine whether defendant's activity was within purview of regulations), *cert. denied*, 444 U.S. 1074 (1980); United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975) (discharge without permit, establishing broad definition of navigable waters).

22. *See, e.g.*, Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) (dismissal of criminal indictment under Clean Air Act reversed); United States v. Ward, 676 F.2d 94 (4th Cir.) (convictions for violation of regulations controlling PCBs resulting in fine of $200,000 and 2-1/2 year prison term affirmed), *cert. denied*, 459 U.S. 835 (1982); United States v. Wes-Con, Inc., Cr. No. 80-10040 (D. Idaho Jan. 16, 1981) (conviction of corporation for violation of PCB disposal regulations and false reporting); United States v. Oxford Royal Mushroom Prods., Inc., 487 F. Supp. 852 (E.D. Pa. 1980) (motions to dismiss indictments denied); United States v. Distler, 9 ENVTL. L. REP. (ENVTL. L. INST.) 20,700 (W.D. Ky. 1979), *aff'd*, 671 F.2d 954 (6th Cir.) (suit for dumping chemicals causing upset of publicly owned treatment work), *cert. denied*, 454 U.S. 827 (1981); United States v. Little Rock Sewer Comm., 460 F. Supp. 6 (E.D. Ark. 1978) (sewer committee guilty of making false statements under CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2)); United States v. Hudson Farms, Inc., 12 Env't Rep. Cas. (BNA) 1444 (E.D. Pa. 1978) (court denied motions to dismiss criminal indictments under CWA § 309(a)(3), 33 U.S.C. § 1319(a)(3)); United States v. Hamel, 551 F.2d 107 (6th Cir. 1977) (conviction of individual for knowingly discharging gasoline in violation of Clean Water Act, affirmed).

> of additional government regulations and the spending of more tax moneys, and that we place more emphasis on the simple enforcement of existing laws and regulations and on the maintenance and operation of the present pollution control equipment.
>
> . . . .
>
> In one area in particular, stronger enforcement is necessary now to protect the public. It is an area where the regulatory scheme is not only undeveloped; it has not even taken effect. I refer to toxic and hazardous wastes.[23]

Civiletti emphasized individual criminal responsibility for corporate acts and pledged to prosecute corporate officials in order to realize maximum deterrence to the illegal disposal of hazardous wastes.[24] In 1980, the Land and Natural Resources Division of the Department of Justice created a new Environmental Enforcement Section. The Division listed criminal enforcement as its number one priority.[25]

To begin implementation of the criminal enforcement program at EPA, a Department of Justice attorney, Peter Beeson, was assigned to EPA at the end of the Carter Administration to develop a formal criminal enforcement program. This led to the creation of the Office of Criminal Enforcement, with Beeson as its director, on January 5, 1981.[26] Its charge was to implement the Agency's commitment "actively to pursue criminal sanctions, where appropriate, to enhance the effectiveness of the enforcement program."[27] In October 1982, the first criminal investigators were hired at EPA. Most of these investigators initially came from metropolitan police departments or other federal law enforcement agencies; none had environmental backgrounds.[28] Simultaneously with EPA's formation of a criminal enforcement office, the Land and Natural Resources Division of the Department of Justice set up within its Environmental Enforcement Section a special unit whose sole responsibility was investigation and enforcement of environmental crimes. The new

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23. Address by Benjamin Civiletti, U.S. Attorney Gen., Michigan Law School Graduation Exercises (May 17, 1980).

24. *Id.*

25. J. TOMPKINS, JR., OFFICE OF POLICY & MGMT. ANALYSIS, CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL: NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIME (1980).

26. *See* Criminal Enforcement Strategy, *supra* note 14, at 8.

27. B. Blum, Creation of the Office of Criminal Enforcement 1 (unpublished EPA internal memorandum) (Jan. 5, 1981).

28. Criminal Enforcement Strategy, *supra* note 14, at 9. EPA now has an "ambitious training program" for its investigators, drawing on other expert sources in law enforcement and environmental technology, and plans to expand its efforts. *Id.* at 6-7.

Environmental Crimes Unit, headed by Judson Starr, accepted referrals from EPA and supervised prosecution of environmental criminal cases.

As these programs took shape, criminal enforcement continued to focus upon activities causing serious environmental harm especially where there was clear recalcitrance on the part of the alleged violator, or where clearly false statements were made in violation of the reporting sections of the statutes. In short, criminal enforcement was viewed as reaching the more obvious or egregious violations, with additional or more stringent sanctions sought against violators whose conduct seemed especially culpable.[29]

This limited focus began to change as congressional pressure—and EPA's own recognition of the deterrent value of criminal enforcement in encouraging voluntary compliance—led to a more active and broad-based criminal program. Media attention to incidents such as the explosion of the Louisville, Kentucky sewer system under a major roadway which resulted from Ralston Purina Company's illegal discharge of hexane into the sewers,[30] alerted the public to the imminence and enormity of the potential for lethal results from illegal disposal of chemicals and hazardous waste, and to the corresponding need for protection through deterrence. Increasingly greater resources were devoted to this area[31] and the pace of criminal enforcement in hazardous waste violations has accelerated ever since.[32]

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29. B. Blum, *supra* note 27, at 2-3. *See also* C. Price, Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency 3 (unpublished EPA internal memorandum) (Jan. 23, 1984) ("In light of the limited criminal investigative resources available to the Agency, criminal investigations and referrals are necessarily limited to situations of the most significant and/or flagrant environmental misconduct.").

30. United States v. Ralston Purina Co., 12 ENVTL. L. REP. (ENVTL. L. INST.) 2057 (W.D. Ky. 1982). The Ralston Purina Co., which manufactures breakfast cereals and pet foods, used hexane, a highly flammable waste, in its soybean extraction plant in Louisville, Kentucky. The hexane released into the city sewer lines resulted in a huge explosion under a major arterial roadway (fortunately at 5:00 a.m.), causing millions of dollars of damage.

The Louisville sewer district has had more than its share of environmental damage; it was also the victim in United States v. Distler, 9 ENVTL. L. REP. (ENVTL. L. INST.) 20,700 (W.D. Ky. 1979) (pesticide wastes illegally disposed of in sewers, disrupting major portion of system), *aff'd*, 671 F.2d 954 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981). At least in the *Distler* case, the sewer district was able to recoup the remainder of its damage and recovery expenses under its insurance policy. Louisville & Jefferson County Metro. Sewer Dist. v. Travelers' Ins. Co., 753 F.2d 533 (6th Cir. 1985) (damage covered by "vandalism and malicious mischief" provision of insurance policy).

31. By early 1985, EPA had a staff of 20 trained criminal investigators who were authorized to carry firearms. Comment, *Marking Time: A Status Report on the Clean Air Act Between Deadlines*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 10,022, 10,038 (1985).

32. Accordingly to the Department of Justice's internal *Indictment and Convictions* updates, from the beginning of Fiscal Year 1983 to February 14, 1986, the Environmental Crimes Unit received 220 referrals which resulted in 252 indictments and 211 pleas and convictions.

Compliance and cleanup through civil enforcement remain the main

Envtl. Enforcement Section, Land & Natural Resources Div.; U.S. Dep't of Justice, Indictments and Convictions, Fiscal Year 1986; Envt'l Enforcement Section, Land & Natural Resources Div.; U.S. Dep't of Justice, Indictments and Convictions, Fiscal Year 1985; Envt'l Enforcement Section, Land & Natural Resources Div.; U.S. Dep't of Justice, Indictments and Convictions, Fiscal Year 1984; Envt'l Enforcement Section, Land & Natural Resources Div.; U.S. Dep't of Justice, Indictments and Convictions, Fiscal Year 1983 (unpublished internal annual statistical summaries) (copies on file at *Loyola of Los Angeles Law Review* office) [hereinafter cumulatively cited together as Indictments & Convictions 1983-86]. A total of $1,778,090 in fines was assessed. A total of 87 years, 9 months in jail terms was imposed with most jail time suspended in favor of probationary terms and conditions. And defendants actually served 10 years, 4 months, 10 days in confinement. *Id.*

SUMMARY

	Referrals	Indictments	Pleas/Convictions
Fiscal year 1983	26	40	40
Fiscal year 1984	37	43	32
Fiscal year 1985	51	40	37
Fiscal year 1986	112	129	102
TOTAL	226	252	211

	Fines Imposed	Jail Terms	Actual Confinement
Fiscal Year 1983	$ 341,100	11 yrs.	5 yrs.
Fiscal Year 1984	$ 384,290	5 yrs. 3 mos.	1 yr. 7 mos.
Fiscal Year 1985	$ 565,850	5 yrs. 5 mos.	2 yrs. 11 mos.
Fiscal Year 1986	$ 486,800	66 yrs. 1 mo.	— 8.3 mos.
TOTAL	$1,778,040	87 yrs. 9 mos.	10 yrs. 4.3 mos.

As this Summary shows, enforcement has become more active and effective with each succeeding year.

The authors' survey of the convictions which were reported in detail by the Department of Justice in fiscal years 1983-1986 showed the character of enforcement more clearly:

	Corporations	Individuals	Totals
Convictions	37	69	105
Fines, sanctions imposed	34	53	86
Probation imposed	3	39	42
Restitution, cleanup work ordered	5	5	10
"Alternative" sentencing imposed (community service, trust funds, etc.)	3	20	23
Jail Time	—	17	17

In addition to the cases sumamrized, in one large series of cases involving pesticide use, 76 individual farmers pled guilty and paid fines of $500 each, for a total of $38,000.

