SMU DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 45 | Issue 3 Article 7

January 1991

Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders

Steven M. Morgan

Allison K. Obermann

Recommended Citation

Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 Sw L.J. 1199 (1991)
https://scholar.smu.edu/smulr/vol45/iss3/7

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

PERILS OF THE PROFESSION: RESPONSIBLE CORPORATE OFFICER DOCTRINE MAY FACILITATE A DRAMATIC INCREASE IN CRIMINAL PROSECUTIONS OF ENVIRONMENTAL OFFENDERS

by

Steven M. Morgan, P.C. and Allison K. Obermann, Esq. *

I. INTRODUCTION

ON July 16, 1991, U.S. District Judge Jerry Buchmeyer sentenced the former owner of a waste disposal company in Garland, Texas to a three-year prison term for dumping untreated industrial waste into the Dallas sewer system. The former owner, Herman Goldfaden, also paid a monetary penalty of $75,000, while his company received the maximum $1,000,000 fine.[1] Asking for leniency, Goldfaden said "I'm a good man. I've been good to my employees . . . [b]eing in jail will hurt."[2] The judge nevertheless imposed a sentence that, though harsh, is consistent with a growing trend in criminal environmental cases. Furthermore, recent court cases have shown that while the managerial behavior in this instance was highly culpable, many corporate executives may face criminal liability purely on the basis of their position in the company.

Enforcement of criminal liability for environmental crimes is on the rise. In response to congressional encouragement,[3] as well as growing public pressure, prosecutors are pursuing criminal indictments with increasing vigor. 1990 was a record year in terms of criminal indictments for environmental crimes. The Department of Justice (DOJ) returned 134 indictments in 1990, a 33% increase from 1989. Of those prosecuted, the greatest percentage

---

* Steven M. Morgan received his B.A. from Northwestern University and his Doctor of Jurisprudence from Vanderbilt University School of Law. He is currently a Partner at Akin, Gump, Hauer & Feld. Allison K. Obermann received her B.A. from Dartmouth College and her Doctor of Jurisprudence from the University of Texas School of Law. She is currently an Associate at Akin, Gump, Hauer & Feld. The authors gratefully acknowledge the significant contributions made to this article by Joseph D. Batson.

1. Tracy Everbach, *Man Gets 3-Year Term for Illegal Dumping*, DALLAS MORNING NEWS, July 17, 1991, at 21A.

2. *Id.* at 22A.

3. James S. Lynch, *The Criminal Provisions of RCRA: Should Strict Liability be Applied to its Permit Requirement*, 5 ST. JOHN'S J. LEGAL COMMENT. 127, 129 (1989).

(78%) were corporations and their managers. More significantly, the DOJ has been achieving a 95% conviction rate for environmental prosecutions.[4]

Prosecution of environmental crimes is politically advantageous[5] and lacks many of the prosecutorial hurdles found outside the environmental context. The labyrinth of regulation in this area, the persistent legal standard of strict liability in many laws, the vast array of reporting requirements, and the lack of privilege with regard to most environmental information, all combine to make the defense of a criminal environmental charge a difficult endeavor.

In light of this trend, recent cases involving the responsible corporate officer doctrine are especially significant. This emerging theory of liability holds a corporate officer liable for the acts of his or her employees and allows juries to infer the requisite *mens rea* for environmental violations based on that officer's position, responsibility, and authority in a company. Prosecutors are employing the responsible corporate officer doctrine with greater frequency, and the courts of appeals are interpreting the doctrine with varying degrees of stringency. Therefore, it is important that corporations under the penumbra of environmental regulation keep abreast of these cases and employ procedures designed to minimize their potential liability.

This Article examines the responsible corporate officer doctrine in the ever expanding context of criminal environmental enforcement. It first discusses the origins of the doctrine in the public welfare arena. The Article next examines four of the most recent cases interpreting the doctrine. The Article then discusses the significance of the responsible corporate officer doctrine in light of federal sentencing guidelines which are producing more onerous consequences for environmental criminals. Finally, the Article outlines possible methods to reduce the potential for criminal liability based upon a recent DOJ policy statement.

II. The Responsible Corporate Officer Doctrine

A. *Background: Drugs and Hand Grenades*

The origins of the responsible corporate officer doctrine can be traced to *United States v. Dotterweich*,[6] a 1943 case arising under the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), which prohibits the introduction or delivery for introduction of any adulterated or misbranded drug into interstate commerce.[7] *Dotterweich* is a seminal case on public welfare legislation, through which Congress sought to "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are

4. David Aufhauser et al., *Environmental Crimes, 1990 Annual Report*, 1990 A.B.A. Sec. Nat'l Resources, Energy, & Envtl. L. 211 (1990).

5. Steven L. Humphreys, *Possible Legal Challenges to Prosecution of Environmental Crime*, 5 Toxics L. Rep. (BNA) 295, 302 (Aug. 1, 1990).

6. 320 U.S. 277 (1943).

7. Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, ch. 675 (1938) (codified as amended at 21 U.S.C. §§ 301-392 (1988)).

largely beyond self-protection."[8] The goal of the FDCA, as interpreted by the Supreme Court, was to "[put] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[9] Thus, for purposes of deterrence in an industry involving "illicit and noxious articles," the Court reasoned that an executive standing in responsible relation to the public danger could be held criminally liable despite the absence of any conscious fraud. The Court acknowledged the potential hardship such public welfare statutes could impose on individuals lacking any knowledge of the wrongdoing.[10] Nevertheless, the Court held that the potential hardship to a public that was "wholly helpless" in the face of a hazardous industry outweighed the burden on those in a position to inform themselves as to the laws restricting such commerce.[11]

In *Dotterweich* the president and general manager of a pharmaceutical company was convicted of a violation of the FDCA after his company purchased drugs from manufacturers and shipped them, repacked under its own label, in interstate commerce. The jury found Dotterweich guilty on two counts of shipping misbranded drugs in interstate commerce and one count of shipping an adulterated drug.[12] The Court rejected Dotterweich's theory that his ignorance of any wrongdoing should immunize him from liability.[13] The Court held that the FDCA, being a public welfare statute, dispensed with the elements of awareness or knowledge in the interest of public safety.[14]

The Supreme Court revisited the FDCA and the *Dotterweich* decision in 1975.[15] In *United States v. Park* the Court expanded strict liability for violations of the FDCA and imposed a standard of care on corporate officials in a position to prevent or remedy such violations. Park, the president and chief executive officer of a national food chain, pleaded not guilty to charges alleging rodent infestation at certain warehouses, a violation of the FDCA. Park asserted that he had delegated authority for such matters to dependable subordinates, although there was also evidence that the Food and Drug Administration (FDA) had advised Park of unsanitary conditions at the warehouse. The jury convicted Park on all counts, but the court of appeals reversed, and held that while *Dotterweich* dispensed with the element of "awareness of some wrongdoing" the Supreme Court had not construed the FDCA as dispensing with the element of wrongful action.[16]

The Supreme Court rejected the court of appeals' argument that wrongful action was an indispensable element of a conviction under the FDCA.[17] The Court stressed that corporate officials who voluntarily assume positions of

8. *Dotterweich*, 320 U.S. at 280.
9. *Id.* at 281.
10. *Id.* at 284.
11. *Id.*
12. *Id.* at 278.
13. *Dotterweich*, 320 U.S. at 280.
14. *Id.*
15. United States v. Park, 421 U.S. 658 (1975).
16. *Id.* at 666 (citing *Dotterweich*, 320 U.S. at 281).
17. *Id.* at 672.

authority in business enterprises that affect the health and well-being of the public that supports them should likewise assume the duties of foresight and vigilance that the FDCA imposes upon them.[18] In describing this duty of care, the Court stated that "the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure [sic] that violations will not occur."[19]

The Court affirmed the district court's jury instruction that directed that Park's position in the corporate hierarchy could not suffice as the sole basis for his conviction.[20] The Court, nevertheless, held that "the [g]overnment establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."[21] Thus, *Park* recognizes that, in the context of public welfare statutes, corporate executives are ultimately responsible for violations of subordinates over whom they exert authority. Furthermore, corporate officers work under the burden of a duty of vigilance to ensure that violations do not occur.[22]

More significantly, the breadth of responsibility that often accompanies the chairmanship of a large national corporation afforded Park but a meager defense. The Court acknowledged the viability of an objective impossibility defense.[23] That is, corporate agents may raise the affirmative defense that they were "powerless to prevent or correct the violation."[24] Various letters from the FDA advising Park of sanitary deficiencies at the warehouses, however, easily defeated his objective impossibility defense. In addition, the Court implied that such a defense would have to survive serious judicial scrutiny in order to shield a corporate officer from liability under the FDCA, since the deterrent characteristics of public welfare statutes are rooted in "penal sanctions cast in rigorous terms."[25] Indeed, the legal tenet for which scholars now routinely cite the *Park* decision is that responsible corporate agents can incur vicarious criminal liability based solely on corporate bylaws and that the objective impossibility defense offers sparse refuge.[26]

The theoretical basis for the significant escalation in environmental prosecutions during the past ten years is rooted in the less stringent *mens rea* requirement of public welfare offenses. The Supreme Court explained this

18. *Id.*

19. *Id.*

20. *Paris*, 421 U.S. at 674-75.