Criminal enforcement actions were brought under or involved various provisions of the following legislation: CWA, Pub. L. No. 92-500, 86 Stat. 896 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 & Supp. I 1983)); RCRA, Pub. L. No. 94-580, 90 Stat. 2798 (codified as amended at 42 U.S.C.A. §§ 6901-6987 (West 1983 & Supp. 1985)); Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1977) (codified as amended at 15 U.S.C. §§ 2601-2629 (1982)); Federal Insecticide, Fungicide and Rodenticide Act, Pub. L. No.

priorities of EPA, but deterrence through criminal prosecution has also become an important policy goal of enforcement efforts. Consistent with Attorney General Civiletti's early statement of governmental policy,[33] the general approach which has developed in EPA and the Department of Justice criminal enforcement units not only is to pursue corporations but, increasingly, to seek indictments against individuals within corporations who might be personally culpable. The reasoning behind this is straightforward and obvious: individuals commit crimes, corporations do not. Corporations in many cases may not feel the sting of fines as smartly as would individuals, since in the case of significant operations even sizable fines may be viewed as "a cost of doing business." Moreover, as incorporeal entities, corporations themselves cannot go to jail. The deterrent effect of the environmental statutes is enhanced, enforcement authorities have concluded, if responsible individuals within the corporation know they may not sanction or participate in illegal activity without subjecting themselves personally to the possibility of substantial fines and/or *imprisonment.*

In addition, greater enforcement efforts—particularly against individuals—reflect a general principle that criminal law should apply equally to the corporate world as to street crime and other more familiar legal contexts. A failure to enforce environmental criminal statutes is perceived as breeding disrespect for law enforcement in general.

At this time, the criminal enforcement program has moved beyond the "experimental" stage. It has been institutionalized within EPA and the Department of Justice and these agencies have developed fairly well-established criteria and procedures for case selection and prosecution. From an ad hoc program with one attorney serving both as its Director and Staff, the Office of Criminal Enforcement has expanded dramatically.

92-516, 86 Stat. 975 (1972) (codified as amended at 7 U.S.C. §§ 136-136*y* (1982)); Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26, 33, 42, 49 U.S.C.); Refuse Act of 1899 §§ 13, 16, ch. 425, 30 Stat. 1121, 1152 (codified as amended in 33 U.S.C. §§ 407, 411 (1982)); Hazardous Materials Transportation Act § 105, 49 U.S.C. § 1804 (1982). In addition, the circumstances of several cases permitted invocation of the Migratory Bird Treaty Act § 2, 16 U.S.C. § 703 (1982). Only one successful prosecution was reported under the CAA, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982 & Supp. I 1983)), in this period. The case resulted in the convictions of a company and three individuals. Indictments were returned, however, in one other Clean Air Act action. Indictments & Convictions 1983-86, *supra* note 32.

General criminal statutes employed included: 18 U.S.C. § 2 (1982) (crime against the United States); *id.* § 287 (false claim); *id.* § 371 (conspiracy to commit offense or to defraud United States); *id.* § 641 (conversion of government property); *id.* § 1001 (false statement); *id.* §§ 1341, 1343 (mail fraud).

33. *See supra* notes 23-24 and accompanying text.

The Office of Criminal Enforcement, headquartered in Washington, D.C., is responsible for policy development, program guidance and liaison with the Department of Justice and regional EPA offices. The investigators are now located in all ten regional EPA offices and are managed through the National Enforcement Investigation Center (NEIC) in Denver, Colorado. Investigators work directly with United States Attorneys' offices and have law enforcement authority as deputized United States Marshals.[34] Budgeted resources for criminal investigation and prosecution support, together with recognition of criminal enforcement as an Agency priority in the internal management arguments and workload models, ultimately drive governmental resource allocation decisions.

In short, criminal enforcement is now recognized not only as good government but also as good politics. The Agency has taken most, if not all, of the steps necessary to insure a modicum of support for and recognition of criminal enforcement as a priority. Nonetheless, investigative and prosecutorial resources are still limited and criminal prosecutions must compete with civil enforcement matters for scarce resources, which means that the number and complexity of criminal cases that can be handled is severely constrained.[35] However, in all, the future of criminal enforcement seems assured, at least on a limited level. Its impact, even with limited resources, cannot be ignored or denied.

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34. As deputized marshals, investigators have authority to carry firearms and execute search and arrest warrants. This additional authority was provided only after an extensive debate within the Reagan Administration and congressional hearings which were critical of the Attorney General's failure to grant law enforcement authority to EPA's investigative staff. Letter from Benjamin Civiletti, U.S. Attorney Gen., to Douglas M. Costle, Adm'r (Jan. 16, 1981).

The FBI has also joined in support of environmental prosecutions. A 1982 memorandum of understanding between EPA and the FBI committed the FBI to investigate 30 cases per year upon request from EPA.

35. One indication that budgetary constraints limit prosecution of complex cases is the authors' survey of convictions which showed the following:

Fines or Penalties	$100-$5,000	$5,001-$10,000	$10,001-$25,000	$25,001-$50,000	$50,001-$100,000	$100,000
77	40	11	22	11	3	1

Indictments & Convictions 1983-86, *supra* note 32 (In computing the total number of "fines or penalties," the authors combined multiple fines assessed against a single corporation or individual into one total, and did not count portions of fines that were "suspended" pending community service or other alternative sentencing.). This pattern reflects a continuing concern with compliance and cleanup—rather than punishment—as priorities, and a focus, albeit somewhat lessened, on reporting or discharge limits violations. Reporting and discharge limits violations are easier to investigate and prove, but tend to result in less significant penalties.

II. LIABILITY FOR ENVIRONMENTAL CRIMES

A. Relevant Statutory Provisions

Criminal enforcement in the area of environmental protection is based on a myriad of often overlapping, sometimes confusing statutory provisions. These include criminal sanctions specified in environmental statutes, as well as the application of general criminal statutes to environmental violators.

1. Environmental statutory provisions

Most environmental statutes contain criminal sanctions, consistent with Congress' and EPA's recognition that such sanctions provide an increased deterrent effect and greatly enhance voluntary compliance with civil provisions. These statutes are generally characterized by a scienter requirement and by substantial penalties designed to ensure that noncompliance is economically unattractive.

Sections 309(c) and 311(b)(5) of the Clean Water Act specify criminal sanctions for willful or negligent conduct by any "person" for violating certain Clean Water Act provisions,[36] for knowingly making a false statement,[37] or for failing to notify EPA of discharges of oil or other hazardous substances.[38] Section 309(c)(3) adds "responsible corporate officer" to the definition of "person" for criminal violations.[39] Violations are classified as misdemeanors, with fines for willful or negligent conduct set at $2500 to $25,000 per day of violation and/or one year of imprisonment.[40] Subsequent offenses may result in the imposition of fines of up to $50,000 and/or two years imprisonment per violation.[41] False reporting under section 309(c)(2) is punishable by a fine of $10,000 and/or six months imprisonment.[42] Failure to notify the appropriate government agency of a discharge is punishable by a fine of up to $10,000 and/or one year imprisonment per violation.[43]

Section 113(c) of the Clean Air Act provides sanctions for "know-

36. CWA § 309(c)(1), 33 U.S.C. § 1319(c)(1) (1982).
37. *Id.* § 309(c)(2), 33 U.S.C. § 1319(c)(2) (1982).
38. *Id.* § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1982).
39. *Id.* § 309(c)(3), 33 U.S.C. § 1319(c)(3) (1982).
40. *Id.* § 309(c)(1), 33 U.S.C. § 1319(c)(1) (1982).
41. *Id.*
42. *Id.* § 309(c)(2), 33 U.S.C. § 1319(c)(2) (1982). This provision should not be confused with 18 U.S.C. § 1001 (1982) (providing for criminal penalties for willfully supplying false information to any United States department or agency). See *infra* text accompanying notes 84-87 for discussion.
43. CWA § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1982).

ing" violations of the Act by any "person,"[44] which includes "responsible corporate officer."[45] Violations are misdemeanors and can result in fines of up to $25,000 per day of violation and/or one year imprisonment for substantive violations.[46] Subsequent violations are subject to fines up to $50,000 per day of violation and/or two years imprisonment.[47] Again, false reporting violations incur a lesser penalty, up to $10,000 and/or six months imprisonment per violation.[48]

Section 3008(d) of RCRA[49] contains sanctions for "knowingly" conducting any prohibited act, such as transporting hazardous waste to an unpermitted facility,[50] treating, storing or disposing of hazardous waste without obtaining a permit to do so or in violation of such permit;[51] making a false statement in a document;[52] destruction, alteration or concealment of documents required to be maintained under RCRA;[53] transportation without a manifest;[54] and improper foreign export of hazardous materials.[55] The criminal penalty imposed for violating any of these RCRA provisions is a fine of up to $50,000 per day of violation and/or two years imprisonment.[56] However, stiffer jail terms of up to five years are authorized for transporting hazardous waste to an unpermitted facility[57] and for treating, storing or disposing of hazardous waste without a permit.[58] Additionally, penalties for subsequent RCRA convictions are mandatorily doubled.[59]

Section 3008(e) of RCRA specifically prohibits the handling of any hazardous waste in a manner which "places another person in imminent danger of death or serious bodily injury."[60] The penalty for individuals convicted under this "knowing endangerment" provision is substantial: the imposition of a fine of up to $250,000 and/or imprisonment for up to

44. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (1982).
45. *Id.* § 113(c)(3), 42 U.S.C. § 7413(c)(3) (1982); *see also id.* § 302(e), 42 U.S.C. § 7602(e) (1982).
46. *Id.* § 113(c)(1), 42 U.S.C. § 7413(c)(1) (1982).
47. *Id.*
48. *Id.* § 113(c)(2), 42 U.S.C. § 7413(c)(2) (1982).
49. RCRA § 3008(d), 42 U.S.C.A. § 6928(d) (West Supp. 1985).
50. *Id.* § 3008(d)(1), 42 U.S.C.A. § 6928(d)(1) (West Supp. 1985).
51. *Id.* § 3008(d)(2), 42 U.S.C.A. § 6928(d)(2) (West Supp. 1985).
52. *Id.* § 3008(d)(3), 42 U.S.C.A. § 6928(d)(3) (West Supp. 1985).
53. *Id.* § 3008(d)(4), 42 U.S.C.A. § 6928(d)(4) (West Supp. 1985).
54. *Id.* § 3008(d)(5), 42 U.S.C.A. § 6928(d)(5) (West Supp. 1985).
55. *Id.* § 3008(d)(6), 42 U.S.C.A. § 6928(d)(6) (West Supp. 1985).
56. *Id.* § 3008(d), 42 U.S.C.A. § 6928(d) (West Supp. 1985).
57. *Id.* § 3008(d)(1), 42 U.S.C.A. § 6928(d)(1) (West Supp. 1985).
58. *Id.* § 3008(d)(2)(A)-(C), 42 U.S.C.A. § 6928(d)(2)(A)-(C) (West Supp. 1985).
59. *Id.* § 3008(d), 42 U.S.C.A. § 6928(d) (West Supp. 1985).
60. *Id.* § 3008(e), 42 U.S.C.A. § 6928(e) (West Supp. 1985).