21. *Id.* at 673-74.

22. Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 WM. MITCHELL L. REV. 987, 992 (1978).

23. *Park*, 421 U.S. at 673-74.

24. *Id.* at 673.

25. *Id.*

26. Christopher Harris, *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203, 229 n.158 (1988).

lower knowledge threshold in *Liparota v. United States*.[27] *Liparota* provides insight into the relationship courts have found between public welfare statutes like the FDCA and environmental laws.

In *Liparota* the co-owner of a sandwich shop was indicted for illegally acquiring and possessing food stamps, a statutory offense under 7 U.S.C. § 2024(b)(1). The issue before the Court concerned the degree of knowledge the government had to prove on the part of the defendant. Did the defendant violate the statute with an "evil-meaning mind," or would general intent suffice? While articulating its rationale for holding that the statute requires knowledge on the defendant's part that his conduct violated the statute, the Court made a distinction that is highly indicative of public welfare reasoning. Even if Congress included knowledge as an element of a crime, "[i]n most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[28] Referring to a firearms case, *United States v. Freed*,[29] the Court reiterated its holding in that case that the government did not have to prove that the owner of unregistered hand grenades knew that the grenades were unregistered to convict under a federal statute making it illegal to receive or possess an unregistered firearm.[30] In *Freed* the Court noted that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act."[31]

As we shall see, corporate officials in industries regulated by environmental statutes would be wise to think of themselves as owners of hand grenades, the shrapnel from which can readily pierce the corporate veil. Prior to the recent series of cases employing the responsible corporate officer doctrine, some writers speculated hopefully that the doctrine would not expand beyond statutes that do not require a showing of willfulness or intent.[32] Courts, however, have been quick to group toxic or hazardous materials in the same category as drugs, firearms and hand grenades.[33] Environmental statutes, like the FDCA, are being treated as public welfare statutes for which a mere showing of general intent satisfies the knowledge requirement and is not considered overly punitive when compared to the health and safety risks hazardous substances clearly pose.[34] As resort to the doctrine

27. 471 U.S. 419 (1985).

28. *Id.* at 433.

29. 401 U.S. 601 (1971).

30. *Liparota*, 471 U.S. at 433.

31. *Id.* (quoting *Freed*, 401 U.S. at 609).

32. Frederick W. Addison, III & Elizabeth E. Mack, *Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time*, 44 Sw. L.J. 1427, 1435 (1991).

33. *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564-65 (1971); United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 1143, 107 L. Ed. 2d 1047 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502-03 (11th Cir. 1986); United States v. Johnson & Towers, Inc., 741 F.2d 662, 667 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

34. F. Henry Habicht, II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10,478, 10,483 n.41 (Dec. 1987).

becomes more frequent, the responsible corporate officer doctrine could affect not only the midnight dumpers of the regulated community but lax or inattentive executives responsible for compliance with the labyrinth of environmental regulations as well.

B. Recent Cases Applying Responsible Corporate Officer Doctrine

Recent cases relying on *Dotterweich*, *Park*, and to a lesser extent *Liparota*, adopt the less burdensome theories of intent that often accompany public welfare offenses. At least one court interpreting environmental laws under the responsible corporate officer doctrine has read *Park* broadly, imposing liability based almost solely on the officer's position in the corporate hierarchy.[35] Others refuse to impose liability on the basis of the agent's position alone, yet minimal circumstantial evidence in addition to the officer's position within the corporation may nonetheless suffice. However courts interpret it, the responsible corporate officer doctrine substantially eases a prosecutor's burden and could prove problematic to all but the most vigilant corporate officers.

The Fourth Circuit's decision in *United States v. Dee*[36] has been one of the more stringent applications of the responsible corporate officer doctrine. The defendants in *Dee* were civilian engineers employed to develop chemical warfare systems for the Army. Gepp, a chemical engineer, was responsible for operations and maintenance at the facility. Dee and Lentz were Gepp's superiors. As heads of their respective departments, the defendants were responsible for ensuring that provisions of various company compliance policies, as well as the Resource Conservation and Recovery Act (RCRA)[37] requirements, were fulfilled within their departments and that their subordinates were aware and in compliance with those regulations. The district court found all three guilty of multiple violations of RCRA for illegally storing, treating, and disposing of hazardous waste. The district court suspended each defendant's sentence and placed each defendant on three years probation and 1,000 hours of community service.