fifteen years.[61] Organizations convicted under the provision are subject to a fine of up to $1,000,000.[62]

Section 16(a) of the Toxic Substances Control Act (TSCA) imposes sanctions for knowingly or willfully committing any of the acts prohibited by section 15 of TSCA[63] and imposes penalties of up to $25,000 and/or one year imprisonment per violation in addition to any civil penalties.[64]

Section 14(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) provides that FIFRA violations are misdemeanors punishable by fines of up to $25,000 and/or one year imprisonment per violation,[65] unless the violation is by a private applicator, in which case sanctions may not exceed $1000 and/or thirty days imprisonment.[66] Disclosure of information protected by section 3 of FIFRA is punishable by fines of up to $10,000 and/or three years imprisonment.[67] In addition, FIFRA contains a special provision which imputes to corporate officers and agents individual responsibility for the actions of all employees, agents or officers taken on behalf of the corporation.[68]

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[69] commonly known as "Superfund," also contains a number of criminal sanction provisions. Section 103 requires immediate notification of the release of hazardous substances to the appropriate federal agency.[70] Strict liability is imposed for failure of any person or persons in charge of a vessel or facility to provide immediate notification as soon as that person has knowledge of the release.[71] For these purposes "person" is defined in section 101(21) to include individu-

61. *Id.*

62. *Id.* Section 3008(f) of RCRA provides a special definition of "knowing" for determining liability under the knowing endangerment provision. RCRA § 3008(f), 42 U.S.C. § 6928(f). For a detailed discussion of the "knowing" element, see *infra* note 125.

63. TSCA § 15, 15 U.S.C. § 2614 (1982).

64. *Id.* § 16(a), 15 U.S.C. § 2615(a) (1982). *See, e.g.*, United States v. Ward, 676 F.2d 94 (4th Cir. 1982) (conviction under TSCA for unlawful disposal of toxic substances and aiding and abetting the disposal of toxic substances of individuals who conspired to dump and dumped oil along roadways in North Carolina).

65. FIFRA § 14(b)(1), 7 U.S.C. § 136*l*(b)(1) (1982).

66. *Id.* § 14(b)(2), 7 U.S.C. § 136*l*(b)(2) (1982) (defining a "private applicator" as a person who is certified to use or supervise the use of a restricted pesticide on his own or his employer's property without compensation other than for personal services).

67. *Id.* § 14(b)(3), 7 U.S.C. § 136*l*(b)(3) (1982).

68. *Id.* § 14(b)(4), 7 U.S.C. § 136*l*(b)(4) (1982).

69. CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26, 33, 42, 49 U.S.C.).

70. *Id.* §§ 103(a)-(b), 42 U.S.C. §§ 9603(a)-(b) (1982).

71. *Id.* § 103(b), 42 U.S.C. § 9603(b) (1982).

als, firms, corporations, associations, partnerships, consortiums, joint ventures or commercial entities.[72] Penalties for these provisions are up to $10,000 and/or one year imprisonment.[73] A further deterrent is that a substantive conviction also strips the person of defenses or liability limitations provided in section 107 of CERCLA[74] in cost recovery actions.[75]

Section 103(c) of CERCLA[76] requires notification to EPA, within specified time limits, of the existence of any facility at which hazardous wastes are or were treated, stored and disposed of by any person who now owns or operates, or at the time of disposal owned or operated, or accepted for transportation to and selected the facility, unless the facility is within the exemptions set out in the statute. Knowing failure to comply with this provision can result in penalties of up to $10,000 and imprisonment for up to one year.[77]

The Refuse Act[78] is a nineteenth century statute which essentially prohibits discharges of almost any pollutant into navigable waters. Violations are punishable by fines of up to $2500 or imprisonment for up to one year.[79]

Environmental statutes in many states provide for criminal sanctions under a variety of circumstances and specify substantial penalties.[80] These statutes or regulations are often modeled after federal provisions, particularly in states which are operating environmental enforcement programs "in lieu of" federal enforcement of RCRA.[81] In some cases, however, state regulations may differ from or go beyond the types of con-

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72. *Id.* § 101(21), 42 U.S.C. § 9601(21) (1982).

73. *Id.* § 103(b), 42 U.S.C. § 9603(b) (1982).

74. *Id.* § 107, 42 U.S.C. § 9607 (1982).

75. *Id.* § 103(c), 42 U.S.C. § 9603(c) (1982). "In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 9607 of this title . . . ." *Id.*

76. *Id.*

77. *Id.*

78. The Refuse Act of 1899, ch. 425, 30 Stat. 1121, 1152 (codified as amended in scattered sections of 33 U.S.C.). See *supra* note 7 and accompanying text for an historical discussion of the Refuse Act.

79. *Id.* § 16, 33 U.S.C. § 411 (1982).

80. A discussion of the various, intricate state criminal environmental laws is beyond the scope of this Article. Practitioners, however, must be alert to the interrelationship between state and federal environmental regulations. See *infra* notes 175-79 and accompanying text for a limited discussion of parallel state and federal environmental proceedings.

81. RCRA § 3006, 42 U.S.C.A. § 6926(b) (West Supp. 1985). As with other environmental statutes, states have primary responsibility for enforcement under the RCRA. Before EPA can delegate enforcement under RCRA, states must "provide adequate enforcement of compliance" with federal requirements. *Id. See* Requirements for Authorization of State Hazardous Waste Programs, 40 C.F.R. § 271.16(a)(3)(ii) (1985).

duct sanctioned by federal statutory provisions.[82]

2. Non-environmental criminal statutes

In addition to the specific environmental provisions discussed above, federal environmental authorities have available to them the usual panoply of general criminal statutes and sanctions. Conduct or facts in a particular case may lead authorities to invoke any of a wide variety of general criminal provisions, usually in conjunction with specific environmental statutes.[83]

In 18 U.S.C. § 1001,[84] criminal penalties are available for a wide range of false statements made to government, in contrast with and in addition to liability for submitting false reports under the environmental statutes.[85] Liability under 18 U.S.C. § 1001 for violating section 309(c)(2) of the Clean Water Act,[86] for example, attaches only for falsification of those records specifically required by the Clean Water Act.[87] Such statements need not have been made under oath or in writing, so that statements made in the course of investigation potentially may raise liability. To be within the statute's purview, the statements must involve matters within the jurisdiction of the particular federal agency and rise to the level of knowing and willful falsification or concealment by trick, scheme or device, including fraudulent representations.[88] Penalties of up to $10,000 and/or five years imprisonment may be invoked.[89]

The federal mail and wire fraud statutes can be invoked to reach any scheme where either the mail or interstate wires or airwaves are used in furtherance of a scheme or artifice to defraud or to obtain property or money by false representations.[90] The statutes provide penalties of up to $10,000 and/or five years imprisonment.[91]

The federal obstruction of justice provision, 18 U.S.C. § 1503, prohibits the intimidation of witnesses or obstruction of the administration

82. *See supra* note 80.

83. *See supra* note 32.

84. 18 U.S.C. § 1001 (1982).

85. *See, e.g.*, United States v. Oulette, 11 Env't Rep. Cas. (BNA) 1350 (E.D. Ark. 1977) (citing CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2) (1982) (establishing a public welfare offense for which proof of specific criminal intent is not required)).

86. CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2) (1982).

87. 18 U.S.C. § 1001.

88. *Id.*

89. *Id.*

90. 18 U.S.C. § 1341 (1982) (mail fraud); *id.* § 1343 (fraud by wire, radio or television). *See, e.g.*, United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979) (Mail Fraud Act used to indict chemical manufacturer and its officers for making false representations to EPA).

91. 18 U.S.C. §§ 1341, 1343 (1982).

of justice by corrupt or threatening conduct or communications.[92] One potential area of liability in the criminal environmental context under this statute is the employment relationship between a corporation and its "informer" employees.[93] The penalties provided are up to $5000 in fines and/or imprisonment of not more than five years.[94] A related obstruction of justice statute, 18 U.S.C. § 1505,[95] provides similar penalties for acts interfering with a witness in any proceeding pending before any United States department or agency.

Aiding and abetting a criminal act can be charged,[96] particularly when liability against individuals for corporate acts is sought.[97] Conspiracy to defraud charges might be employed for conduct which attempts to willfully circumvent agency regulations.[98] Perjury charges may be invoked against any witness who, while testifying under oath before a competent tribunal, willfully and contrary to such oath, states or subscribes to any material which the witness does not believe to be true.[99] A perjury conviction subjects the violator to a fine of up to $2000 or imprisonment of five years, or both.[100] A criminal contempt provision specifically addressed to hazardous waste matters[101] may be relevant when existing consent decrees are violated or when subpoenaed witnesses fail to appear.

The Racketeer Influenced and Corrupt Organizations Act (RICO) provisions of the Organized Crime Control Act[102] makes it illegal to acquire, maintain or control any enterprise through a pattern of racketeering activity.[103] The use of RICO to prosecute enterprises organized for

92. 18 U.S.C. § 1503 (1982).

93. See *infra* notes 183-85 and accompanying text for a discussion of employer-employee conflicts of interest associated with criminal enforcement actions.

94. 18 U.S.C. § 1503.

95. *Id.* § 1505.