On appeal, the defendants first asserted that they were immune from liability because of their status as federal employees at a federal facility. The Fourth Circuit rejected this argument, finding that even where federal employees enjoy a degree of immunity for certain actions, there was no general immunity from criminal liability for actions taken while in office.[38]

The defendants next argued that they did not knowingly violate RCRA. The defendants claimed that they did not know that violation of RCRA was a crime and that they were unaware that the chemicals they managed were hazardous. The court held that ignorance of the law is no defense and, more specifically, that the government did not need to prove the defendants knew

35. *See* United States v. Dee, 912 F.2d 741, 748-49 (4th Cir. 1990), *cert. denied*, — U.S. —, 111 S. Ct. 1307, 113 L. Ed. 2d 242 (1991).
36. *Id.*
37. 42 U.S.C. §§ 6901-6992k (1988).
38. *Dee*, 912 F.2d at 744.

violation of RCRA was a crime, nor that regulations existed which listed and identified the chemical wastes as RCRA hazardous wastes.[39] The court stated that the government need only prove that the defendants knew of the generally hazardous nature of the chemicals they were handling.[40] Applying the reasoning of public welfare statutes like the FDCA to RCRA, the court stated that "where . . . dangerous or deleterious devices or products of obnoxious waste materials are involved, 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."[41]

Defendant Gepp contended that there was insufficient evidence that he directed the storage or disposal operations. He asserted that "[s]loppy storage procedures is [sic] not a crime."[42] The court strongly disagreed, stating "[n]egligent and inept storage of hazardous wastes is one of the evils RCRA was designed to prevent, and § 6928(d) makes such egregious behavior a crime."[43] The court found evidence that Gepp was in charge of operations at the plant, had originally ordered placement of the hazardous chemicals in a storage shed, had repeatedly ignored warnings about the hazardous condition of chemicals that were improperly stored, and had made no effort to comply with RCRA regulations. The court found this evidence sufficient for the imposition of criminal liability under RCRA.[44]

The next federal court to consider the responsible corporate officer doctrine rejected strict adherence to the doctrine by holding that a corporate officer may not be held criminally liable under environmental laws solely because his employees acted illegally.[45] In *United States v. White* the court held that neither RCRA nor the Federal Insecticide, Fungicide, and Rodenticide Act[46] allows a corporate officer to be held criminally liable unless he or she knowingly participated in the illegal acts charged.[47]

White involved allegations that waste pesticide materials, stored in an evaporation tank at PureGro Inc., were illegally removed and sprayed on a field. A PureGro corporate officer, Steven Steed, was charged with knowingly storing and disposing of hazardous waste without a permit by virtue of his direct responsibility for all environmental safety matters at PureGro's facilities and his oversight of its employees.

The court concluded, however, that the responsible corporate officer doctrine does not apply to crimes where the federal government must prove criminal intent. To convict Steed, the court held that the government must show that Steed had actual knowledge of the violations or aided and abetted

39. *Id.* at 745.
40. *Id.*
41. *Id.* at 745 (quoting *International Minerals & Chem. Corp.*, 402 U.S. at 558).
42. *Id.* at 747.
43. *Dee*, 912 F.2d at 747.
44. *Id.* at 748.
45. United States v. White, No. CR-90-228-AAM, 1991 U.S. Dist. LEXIS 5567 (E.D. Wash. Mar. 28, 1991).
46. 7 U.S.C. §§ 136-136y (1988).
47. *White*, LEXIS 5567, at *26.

the employees who committed the violations.[48] The court concluded that the fact that Steed should have known that violations would occur was not enough to prove the degree of knowledge required to support a criminal conviction. "[T]he government must prove not only knowing treatment, storage or disposal of hazardous waste but also that the defendant knew the waste was hazardous."[49]

The court's analysis in *White* is congruent with the Third Circuit's decision in *United States v. Johnson & Towers*,[50] where the Third Circuit held that knowledge of every element of the crime is necessary for a conviction under RCRA.[51] Scholars, however, have criticized the reasoning of *Johnson & Towers* as being inconsistent with the congressional goal of promoting enforcement and compliance through the criminal provisions of RCRA.[52] Furthermore, the trend in the courts of appeals appears to be toward a finding of criminal liability under environmental statutes based only upon proof of general intent.[53]

The two most recent cases to employ the responsible corporate officer doctrine also illustrate that *White* may have been an aberrant decision. These cases differ, however, in their interpretation of the degree to which an officer's position in a company can impute knowledge of a violation.

Just a month after the *White* decision, the Tenth Circuit issued what appears to be the broadest reading of the responsible corporate officer doctrine thus far. In *United States v. Brittain*,[54] a city public utilities director appealed his conviction for falsely reporting a material fact to a government agency and discharging pollutants in violation of an NPDES permit. The district court based its conviction on evidence that the plant supervisor of the city's wastewater treatment plant had informed the defendant that during heavy rains raw sewage was being diverted by a bypass pipe to an outfall for which the facility did not have a permit. Evidence also showed that the defendant twice witnessed such discharges and had instructed the plant supervisor not to report the discharges to the EPA as required by the permit.