96. *Id.* § 2. *See, e.g.*, United States v. Ward, 676 F.2d 94 (4th Cir.) (aiding and abetting unlawful disposal of toxic substances under TSCA), *cert. denied*, 459 U.S. 835 (1982).

97. *See, e.g.*, United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985). In *Johnson & Towers*, a chemical company foreman and trucking supervisor observed hazardous waste being pumped into a ditch which fed into a creek. *Id.* at 664. The trial court found that these individuals did not violate RCRA § 3008(d)(2)(A), 42 U.S.C. § 6928(d)(2)(A), *see supra* notes 49-59 and accompanying text, since that provision applies only to "owners and operators." 741 F.2d at 664. Nonetheless, the trial court held they could be found liable for aiding and abetting under 18 U.S.C. § 2. On appeal, § 3008(d)(2)(A) of the RCRA ultimately was held to apply to "employees," in addition to "owners and operators." 741 F.2d at 664-65.

98. 18 U.S.C. § 371 (1982).

99. 18 U.S.C. § 1621 (1982).

100. *Id.*

101. Federal Hazardous Substances Act § 8, 15 U.S.C. § 1267 (1982).

102. Organized Crime Control Act of 1970, § 901(a), 18 U.S.C. §§ 1961-1968 (1982).

103. 18 U.S.C. § 1962(a).

illegal purposes has been upheld, which greatly expands the statute's scope.[104] Although there are no reported prosecutions in the environmental area under RICO, the federal statutes offer prosecutors an attractive combination of criminal and civil penalties[105] and a possible alternative when statutes of limitations on underlying offenses have run.[106]

B. Standards of Liability

When governmental authorities do invoke these various criminal provisions, they have powerful environmental enforcement tools at their disposal. Environmental statutes are within the class of laws established to protect the public welfare.[107] In contrast to most criminal statutes, the standard of criminal environmental liability is less stringent, reflecting the legislative concern for protecting the important public interest in environmental safety.[108] Accordingly, they could be liberally read to impose criminal liability without any requirement of intent.[109]

Most environmental statutes, however, attach criminal liability on a showing of "knowing" or "willful" violation of the applicable acts' requirements.[110] This does not imply a strict standard of intent or deliber-

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104. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3287 (1985) (citing United States v. Turkette, 452 U.S. 576, 585 (1981)); United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); U.S. DEP'T OF JUSTICE, HAZARDOUS WASTE VIOLATIONS: A GUIDE TO THEIR DETECTION, INVESTIGATION, AND PROSECUTION 15-18 (1981).

105. 18 U.S.C. § 1963 (criminal penalties); *id.* § 1964 (civil remedies).

106. RICO has no express statute of limitations provision. Under 18 U.S.C. § 3282, however, a five year statute of limitations is applicable to criminal statutes which do not have express limitations provisions. 18 U.S.C. § 3282 (1982). To be criminally convicted under RICO, at least two acts of racketeering activity must be established; the last such activity must have occurred within 10 years of the most recent activity. Thus, RICO prosecutions are viable so long as the most recent racketeering activity occurred within five years prior to the indictment and at least one other act occurred within 10 years of the most recent. 18 U.S.C. § 1961(1)(A)(5) (1982). *See* United States v. Revel, 493 F.2d 1, 3 (5th Cir. 1974) (federal anti-racketeering prosecution permissible even when statute of limitations on underlying state offense has run), *cert. denied*, 421 U.S. 909 (1975); United States v. Boffa, 513 F. Supp. 444, 478-80 (D. Del. 1980) (although five year statute of limitations had expired on underlying allegations of mail fraud, the acts would still be used as predicate acts in RICO prosecution to satisfy statute of limitations).

107. United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985); see *infra* notes 112-15 and accompanying text for discussion.

108. A full analysis of the standards of criminal liability under environmental statutes is outside the focus of this Article. For a detailed discussion, see generally Riesel, *supra* note 7, at 10,071-72.

109. *Id.* at 668 (citing United States v. Behrman, 258 U.S. 280, 288 (1922); United States v. Balint, 258 U.S. 250, 252-54 (1922)).

110. *See, e.g.*, FIFRA § 14, 7 U.S.C. 136(1) (1982) (knowing); TSCA § 16, 15 U.S.C. § 2615(b) (1982) (knowing or willful); RCRA § 3008(d)-(e), 42 U.S.C.A. § 6928(d)-(e) (West

ate wrongdoing for criminal liability. In the context of public welfare statutes, the words "knowingly" and "willfully" mean either an intentional disregard or "plain indifference" to statutory requirements.[111]

In *United States v. Johnson & Towers, Inc.*,[112] the Third Circuit reconciled the "knowing violation" requirement with the public welfare character of RCRA.[113] The court determined that RCRA could be construed to impose strict liability since the defendant, regardless of whether he knew of the requirement, was a "person" who handled hazardous waste without a permit. However, the court determined that the statute should be construed to require that the individual be aware of the need for a permit and that the company failed to obtain one.[114] The court further noted that under appropriate circumstances, a jury could infer such knowledge for those individuals who hold requisite responsible positions in the corporation.[115]

The public welfare character of environmental statutes and their specific language also combine to produce a mixed standard as to criminal liability of corporate officers for activities in which they do not directly participate. In two cases involving the Food, Drug, and Cosmetic Act,[116] a public welfare statute, the United States Supreme Court held that even corporate officials who had no personal involvement in the illegal conduct could be held *criminally* liable.[117] In *United States v. Dotterweich*,[118] the president of a pharmaceutical company was convicted for

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Supp. 1985) (knowing); CWA §§ 309(c), 311(b)(5), 33 U.S.C. §§ 1319(c), 1321(b)(5) (1982) (willful or knowing); CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (1982) (knowing); CERCLA § 103(c), 42 U.S.C. § 9603(c) (knowing failure to notify).

111. United States v. Illinois Cent. R.R. Co., 303 U.S. 239, 243 (1938).

112. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985).

113. *Id.* at 667-68 (citing Solid Waste Disposal Act § 3008(d)(2)(A), 42 U.S.C. § 6928(d) (1982)).

114. *Id.* at 667-69.

115. *Id.* at 669-70. The *Johnson & Towers* court stated that for some materials " 'the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.' " *Id.* at 669 (quoting United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (failure to record chemical shipments)). *See also* Carolene Prod. Co. v. United States, 140 F.2d 61, 66 (4th Cir.), *aff'd*, 323 U.S. 18 (1944).

One commentator has drawn an analogy between the supervisory liability of corporate officials under environmental laws and *In re* Yamashita, 327 U.S. 1 (1946), in which World War II Japanese General Tomayuksi Yamashita was found culpably negligent for breaching an affirmative duty to "discover and control" activities of his troops despite their being spread over a large area. Yamashita was subsequently hanged. Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALB. L. REV. 61, 74 (1972).

116. 21 U.S.C. §§ 301-392 (1982).

117. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975).

118. 320 U.S. 277 (1943).

the interstate shipment of adulterated and misbranded drugs, although the official was not shown to have participated in or even to have known of the specific transactions, and the corporation itself was acquitted.[119] The Court explained that it was sufficient that he had "a responsible share in the furtherance of the transaction which the statute outlaws."[120] In *United States v. Park*,[121] the president of a large natural food chain was held liable for causing food adulteration, although responsibility for the sanitation function had been delegated to other individuals.[122] The Court held that such responsible individuals had a duty to implement measures to avoid violations and to seek out and remedy violations that do occur.[123]

Moreover, courts seeking to define the standard of liability in this area have held that under the "responsible corporate officer" theory, corporate officials may be responsible for wrongdoings affecting public health and welfare if the government can prove that the official was in a position to seek out, discover and stop the illegal act and failed to do so.[124] Actual knowledge of the act is not required. The various environmental statutes which expressly hold responsible corporate officials liable makes this theory easier to apply in criminal enforcement actions.[125]

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119. *Id.* at 279.

120. *Id.* at 284.

121. 421 U.S. 658 (1975).

122. *Id.* at 662-63.

123. *Id.* at 672.

124. *See, e.g.*, United States v. A. C. Lawrence Leather Co., Cr. No. 82-37-01-L (D.N.H. Apr. 7, 1983). The doctrine of "the responsible corporate official," as used in criminal cases involving violations of public health and welfare statutes, had its genesis in *Park* and *Dotterweich* and was applied in two environmental cases: United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3rd Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985); United States v. Frezzo Bros., Inc., 461 F. Supp. 266, 272-73 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

125. *See, e.g.*, FIFRA § 14(b)(4), 7 U.S.C. § 136*l*(b)(4) (1982); CWA § 309(c)(3), 33 U.S.C. § 1319(c)(3) (1982); CAA § 113(c)(3), 42 U.S.C. § 7413(c)(3) (1982). Such express statutory language for the exception for public welfare laws is critical to application of the responsible corporate officer theory, otherwise corporate officers are liable only if they authorized, ratified, participated in or helped perpetrate the crime. United States v. Wisconsin, 370 U.S. 405 (1962). The general rule is:

> Officers, directors, or agents of a corporation may be criminally liable individually for acts done by them in behalf of the corporation. *They cannot, in the absence of statute, be held so liable for acts in which they have not either actively participated, or which they have not directed or permitted.*

19 C.J.S. *Corporations* § 931 (1940) (emphasis added). RCRA § 3008(f), 42 U.S.C.A. § 6928(f) (West Supp. 1985), provides a specific definition of "knowingly" for purposes of RCRA's "knowing endangerment" provision, RCRA § 3008(e), 42 U.S.C.A. § 6928(e) (West Supp. 1985). The section that defines "knowingly" states in pertinent part:

> For the purposes of subsection (e) of this section—
>
> (1) A person's state of mind is knowing with respect to—

The statutory standard of liability, then, has been construed essentially as "knew or should have known;" although similar to a negligence test, it probably requires a more overt or egregious lack of due care similar to a gross negligence test. Perhaps the most instructive example of this standard of liability is found in *United States v. A. C. Lawrence Leather Co.*[126] The company and five officials were charged with bypassing a wastewater treatment plant and regularly discharging raw, untreated wastes into a nearby river and concealing this activity from EPA.[127] The defendants were also charged with illegally storing hazardous waste, tetraclorethylene, used in Lawrence's leather treatment operations.[128] Although three officials were charged with actually ordering the bypass, the court, relying on *Dotterweich*[129] and *Park*,[130] also indicated the company's president and vice president. It was alleged that, as re-

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(A) his conduct, if he is aware of the nature of his conduct;
(B) an existing circumstance, if he is aware or believes that the circumstance exists; or
(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—
(A) the person is responsible only for actual awareness or actual belief that he possessed; and
(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

RCRA § 3008(f), 42 U.S.C. § 6928(f).

It is unclear just exactly how the standard of liability under this section may differ from the general test since, to date, no reported decision has construed RCRA § 3008(f). Section 3008(f)(2)(B) suggests, however, that the "responsible corporate official" theory may not be applicable to § 3008(e) prosecutions. RCRA § 3008(f)(2)(B), 42 U.S.C. § 6928(f)(2)(B).

126. Cr. No. 82-37-01-L (D.N.H. Apr. 7, 1983).

127. During the period of time the bypassing was concealed from the authorities, the company had applied for and was receiving nearly a quarter of a million dollars from EPA, ostensibly to study how effective its wastewater treatment plant could be in removing pollution from the industrial waste generated by the facility. As a requirement under the grant, the company was required to file reports to be used to develop pollution standards for the whole leather tanning industry. Needless to say the bypassing operation rendered useless the information the government paid for.

128. The indictments alleged violations of the following federal statutes: 18 U.S.C. § 287 (1982) (false claims); 18 U.S.C. § 371 (1982) (conspiracy); 18 U.S.C. § 1001 (1982) (false statements); 18 U.S.C. §§ 1341, 1342 (1982) (mail fraud); 33 U.S.C. §§ 1311, 1319(c)(1) (1982) (Clean Water Act violations);RCRA §§ 211-215, 224(b), 243(c), 42 U.S.C.A. § 6925 (West Supp. 1985) (operation without RCRA permit); RCRA § 232(c)(3), 42 U.S.C.A. § 6928(d)(3) (West Supp. 1985) (RCRA false statement); CERCLA § 103(c), 42 U.S.C. § 9603(c) (1982) (CERCLA failure to notify).

129. 320 U.S. 277 (1943); *see supra* notes 118-20 and accompanying text.

130. 421 U.S. 658 (1975); *see supra* notes 121-23 and accompanying text.

sponsible corporate officials, they failed to seek out, discover and stop the practice. The company was convicted after a trial and was fined nearly a half million dollars; the individuals pled guilty and received probation.[131]

An exception to this general liability standard is the Clean Water Act, which imposes criminal liability not only for willful acts, but also for violations due to *simple* negligence.[132] If the defendant, in the exercise of due care, should have known that his activities were likely to result in a violation of certain of the Clean Water Act's requirements, liability attaches.[133]

C. *Corporate and Individual Responsibility for Criminal Actions*

Corporations are considered legal "persons"[134] and are expressly defined as "persons" for purposes of criminal enforcement of environmental statutes.[135] Accordingly, when corporate policy diverges from environmental requirements, the corporation may be criminally liable.[136] In addition, corporations may be held liable for actions of their employees and agents acting within the scope of their employment or agency, because courts will impute the knowledge of such individuals to the corporation.[137] Acts of commission or omission of even fairly low-level

131. United States v. A. C. Lawrence Leather Co., Cr. No. 82-37-01-L (D.N.H. Apr. 7, 1983).

132. CWA § 309(c)(1), 33 U.S.C. § 1319(c)(1) (1982).

133. *Id.* Liability can be alleged alternatively under both standards. *See, e.g.*, United States v. Hudson Farms, Inc., 12 Env't Rep. Cas. (BNA) 1144 (E.D. Pa. 1978); United States v. Frezzo Bros., Inc., 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

134. *See, e.g.*, New York, Cent. & Hudson River Co. v. United States, 212 U.S. 481, 494-96 (1909); Boise Dodge Inc. v. United States, 406 F.2d 771 (9th Cir. 1969). *See generally Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

135. *See, e.g.*, FIFRA § 14(b), 7 U.S.C. § 1361(b) (1982); TSCA § 16(b), 15 U.S.C. § 2615(b)(1982); CWA § 309(c), 33 U.S.C. § 1319(c) (1982); RCRA § 3008(d), 42 U.S.C.A. § 6928(d) (West Supp. 1985); CAA § 113, 42 U.S.C. 7413(c) (1982). See *supra* notes 36-68 and accompanying text for a discussion of the criminal provisions of these statutes.

136. *See, e.g.*, United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984) (RCRA violations), *cert. denied*, 105 S. Ct. 1171 (1985); United States v. Frezzo Bros., Inc., 461 F. Supp. 266 (E.D. Pa. 1978) (Clean Water Act violation), *aff'd*, 602 F.2d 1129 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); United States v. A. C. Lawrence Leather Co., Cr. No. 82-37-01-L (D.N.H. Apr. 7, 1983) (Clean Water Act, CERCLA, RCRA and related violations).

137. *See* Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir.) (corporation is "person in charge" under Clean Water Act), *cert. denied*, 429 U.S. 827 (1976); United States v. Mobil Oil Corp., 464 F.2d 1124 (5th Cir. 1972) (corporation is "person in charge" under Clean Water Act). *See generally* United States v. A & P Trucking Co., 358 U.S. 121 (1958) (partnership can "knowingly" violate ICC regulations); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972) (corporate criminal liability under Sherman Act), *cert. denied*, 409 U.S. 1125

agents or employees may be imputed to a corporation if the agent intended to act for the corporation, even if the corporation derived no actual benefit from the acts.[138] Statements of environmental concern and mandatory policies, coupled with claims that illegal acts must have been due to independent, misguided individual employees, may not in all cases shield the corporation from liability.[139] For example, this principle has been applied to establish the liability of a "well-intentioned" municipal corporation under the Clean Water Act.[140]

Conversely, corporate officers are liable for those activities of the corporation within their knowledge and control. The corporate shield available in many civil actions is not present in criminal cases.[141]

The language of federal environmental statutes evinces a clear intent to impose liability to all individuals who actually participate in the management or control of hazardous waste operations, even though such individuals would normally be afforded the protection of corporate limited liability. Such legislative mandates make it unnecessary to rely on the traditional doctrine of "alter ego."[142]

(1973). The standard jury instruction requested by the government in such cases provides: "If you conclude that an agent of the defendant corporation, acting on behalf of the corporation and within the scope of his employment or of his apparent authority engaged in the crimes charged in the indictment then the defendant corporation is guilty of those crimes." *See, e.g.*, Government's Request for Jury Instructions, United States v. Wes-Con, Inc., Cr. No. 80-10040 (D. Idaho Jan. 16, 1981).

138. Standard Oil Co. of Texas v. United States, 307 F.2d 120, 127-28 (5th Cir. 1962) (prosecution under Connolly Hot Oil Act, 15 U.S.C. §§ 715-715*m* (1982)).

139. Riss & Co. v. United States, 262 F.2d 245, 250-51 (8th Cir. 1958) (violation of motor carrier statute, 49 U.S.C. § 304(a) (1982)).

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

141. *See* United States v. Olin Corp., 465 F. Supp. 1120 (W.D.N.Y. 1979) (failure to prevent or correct wrongdoing under Clean Water Act). *See generally* United States v. Park, 421 U.S. 658 (1975) (Food, Drug, & Cosmetic Act violations); United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976) (Food, Drug, & Cosmetic Act violations); Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1137, 1140 (1982). Corporate officials may assert an individual privilege against self-incrimination with regard to corporate matters. Wilson v. United States, 221 U.S. 361, 384-85 (1911) (corporate officer may refuse to produce documents).

142. Under certain circumstances, "piercing the corporate veil" is permitted in order to hold either corporate shareholders or officers liable for corporate activity. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES §§ 143, 146 (1961). The general rule followed by federal courts in deciding cases involving regulatory statutes is that the "corporate entity may be disregarded in the interests of public convenience, fairness and equity." Capital Tel. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974). Individual officers have been held civilly liable even where the corporate veil has not been pierced. *See, e.g.*, United States v. Pollution Abatement Serv. of Oswego, 763 F.2d 133 (2d Cir.), *cert. denied*, 106 S. Ct. 605 (1985); United States v. Northeast Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984). This approach mirrors the criminal law in holding individuals liable for their personal actions.

When a statute contains specific directives as to when the corporate entity may be disregarded and individuals held liable for acts of the corporation, courts will defer to the congressional mandate.[143] Most recent environmental statutes evidence such specific intent. For example, CERCLA section 101[144] defines "owner or operator" for civil or criminal liability purposes as "any person who owned, operated, or *otherwise controlled* activities" at an abandoned facility.[145]

The Third Circuit, in *United States v. Johnson & Towers, Inc.*,[146] held that the RCRA provisions which prohibit hazardous waste treatment, storage or disposal without a permit[147] apply to employees who knowingly handle waste absent a permit and not simply to the company owners or operators, even if the employees were not in a position to secure the permit. The court decided that in order to effectuate RCRA's substantive purpose, the statute's reference to "[a]ny person" should be construed broadly to cover anyone with responsibility for handling regulated materials even "though the result may appear harsh."[148]

As an outgrowth of the fiction that corporations are "persons," courts have held that corporations can be guilty of conspiracy with their employees.[149] Even in the absence of an indictment alleging conspiracy between the corporation and its employees, joint trials of corporations and their employees have been upheld.[150] Joint trials are proper where there is a substantial identity of facts and participants among the counts in an indictment.[151]

III. Comparison of Civil and Criminal Enforcement

The experience of enforcement agencies in the past decade readily confirms that criminal actions authorized by environmental statutes have a much greater deterrent effect than civil actions alone. For corporations, which as abstract entities cannot be imprisoned, the greater monetary sanctions often provided in criminal sanctions and the substantial public opprobrium which attaches to criminal violators are powerful in-

143. *See, e.g.*, Anderson v. Abbot, 321 U.S. 349, 363-65 (1944).