The Tenth Circuit affirmed the trial court's conviction and, after prefacing its holding with summarizations of *Dotterweich* and *Park*, directly applied

48. *Id.*

49. *Id.*

50. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

51. *Id.* at 664-65.

52. Lynch, *supra* note 3, at 130. *See also* Andrea M. Fike, *A Mens Rea Analysis for the Criminal Provisions of the Resource Conservation and Recovery Act*, 6 STAN. ENVTL. L.J. 174, 185-87 (1987) (arguing that in interpreting the statute to require knowledge, the *Johnson & Towers* court contravened the intent of Congress).

53. *See* United States v. Hoflin, 880 F.2d 1033, 1038-39 (9th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 1143, 107 L. Ed. 2d 1047 (1990) (rejecting *Johnson & Towers* and holding that knowledge by defendant that city lacked relevant RCRA permit was not essential element of crime); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986) (holding that ignorance of the law is no defense in a heavily regulated industry and lack of knowledge that a substance was not a hazardous waste within the meaning of the statute was an equally ineffective defense).

54. 931 F.2d 1413 (10th Cir. 1991).

the Supreme Court's interpretation of the FDCA to the Clean Water Act.[55] The court held that congressional intent was identical for both the FDCA and the Clean Water Act in that "hardships suffered by 'responsible corporate officers' who are held criminally liable in spite of their lack of conscious wrong-doing" are outweighed by the public welfare objectives of the statute.[56] The court noted that section 1319(c)(3) of the Clean Water Act includes "any responsible corporate officer" in its definition of the term "person" for purposes of criminal penalties.[57] The court interpreted this additional definition as an expansion of liability under the Clean Water Act.[58] The court held that for a responsible corporate officer to be criminally liable under the Clean Water Act, he or she "would not have to willfully or negligently cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility."[59]

Brittain illustrates the responsible corporate officer doctrine in its most inclusive form. The decision should set off alarms in corporate board rooms within the Tenth Circuit's jurisdiction. According to *Brittain*, criminal liability attaches purely by virtue of an officer's job description. The holding may, however, be limited to statutes such as the Clean Water Act and the Clean Air Act, which specifically designate responsible corporate officers as liable parties in their criminal provisions.[60] Direct evidence of the defendant's highly culpable activity may also have influenced the court. The holding would nevertheless impose liability upon negligent officers with little or no consciousness of wrong doing.

The most recent interpretation of the responsible corporate officer doctrine emanates from the First Circuit and somewhat moderates the reasoning of *Brittain*. *United States v. MacDonald & Watson Waste Oil Co.*[61] provides one of the most moderate interpretations of the doctrine to date. The case involved the president and two employees of a Rhode Island company who were all convicted under RCRA for knowingly transporting hazardous waste to an unpermitted facility. MacDonald & Watson Waste Oil Co. (M&W) was in the business of transporting and disposing of waste oils and contaminated soil. M&W transported toluene-contaminated soil to a permitted facility that was authorized to accept liquid hazardous wastes and soils contaminated with non-hazardous wastes for disposal. The permit did not, however, authorize M&W to dispose of toluene-contaminated soil at the facility.

The trial court instructed the jury that in addition to demonstrating that the defendant had actual knowledge of the violation, the government could

55. *Id.* at 1419.
56. *Id.*
57. *Id.* (interpreting 33 U.S.C. § 1319(c)(3) (1988)).
58. *Id.*
59. *Brittain*, 931 F.2d at 1419.
60. *See* Federal Water Pollution and Control Act, 33 U.S.C. § 1319(c)(3) (1988); Clean Air Act, 42 U.S.C. § 113(c)(6) (1988).
61. 933 F.2d 35 (1st Cir. 1991).

establish the defendant's liability through showing that the defendant was a responsible corporate officer of the corporation that had committed the violation. The trial court instructed the jury that in order to prove that the defendant was a responsible corporate officer, the prosecution must satisfy three elements: (1) that the defendant was an officer rather than an employee of the corporation; (2) that the officer had direct responsibility over the activities that caused a violation; and (3) that the officer knew or believed that a violation of the type alleged had actually occurred.