144. CERCLA § 101(20)(A)(ii), 42 U.S.C. § 9601(20)(A)(ii) (1982).

145. *Id.* (emphasis added).

146. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985).

147. RCRA § 3008(d)(2)(A), 42 U.S.C.A. § 6928(d)(2)(A) (West Supp. 1985).

148. 741 F.2d at 667.

149. Nye & Nissen v. United States, 336 U.S. 613, 618-19 (1949); United States v. Dotterweich, 320 U.S. 277, 281-85 (1943).

150. Fed. R. Crim. P. 8. *See, e.g.*, United States v. Olin Corp., 465 F. Supp. 1170 (W.D.N.Y. 1979).

151. *See* notes 72 and 93-96 and accompanying text.

centives to proper behavior.[152] In addition, many corporations are concerned that the stigma of a criminal conviction may affect their ability to bid on government contracts.[153]

It is the effect on individuals within the corporation, however, which gives criminal sanctions their punch. Corporations act through individuals, primarily officers and directors who set policy and give orders. Civil enforcement actions are typically directed against the corporation; even when individuals are named, the costs of defending the action and paying any resulting judgment are often covered by the corporation, and thus seen as "a cost of doing business."[154]

Criminal actions, however, invoke a greater possibility of *personal* liability since they usually allege willful acts,[155] which are not covered by insurance policies,[156] or by the power and duty to indemnify.[157] More importantly, criminal sanctions typically include the possibility of jail time.[158] For the well-off white collar officer with a genteel background, a devoted family and prominent community status, the spectre of a year in

152. In one poll, 60,000 people were surveyed about the perceived severity of various crimes. They ranked environmental offenses seventh, after murder, but ahead of heroin smuggling, skyjacking and armed robbery. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN (1984).

153. Starr, *EPA, Justice Described as Urging Courts to Send More Corporate Violators to Jail*, [Current Developments-Enforcement] 16 ENV'T. REP. (BNA) 45 (May 10, 1985). Some corporations have even asked the Justice Department to prosecute individual officers rather than the corporations themselves to avoid the criminal liability from attaching to the corporation. *Id.*

154. For example, CAL. CORP. CODE § 317 (Deering 1977 & Supp. 1986) gives a corporation the power to indemnify a director, officer or employee for his costs, including attorney fees, in defending against a proceeding if the employee in good faith believed he was acting in the legal and best interests of the corporation, even if the acts were in fact unlawful. *See* CAL. LABOR CODE § 2802 (Deering 1976) (employer must indemnify employee for losses incurred in discharge of duties); *see also* Douglas v. Los Angeles Herald-Examiner, 50 Cal. App. 3d 449, 123 Cal. Rptr. 683 (1975) (newspaper obligated to indemnify and provide defense for employee sued for actions within course and scope of employment).

155. *See supra* notes 110-11 and accompanying text.

156. *See, e.g.*, Atlas Assurance Co. v. McCombs Corp., 146 Cal. App. 3d 135, 145, 194 Cal. Rptr. 66, 71 (1983) (expands rule that guilty plea exonerates insurance company from liability to defend and pay where act was "dishonest or criminal" to allow *nolo contendere* plea by employee to be used against corporation). *See also* Grand River Lime Co. v. Ohio Casualty Ins. Co., 32 Ohio App. 2d 178, 289 N.E. 2d 360 (1972) (liability insurer's duty to defend may be abrogated by willful, intentional act).

157. CAL. CORP. CODE § 317(b) (Deering 1977 & Supp. 1986), for example, permits indemnification only if the director, officer, or employee, "in the case of a criminal proceeding, had no reasonable cause to believe the conduct of such person was unlawful." *See also* CAL. LABOR CODE § 2802 (Deering 1976) (Indemnify is precluded if "the employee, at the time of obeying such directives, believed them to be unlawful.").

158. *See supra* notes 36-82 and accompanying text.

county jail with all manner of miscreants can provide an impetus for law abiding behavior that no corporate concern could match.

Initially there was some doubt that courts would readily impose sentences on most environmental violators, since violators are likely to be prominent citizens without prior records or other public blemishes, and because the harm to the environment and to any perceptible victims may not be apparent or measurable. Nonetheless, the courts have recognized the role of criminal sanctions in environmental enforcement and, in some cases, have meted out jail time.[159]

In addition to these considerations, bringing criminal enforcement actions against individuals, as well as civil actions against the corporation, may have subsidiary, practical advantages as well. Individuals subjected to possible personal liability and jail time may be more motivated to disclose information, or otherwise cooperate in an enforcement action against the corporation if such conduct might secure a reduced sentence or immunity in the individual prosecution. Moreover, the possibility of subsequent individual liability may lead corporate officers, agents or employees engaged in questionable activities to bring such activities to the attention of authorities. Given the relatively limited investigative and enforcement resources available to federal agencies compared to the substantial amount of waste handling activity in the United States, and the difficulties involved in acquiring and presenting evidence on past corporate conduct, voluntary compliance and the cooperation of "insiders" when violations do occur are critical elements in an effective environmental enforcement program.

Environmental statutes acknowledge this reality, and the conflicts of interest posed between employees and corporations when corporate policy is inconsistent with environmental concerns. These statutes protect employees who institute or provide information for enforcement proceedings from firing or economic reprisal and specify procedures for the review of such grievances.[160]

Conversely, maintenance of a parallel civil action[161] may have prac-

159. *See, e.g.*, United States v. Distler, 9 ENVTL. L. REP. (ENVTL. L. INST.) 20,700 (W.D. Ky. 1979), *aff'd*, 671 F.2d 954 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981). *See also* United States v. Lanigan, 534 F. Supp. 630 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 986 (3d Cir.), *cert. denied*, 460 U.S. 1084 (1983). See also Indictments & Convictions 1983-86, *supra* note 32, indicating that in the period 1983 to mid-1985 at least 13 individuals were sentenced to actual time in jail, not merely probation or suspended sentences.

160. *See, e.g.*, TSCA § 23, 15 U.S.C. § 2622 (1982); CWA § 507, 33 U.S.C. § 1367 (1982); RCRA § 7001, 42 U.S.C.A. § 6971 (West Supp. 1985); CAA § 322, 42 U.S.C. § 7622 (1982); CERCLA § 110, 42 U.S.C. § 9609 (1982).

161. *See infra* notes 172-74 and accompanying text.

tical advantages in prosecuting a criminal case. In contrast to the liberal discovery rules in civil cases, which generally permit discovery of all relevant, nonprivileged matters, discovery in criminal cases is much more restricted.[162] However, the United States Supreme Court has held that under appropriate circumstances evidence obtained through civil discovery may be used in a criminal action without violating due process.[163] Parallel proceedings can thus afford environmental enforcement authorities greater latitude in the investigation and assembly of evidence than if a criminal action were filed alone.[164]

IV. A PRACTICAL APPROACH TO ENVIRONMENTAL CRIMINAL CASES

Criminal enforcement in environmental matters is such a sufficiently recent phenomenon that many issues remain unclear. The technical basis for many violations dictates that factual investigation is critical to determinations of liability. As in any area in which the number of potential violations threatens to overwhelm enforcement resources, the policy choices, prosecutorial discretion, and the defendant's potential coopera-

162. *Compare* FED. R. CIV. P. 26(b) *with* FED. R. CRIM. P. 16.

163. United States v. Kordel, 397 U.S. 1, 11 (1970). The *Kordel* Court conceded the possibility of abuse and the constitutional problems involved in simultaneous proceedings. *Id.* at 11-12. See *infra* note 172 for a discussion of *Kordel*. *See also* SEC v. Dresser Indus., 628 F.2d 1368, 1387 (D.C. Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980) (information gained in civil investigation may be used for criminal enforcement purposes); *White-Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 169, 184-97 (1980); Note, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277 (1967). To avoid this problem, one commentator has suggested refashioning the criminal discovery rules to expand discovery in corporate crime cases. He argues that the traditional justifications for narrow criminal discovery—to discourage perjury and the manufacture of evidence, to avoid the possibility of intimidating witnesses, and to minimize the advantage defendants gain because of their fifth amendment privilege—are diluted in corporate environmental crime cases. *See Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1333-34 n.134 (1979).

164. According to EPA policy:

> Information obtained in civil cases from subjects of a parallel proceeding may be provided to personnel working on the criminal case, if the subjects were on notice of the potential for a parallel criminal proceeding when the information was provided by the subjects, and if warnings were given prior to testimonial situations.

C. Price, *supra* note 29, at 9. So long as determination of civil liability is at least one of the purposes of government discovery, the information cannot be withheld merely because it would also be useful in a criminal prosecution. United States v. Salter, 432 F.2d 697, 699 (1st Cir. 1970). On occasion, this opportunity to circumvent normal criminal discovery limitations may also be utilized by the defendant to obtain information from the government. Thus, courts have generally taken a narrower view of such requests. *See, e.g.*, Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962) (defendant's motion denied), *cert. denied*, 371 U.S. 955 (1963); Note, *Stay of Discovery in Civil Court to Protect Proceedings in Concurrent Criminal Action—The Pattern of Remedies*, 66 MICH. L. REV. 738, 742-43 (1968).

tion play a major role in enforcement decisions. Hence, an effective approach to environmental criminal cases is essential for corporations, individuals and their counsel. Knowledge of the statutes and liability issues is a necessary foundation, but in the environmental area, more than most, the focus must be on practical policy issues. This section explores these considerations from the authors' experience in both prosecuting and defending environmental criminal cases.

A. Prosecutorial Standards

There are no hard and fast rules on when a criminal case should be brought in the environmental area or when and how the decision should be made as to whether particular conduct should be subjected to civil or criminal enforcement. Under general Department of Justice policy,[165] prosecutors have almost unbounded discretion in making such decisions. The federal government has "wide latitude in determining when, whom, how and even whether to prosecute for apparent violations of federal criminal law."[166]

This broad discretion, often recognized by the courts,[167] applies in the criminal environmental area, as well. In determining whether to commence a prosecution, a decision must be made that there is probable cause to believe that a federal offense has been committed, that the admissible evidence probably will be sufficient to obtain or sustain a conviction and that a sufficient federal interest exists.

The general perception is that prosecutors must have broad discretion to exercise fairness in executing the law. This is particularly true in the environmental area where most civil cases could also be criminal cases and the decision to bring a criminal case rests largely on a subjective evaluation of the seriousness and the culpability of the particular conduct.

In exercising such discretion, prosecutors must use common sense and good judgment in their selection of cases to assure proper enforcement of the law and to maximize the possible deterrent effect. Among the factors which most frequently enter into a prosecutor's decision in any environmental case include: the seriousness of the offense and the environmental harm caused; the degree of knowledge, willfulness and recalcitrance on the part of the alleged violators; whether the conduct rep-

165. U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1980) [hereinafter cited as PRINCIPLES OF FEDERAL PROSECUTION].

166. *Id.* at 1.

167. *See, e.g.*, Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967).

resents a repetition of past illegal conduct; the duration of the offense; the ability within the particular industry to avoid violations; the effect if criminal sanctions are not sought; the degree of an individual's responsibility, control and knowledge about the illegal activity; and the effectiveness of civil sanctions as a deterrent to protect the federal interests in the absence of a criminal enforcement action.[168]

As a general policy, the Department of Justice looks to responsible corporate officers, agents and employees and closely examines their potential criminal liability in accord with its philosophy that enforcement pressure on individuals greatly enhances the deterrent effect of environmental statutes. The Justice Department and EPA place particular emphasis on cases which arise out of false reports regarding regulated activities and cases where perpetrators have avoided the regulatory scheme by failing to obtain required permits.[169] The government places high priority on these types of violations because they strike at the heart of the effectiveness and vitality of EPA's regulatory programs.

Self-reporting and voluntary compliance are the quintessence of an effective regulatory program. The government does not have the resources to oversee every permittee to ensure they are truthfully and accurately reporting facility compliance status. More importantly, the integrity of the regulatory program depends on the regulated community's recognition of its obligation to obtain and abide by needed permits. Thus, in EPA's view, when a court takes the position that one who could never have obtained a permit cannot be prosecuted for activity without a permit, as in *United States v. Johnson & Towers, Inc.*,[170] the viability of the entire regulatory scheme is threatened.

Unscrupulous operators who shave costs by avoiding regulatory requirements undercut voluntary compliance efforts. Since nonpermitted discharges frequently are of the most environmentally damaging type,[171]

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168. According to Justice Department guidelines, the attorney for the government should weigh all relevant considerations including:

(a) federal law enforcement priorities;
(b) nature and seriousness of the offense;
(c) deterrent effect of prosecution;
(d) the person's culpability in connection with the offense;
(e) the person's history with respect to criminal activity;
(f) the person's willingness to cooperate in the investigation or prosecution of others; and
(g) the probable sentence or other consequences if the person is convicted.

PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 165, at 6-7.

169. *Id.*

170. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985); *see supra* notes 112-15 & 146-48 and accompanying text.

171. *See, e.g.*, United States v. Ward, 676 F.2d 94 (4th Cir. 1982); United States v. Ralston

not only are such operators undercutting regulatory goals, from a public health standpoint they are also the most dangerous. Thus, the government's highest priority is to prosecute these violations and the individuals who engage in them, aid and abet them, or fail to take action or set up procedures to stop them.

In general, the policy of all federal government enforcement efforts in the environmental area has been to impress upon individuals that they must take seriously their obligation, both as individuals and as corporate officers, to ensure that environmental laws are obeyed and that harms to the environment are averted. Lawyers for such corporations are viewed as having special obligations, ethical as well as legal. The Justice Department looks very closely at cases in which attorneys have arguably become a part of willful illegal activity.

The broad discretion given to prosecutors, and the policy considerations which guide them, come into play in shaping the nature of the remedy sought. At the outset, nearly all environmental statutes authorize the government to seek civil as well as criminal sanctions. In general, courts have held that the use of parallel civil and criminal proceedings in appropriate circumstances does not violate constitutional due process.[172] Both EPA and the Department of Justice have policy guidelines for determining when parallel proceedings are warranted.[173] In general, criminal sanctions will be sought to supplement civil penalties when the conduct is especially egregious or willful, the deterrent effect is likely to

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Purina Co., 12 ENVTL. L. REP. (ENVTL. L. INST.) 20,257 (W.D. Ky. 1982); United States v. Distler, 9 ENVTL. L. REP. (ENVTL. L. INST.) 20,700 (W.D. Ky. 1979), *aff'd*, 671 F.2d 954 (6th Cir. 1981).

172. There are no reported environmental cases contesting the use of parallel proceedings. However, in United States v. Kordel, 397 U.S. 1, 10 (1970), the United States Supreme Court held that enforcement of a public welfare statute, the Food, Drug & Cosmetic Act, would be unduly stultified if the government were forced to choose one type of investigation over another, or to defer one action pending final resolution of the other. *See also* United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978); United States v. Gel Spice, 773 F.2d 427 (2d Cir. 1985); SEC v. Dresser Indus., 628 F.2d 1368 (D.C. Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980). In the environmental area, however, where there is no bright line procedure for immediately granting criminal prosecution requests for information obtained in a civil context—information which would be identified initially as focusing on criminal violations—the government owes environmental defendants an extra level of care. The government must be sure that due process considerations are observed and that prosecutorial misconduct does not result from contrary use of civil information gathering techniques once the focus of a case shifts to criminal prosecution. But see *supra* notes 161-64 for a discussion of concurrently pursuing civil and criminal action as a discovery device.

173. *See, e.g.*, Memorandum from Judson W. Starr, Director, Envtl. Crimes Unit, U.S. Dep't of Justice, to F. Henry Habicht II, Assistant U.S. Attorney Gen., Land & Natural Resources Div., U.S. Dep't of Justice, Parallel Proceedings in the Enforcement of Environmental Law (Jan. 28, 1986) [hereinafter cited as Starr Memorandum]; C. Price, *supra* note 29.

be widespread, and the individuals bear responsibility to a significant degree for the improper practices. Conversely, civil relief will be used to supplement a criminal action when ongoing hazardous activity is involved and injunctive relief is appropriate, when recovery of funds expended for remedial action is needed, or when the maintenance of parallel proceedings is permissible and offers procedural or tactical advantages.[174]

An added dimension to prosecutorial discretion on the federal level is the decision of whether to bring a concurrent federal action when state criminal proceedings are pending or likely. Under many environmental statutes, states are authorized to administer federal regulatory requirements so that criminal provisions are concurrently enforceable by both state and federal authorities.[175] Courts have held that concurrent criminal proceedings do not per se constitute double jeopardy.[176] Federal prosecutors, then, must decide when parallel federal prosecution is warranted.

EPA has a concurrent proceeding policy which provides guidance to avoid the potential for abuse inherent in double actions.[177] The Department of Justice typically brings such actions only if it believes the state prosecution was inadequate in establishing a legal principle or deterring illegal conduct.[178]

Since federal and state authorities may differ on what constitutes "adequate" enforcement, corporations and individuals should be aware that a second prosecution is possible. Courts are mindful of the potential for abuse in concurrent enforcement actions in the civil arena and have been willing on occasion to block such actions, particularly in areas like the Clean Water Act and RCRA, where the legislature has mandated a primary role for state enforcement efforts.[179] Presumably courts would

174. Buente Telephone Conversation, *supra* note 7. *See* C. Price, *supra* note 29, at 2-3; Starr Memorandum, *supra* note 173, at 2-4. See also *supra* notes 172-73 and accompanying text for a discussion about the procedural or tactical advantages of parallel suits.

175. *See, e.g.*, CWA § 309, 33 U.S.C. § 1319 (1982); RCRA § 3006, 42 U.S.C.A. § 6926 (West Supp. 1985); CAA § 110, 42 U.S.C. § 7410 (1982).

176. *See* United States v. Ward, 676 F.2d 94, 97 (4th Cir.) (federal criminal prosecution after conviction of individual on state charges is not double jeopardy because elements and proof required were sufficiently different), *cert. denied*, 459 U.S. 835 (1982).

177. *See generally* C. Price, *supra* note 29, at 4-13.

178. Mr. Ramsey, as former Chief of the Justice Department's Environmental Enforcement section, was integrally involved in implementing the Department's concurrent proceeding policy.

179. *See, e.g.*, United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980) (EPA estopped from bringing parallel action under Clean Water Act by adequate prior state action); United States v. Cargill, Inc., 508 F. Supp. 734 (D. Del. 1981) (EPA estopped from bringing parallel action by adequate prior state action); Shell Oil v. Train, 415 F. Supp. 70, 77 (N.D.

take an even stricter view of possible abuse in parallel criminal prosecutions.

B. Managing the Defense for Criminal Investigations

A detailed discussion of how to manage the defense of a criminal investigation in the environmental law area is beyond the scope of this Article since many of the legal issues involved are both complex and unclear. This is especially true in the context of statutes such as CERCLA and RCRA, since many of the enforcement issues are only now being addressed in reported opinions. However, there are a number of broad areas which should be given prompt and careful attention by any regulated entity which is, or may be, the subject of a criminal prosecution.

The corporation should immediately seek the advice of an outside counsel experienced in environmental criminal enforcement actions at the earliest indication that the government is proceeding criminally. In most cases, corporate counsel know little environmental law, in-house technical people have little legal expertise, and even regular environmental counsel may be unfamiliar with the added complexities of a criminal case. "Learning on the case" is rarely a wise course; in criminal prosecution the need for expertise is even more pressing.