The First Circuit reversed the conviction of M&W's president on the basis of the trial court's responsible corporate officer instruction.[62] The court ruled that the instruction was improper because the third element did not necessitate knowledge of the specific act contained in the indictment, but simply asked whether the officer knew or erroneously believed that illegal activity of the same type had occurred on another occasion.[63] The First Circuit rejected the trial court's conclusion that proof that the defendant was a responsible corporate officer under its three-part test conclusively established the element of the defendant's knowledge of the illegality of the act in question.[64] The court agreed with the government that relevant circumstantial evidence could be used to infer knowledge.[65] The First Circuit nevertheless ordered a new trial because the instruction called for a mandatory presumption of knowledge of facts constituting the offense based solely on the defendant's official responsibility.[66] The court refused to give its approval of a strict liability standard for environmental offenses.

The First Circuit could have upheld the conviction had the trial court instructed the jury that it could infer the requisite knowledge on the basis of circumstantial evidence. The court of appeals suggested that the trial court could have elaborated on the extent to which the defendant's responsibilities "might lead to the reasonable inference that he knew of the . . . transaction."[67] The First Circuit stated that knowledge could be inferred from circumstantial evidence, "including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions."[68]

That the First Circuit did not simply disapprove of the instruction but ruled that it was reversible error is significant, because there appeared to be sufficient evidence in the record to satisfy the knowledge threshold via circumstantial evidence. The First Circuit took note of the prosecution's evidence that the defendant was not only the president and owner of M&W but was a hands-on manager of a relatively small firm.[69] There was also evidence that the defendant had been informed by a consultant on two prior

62. *Id.* at 51.
63. *Id.* at 52.
64. *Id.*
65. *Id.* at 52.
66. *MacDonald & Watson*, 933 F.2d at 52.
67. *Id.*
68. *Id.* at 55.
69. *Id.* at 50.

occasions that toluene-contaminated soil had been transported to the facility by other companies and that such actions violated RCRA. The court apparently wished to send an unequivocal message that proof that a defendant is a responsible corporate officer will not suffice to conclusively establish the element of knowledge expressly required under environmental statutes.[70] The First Circuit stated that "[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge."[71]

Thus, the responsible corporate officer doctrine has received divergent treatment by various courts of appeals. In *Dee* the Fourth Circuit required some knowledge on the part of officers in charge of compliance procedures of the generally hazardous nature of the materials with which they dealt. In contrast, in *Brittain* the Tenth Circuit's interpretation of the responsible corporate officer doctrine comes close to imposing strict criminal liability for all responsible corporate officers. Finally, in *MacDonald* the First Circuit treated a defendant's position of authority as merely circumstantial evidence of the defendant's knowledge of a violation. According to the First Circuit, some additional evidence of culpability, or strong circumstantial evidence of the defendant's actual responsibilities, must supplement mere proof of authority.

The responsible corporate officer doctrine is in the early stages of evolution in the environmental arena. Prosecutors did not begin to apply the doctrine to environmental violations until late 1990. Furthermore, case law will continue to define the issues as prosecutions increase and prosecutors attempt to persuade the courts on various forms of the doctrine. From a defense standpoint, the *MacDonald* interpretation appears to be the most favorable decision. The possibility remains, however, that the other circuits could follow the reasoning in *Brittain*, which could mean jail time for corporate officers with no conscious knowledge of wrong doing.

III. Sentencing Guidelines: No More Slaps on the Wrist

In 1986 Michael A. Brown[72] described the enforcement policy of the United States Environmental Protection Agency (EPA) and the DOJ as one that "encourages the use of means such as persuasion, administrative action and other alternatives before resorting to a court for formal, judicial action."[73] He described the EPA's enforcement policy at the time as one that "[measured] enforcement effectiveness by compliance achieved as opposed to cases referred."[74] Brown recognized however, that despite its stated policy of cooperation, EPA press releases and press conferences indicated that the

---

70. *Id.* at 55.

71. *MacDonald & Watson*, 933 F.2d at 55.

72. Former Enforcement Counsel, U.S. Environmental Protection Agency.

73. Michael A. Brown, *Enforcement and Liabilities*, *in* THE ENVIRONMENTAL LAW HANDBOOK 560, 561 (8th ed. 1985).

74. *Id.* at 562.

agency was beginning to equate the success of its enforcement policy with a litany of prosecution statistics.

Brown was prophetic. A recent memo from Joseph G. Block[75] reflects the government's conspicuous publication of environmental criminal indictments, convictions, penalties, and prison terms.[76]

Early sentences for criminal convictions of environmental crimes commonly involved suspended sentences, probation, and community service. Enormous fines and significant prison terms were slow to emerge as the primary deterrents of environmental crimes. However, as the above statistics indicate, monetary penalties are rapidly multiplying and actual confinement for criminal violators is no longer a rarity.