Early involvement of experienced counsel has two distinct advantages. First, it may be possible to demonstrate that no criminal activity occurred, prior to and without the need for indictment. Alternatively, when the attorney is familiar with the history of the case, one of defendant's disadvantages will not include the counsel's playing "catch up" because he became involved at a stage too late in the case. The continuity of counsel, for both substantive and strategic reasons, is critical to defending a criminal environmental case. Once outside counsel is appointed, the accused then should form an in-house team to work with outside counsel or consultants to manage the flow of information in order to ensure a consistent defense approach to the case.[180]

Cal. 1976) (Congress intended that EPA act only when "a state fails to act."), *aff'd*, 585 F.2d 408 (9th Cir. 1978). In what is apparently the first case involving a challenge to parallel actions under RCRA, an EPA Administrative Law Judge, in *In re* Matter of BKK Corp., No. RCRA-IX-84-0012 (Apr. 18, 1984), held that where the state had engaged in adequate enforcement action, albeit not identical to that intended by EPA, EPA was precluded from instituting enforcement action based on the same alleged violations. On appeal, an EPA Administrator affirmed the Administrative Law Judge's dismissal of EPA action, but vacated the opinion as a precedent. *In re* Matter of BKK Corp., No. RCRA-IX-84-0012, *aff'd and vacated*, (Oct. 23, 1985).

180. In contrast to civil enforcement actions, criminal cases are governed by the so-called

The corporation or individual should instruct counsel, and any in-house team working with counsel, to set up procedures for determining exactly what conduct is taking place with respect to discharges, waste handling and disposal, regulatory compliance, notification, or whatever else may be the subject of the criminal indictment. Such information is essential in evaluating the merits of the accused's defense, determining which evidentiary privileges or other legal defenses may be appropriate, and, in the case of corporations, indemnifying responsible individuals and providing a basis for remedial activities and procedures to correct improper conduct. This information will also facilitate responses to government requests for information in other civil or criminal enforcement actions. It is preferable that this investigation be conducted by outside legal counsel to ensure that, to the extent possible, the attorney-client privilege attaches to the information learned.

An essential part of this initial process, in the case of a company or corporation, is to determine who should speak for the company with respect to the enforcement action. A consistent, coordinated and unified response by the company is critical, especially since information provided in statements made to the government may be the source of subsequent criminal sanctions.[181] The identification of responsible individuals is important not only in facilitating the corporation's defense, but also in ensuring that the corporation fulfills its legal obligations with respect to such officers or employees. Under state law, officers, agents or employees who are subjected to criminal prosecution based on activities conducted within the scope and authority of their employment may be entitled to have the corporation provide a legal defense and indemnity.[182]

It is important to identify any possible conflicts of interest between the corporation and its officers or employees as early as possible in the corporation's own investigation; otherwise, the corporation may be in the position of soliciting information and statements from employees which later may be used against the individuals.[183] This is especially important since statements which an individual could avoid by invoking the fifth amendment protections may be discoverable from a corporation, since corporations have no fifth amendment privilege.[184] Moreover, a corporation's interests will often differ from those of the individual. For exam-

Speedy Trial Act, 18 U.S.C.A. §§ 3161-3174 (West Supp. 1985), which establishes various specific time limits to ensure that criminal cases progress rapidly.

181. *See supra* notes 37-38, 48, 52, 67, 71 & 76 and accompanying text.

182. *See supra* note 156 and accompanying text.

183. *See supra* note 93 and accompanying text.

184. Curcio v. United States, 354 U.S. 118, 122 (1957); United States v. White, 322 U.S. 694, 699 (1944).

ple, the corporation may claim that the acts were outside the course and scope of employment or willful and deliberate, and thus potentially excuse the corporation from imputed liability.[185] As such, the corporation's lawyer or investigators may be open to charges that they solicited information without adequately advising the officer or employee that attorney-client confidentiality would not attach.

A corporation should do its best to establish an effective and cooperative relationship with the governmental regulators, district attorney or other legal enforcement personnel. As noted, enforcement officials have considerable latitude in the criminal enforcement of environmental statutes[186] and the culpability and cooperation of an alleged violator are important factors in determining how to exercise that discretion. Even if the decision is made to prosecute a criminal case, a record of cooperation and good faith can encourage the prosecutor or the court to consider "alternative sentencing" in place of onerous fines or incarceration.[187]

Although the statutes provide broad and sweeping powers to governmental enforcement agencies, the staff resources and time available to invoke such powers is often quite limited and strained. Corporations which adopt a cooperative attitude, assist in the government investigation to the extent consistent with their own interests, and exhibit a willingness to take remedial actions or to accept responsibility, when appropriate, are more likely to secure an out-of-court resolution of the matter or a prosecution on better terms than might otherwise be the case. In some cases, disciplining employees responsible for violations but who lack high corporate knowledge has deterred the government from criminally prosecuting corporations. Conversely, the more traditional crimi-

185. *See supra* note 156 and accompanying text.

186. *See supra* notes 165-79 and accompanying text.

187. Despite some dissension within the Department of Justice over whether "alternative sentencing" is appropriate, the government has acceded to a wide range of nontraditional sentence structuring as a condition of a defendant's probation or as part of the court's sentence. The authors' survey of Department of Justice enforcement actions showed that some form of alternative sentencing was employed in one-fourth to one-third of the cases involving individuals. *See* Indictments & Convictions 1983-86, *supra* note 32. The most common sentence imposed was "community service," in amounts ranging from 100 to 1000 hours. One company was directed to set up an $850,000 environmental trust fund; other defendants have paid $45,000 to the Girl Scout Council of St. Louis, $5000 to the Big Horn County Agricultural Extension Service, $5000 to the "Foundation for the People" for a white collar crime rehabilitation program, and have agreed to turn over proceeds of land owned by the corporation to CERCLA (Superfund) for cleanup costs. Several individual defendants agreed not to participate in any hazardous waste business for five years and one was ordered to enter an alcoholic treatment program. Indictments & Convictions 1983-86, *supra* note 32. Courts favor this approach since it at least purports to do something positive for the public, unlike the collection of general fines or the imprisonment of otherwise responsible citizens.

nal enforcement posture of resisting at every stage and on every ground may not be in the long term interest of the corporation or responsible individuals in this specific area. Yet in some cases, it may be the only possible defensive posture. Finding and striking the appropriate balance may determine whether a client goes to jail or pays a civil fine.

Potential defendants must be made aware that criminal environmental cases may turn on technical, scientific issues. At an early stage, the company should employ, through outside counsel, the most capable consultants to work with the defense team in developing the technical issues in the case. In this connection, as with all federal agencies, EPA has many components, not all of which communicate with each other. Moreover, EPA and other federal agencies sponsor, or actually conduct in-house, many scientific studies and produce reports which may be helpful to a defendant in a criminal case. Similarly, internal EPA debate on the appropriate interpretation of a regulation may provide a basis for a defense in a technically oriented case. Thus, the use of the Freedom of Information Act[188] and a knowledge of agency policy, legal interpretations and bureaucratic organization may be critical to the defense of a client.

Finally, in the case of significant substantive violations, the corporation should consider an immediate and thorough environmental audit by experienced environmental counsel and/or a site characterization. Investigations may be undertaken by in-house personnel where qualified, but such investigations, if used in later proceedings or made public,[189] are likely to impact the government's investigation and prosecution only if perceived as objective. Consequently, the better approach is usually to

188. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552 (1982 & Supp. II 1984)).

189. Some corporations are reluctant to ask outside counsel to perform an audit because it may be discoverable by government enforcement authorities. Under appropriate conditions, a privilege may protect such studies. The common law attorney-client privilege protects confidential communications between an attorney and his client about legal matters, Upjohn Co. v. United States, 449 U.S. 383, 386 (1981), but the privilege extends only to legal advice, not to business or technical assistance, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862-63 (D.C. Cir. 1980). An audit should meet the requirements for attachment of the privilege. Although an audit is a technical document, it is a communication between the counsel who prepared it and his or her client undertaken for the purpose of determining the clients' liabilities. *See* Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971) (patent materials privileged because "documents containing considerable technical factual information but which were nonetheless primarily concerned with giving legal guidance to the client were classified as privileged").

A site assessment performed by expert consultants, which consists of an objective, technical assessment of site geology, contamination, and possible remedial measures, should be assumed to be non-privileged. In most significant cases, it can be required by the enforcing

retain one of the many scientific consulting firms who specialize in this area. Such an investigation will provide the corporation with a scientific basis for evaluating its position and for disputing, where appropriate, the government's claims of damages to persons or property. Accurate information in this area is essential to the corporation's decision on how to defend against the criminal case.

In addition, such site characterizations may help to diffuse public hysteria or refute media reports concerning widespread or substantial environmental dangers. A reasoned assessment showing either a lack of significant potential harm or a lack of causation between the alleged injuries and the corporation's activities may alleviate such public outcries. Since public pressure often fuels enforcement efforts (perhaps more so on the state level where enforcement officials are more directly responsible to the electorate), management of public relations can be a crucial element in a corporation's response to a criminal enforcement effort.

V. CONCLUSION

The use of criminal sanctions is receiving increased emphasis in the enforcement of environmental statutes. Federal criminal enforcement programs, after a slow start, are maturing into effective programs with identifiable standards and procedures. EPA and the Department of Justice are now beginning to flex the considerable muscle given them by these sweeping statutes. Unlike traditional criminal cases, there are also likely to be a full set of technical issues which arise in a civil context. The government's case is typically better prepared and receives more support than most civil environmental matters and thus, defense counsel must be especially prepared to meet the government's case with a strong defense. The complexity of these cases, the risk for defendants and the government's vigor in prosecution, point to difficult times for those enmeshed in environmental criminal cases as defendants.

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authority. *See, e.g.*, RCRA § 3013(a), 42 U.S.C. § 6934(a) (1982); CERCLA § 104(e), 42 U.S.C. § 9604(e) (1982).

Privilege questions as to documents underscore the need for early involvement of counsel. *See supra* notes 183-85 and accompanying text.