The new agenda of prosecutors, which seeks to maximize the deterrent effect of criminal sentences, is one reason prison terms may be rising. Prosecutors now seek to send a message not only to the flagrant industrial midnight dumpers but also to the corporate board rooms from where inadequate environmental policies originate.[77] Some writers also attribute the increase of prosecutions to the political appeal of prosecuting rich, high profile,

75. Chief of Environmental Crimes Section, United States Department of Justice.

76.

	Indictments	Pleas/Convictions
FY 83	40	40
FY 84	43	32
FY 85	40	37
FY 86	94	67
FY 87	127	86
FY 88	124	63
FY 89	101	107
FY 90	134	85
FY 91	87	57
TOTAL	790	578

Fed. Penalties Imposed		Prison Terms	Actual Confinement
FY 83	$ 341,100	11 yrs.	5 yrs
FY 84	384,290	5 yrs. 3 mos.	1 yr. 7 mos.
FY 85	565,850	5 yrs. 5 mos.	2 yrs. 11 mos.
FY 86	1,917,602	124 yrs. 2 mos. 2 days	31 yrs. 4 mos. 12 days
FY 87	3,046,060	32 yrs. 4 mos. 7 days	14 yrs. 9 mos. 22 days
FY 88	7,091,876	39 yrs. 3 mos. 1 day	8 yrs. 3 mos. 7 days
FY 89	12,750,330	51 yrs. 25 mos.	36 yrs. 14 mos.
FY 90	29,977,508	71 yrs. 11 mos. 3 days	47 yrs. 13 mos. 1 day
FY 91	8,256,809	8 yrs. 16 mos.	8 yrs. 16 mos.
TOTAL	$64,331,425	346 yrs. 69 mos. 13 days (351 yrs. 9 mos. 13 days)	152 yrs. 77 mos. 42 days (158 yrs. 5 mos. 12 days)

Environmental Criminal Statistics FY83 through April 2, 1991, *as cited in* McColl, "Environmental Criminal Law," presented to Environmental Section of the Dallas Bar Association (July 25, 1991).

The total for FY 90 includes a $22 million forfeiture that was obtained in a RICO/mail fraud case against three individuals and six related waste disposal and real estate development companies. A major portion of this forfeiture is expected to be designated for hazardous waste cleanup upon liquidation of assets. Included in the jail terms are two 12 year/7 month sentences against two individuals in the same RICO/mail fraud case.

77. Allan R. Gold, *Increasingly, a Prison Term is the Price Paid by Polluters*, N.Y. TIMES, Feb. 15 1991, at A1.

white-collar criminals.[78]

Aside from the dramatic increase in criminal convictions as well as prosecutorial zeal, another reason for these harsher sentences can be attributed to judicial adherence to federal sentencing guidelines. The United States Sentencing Commission, established as an independent agency within the judicial branch in 1984, issued mandatory sentencing guidelines for individuals that went into effect on November 1, 1987. While drafting the guidelines, the United States Sentencing Commission paid special attention to public animosity toward environmental offenders. Studies indicate Americans rank pollution as one of the more morally reprehensible crimes.[79] As a consequence, jail sentences are becoming more common for violators of environmental statutes, even for first-time offenders.[80]

Factors that can result in an increased sentence under the federal sentencing guidelines include:

(1) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment;

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury;

(3) If the offense resulted in the disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure;

(4) If the offense involved transportation, treatment, storage or disposal without a permit or in violation of a permit; and

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense.

Recent cases illustrate the effect of the sentencing guidelines on criminal environmental prosecutions. *United States v. Wells Metal Finishing*[81] provides an example of a trial court increasing a sentence pursuant to federal sentencing guidelines. Defendant Wells and his company were convicted on nineteen counts of knowingly discharging excessive amounts of zinc and cyanide into a city sewer system in violation of the Clean Water Act. The district court sentenced Wells to fifteen months in custody to be served concurrently on each count and one year of supervisory release conditioned upon payment of a $60,000 fine to the city.

The First Circuit affirmed, holding that: 1) the trial court was justified in increasing the sentence based on evidence that the treatment plant spent from $1,000-$10,000 a month to aerate the contaminated water caused by the zinc and cyanide discharges; 2) the city's $60,000 fine for a permit violation was reasonably related to the offense; and 3) the payment of the fine was an appropriate condition of the defendant's probation.[82] The court of appeals also rejected Wells' claim that the increased sentence was based on

78. Frank Friedman, *Is This Job Worth It?*, 8 THE ENVTL. F. 20, 24 (May/June 1991).
79. Habicht, *supra* note 34, at 10,485.
80. Gold, *supra* note 77 at B10.
81. 922 F.2d 54 (1st Cir. 1991).
82. *Id.* at 57.

evidence too general to support the charge.[83] The court stated that even if Wells had requested an evidentiary hearing on the alleged factual inaccuracies of the pre-sentencing investigation, it would be within the discretion of the district court to deny such a request.[84]

In another recent case, *United States v. Bogas*,[85] a court of appeals ordered a lower court to increase an environmental sentence based on the sentencing guidelines.[86] In *Bogas* a municipal officer pled guilty to charges of failure to report a release of hazardous substances and the making of false statements to the EPA. The district court ruled that the defendant's crimes did not require imprisonment. Instead, the defendant was sentenced to a combination of community service, probation, and home detention. The government appealed the ruling, arguing for an increased sentence. On appeal, the Sixth Circuit agreed that the offense level ought to have been increased and remanded the case for resentencing.[87]

In *Bogas* the defendant was the commissioner of an airport who initiated a cleanup where jet fuel additives, partially filled drums of bad paint, and several drums of dirty solvents were buried on airport property. The defendant denied that he was the one who had ordered the waste to be dumped into the pit. The defendant, however, admitted deliberately misstating facts about what had been buried in the pit. Although testing of the property proved little to no soil or water contamination, the court found that the defendant had violated CERCLA by failing to notify federal agencies of the release of hazardous substances.[88] The court also noted that the violation would require a substantial expenditure for the cleanup of over 100 drums that had been buried at the airport.[89] The court found these facts sufficient to remand the case for increased punishment in accordance with sentencing guidelines.[90]

In the Fifth Circuit, the court of appeals recently upheld the conviction and sentence of a defendant, Sellers, who illegally transported and disposed of hazardous wastes, including paint wastes and solvents, on an embankment in a rural area of Mississippi.[91] The Fifth Circuit found that the trial court properly applied the sentencing guidelines for violations of RCRA. The court upheld the trial court's sentence that ordered Sellers to serve forty-one months in prison and pay nearly $7,000 in restitution and court fees.[92]

United States v. Paccione[93] serves as a final example of the influence of sentencing guidelines on environmental prosecutions and the seriousness of the DOJ in its efforts to deter environmental crime with strict punishment.

---

83. *Id.* at 57-58.
84. *Id.*
85. 920 F.2d 363 (6th Cir. 1990).
86. *Id.* at 366.
87. *Id.* at 369.
88. *Id.*
89. *Id.*
90. *Bogus*, 920 F.2d at 368-69.
91. United States v. Sellers, 926 F.2d 410, 413 (5th Cir. 1991).
92. *Id.* at 418.
93. 751 F. Supp. 368 (S.D.N.Y. 1990).

Paccione involved the conviction and sentencing of the operators of an illegal landfill and a transporter of medical waste in one of the largest frauds involving environmental crimes ever prosecuted in the United States. A conservative estimate of the value of the fraud was $35,000,000. Two of the defendants operated an illegal landfill on Staten Island in New York City. The operators, Vulpis and Paccione, engaged in illegal collection, transportation, and disposal of waste in violation of a permit, which they obtained fraudulently. The court also found the defendants guilty of violations of RICO and conspiring to violate RICO for defrauding the city and a privately owned landfill.[94] Paccione and a transporter, McDonald, were convicted of mail fraud stemming from fraudulent statements given to the New York State Department of Environmental Conservation in order to obtain a permit to transport medical waste.[95]

The district court sentenced the transporter, McDonald, to a twelve month prison sentence plus a period of two years supervised release. Additionally, McDonald was fined over $250,000. The court found his punishment to be justified partly because McDonald engaged in a complex scheme that involved forging a document to obtain a permit and sending out hundreds of letters to solicit business.[96] McDonald defrauded numerous generators into believing that their medical waste was being disposed of legally.

The district court sentenced the operators, Vulpis and Paccione, to 151 months imprisonment. The court believed the sentence to be justified because it found that the operator's fraudulent activity caused the loss of approximately $35,000,000.[97] The operators had continued to illegally dump waste despite a restraining order prohibiting them from doing so, and the operators played leadership roles in the dumping of illegal toxic substances.

Paccione differs from the aforementioned cases in that RICO and mail fraud, rather than environmental statutes, were employed for the conviction. The crimes of Vulpis, Paccione, and McDonald, however, were essentially environmental violations, and the prosecutors' decision to try the case under RICO and mail fraud probably had more to do with the stricter sentences available under these causes of action rather than an actual characterization of the crimes. The case demonstrates the enormity of fines and the length of prison terms that can result when courts adhere to sentencing guidelines and prosecutors vigorously pursue violators of environmental laws.

IV. AVOIDING CRIMINAL LIABILITY: DOJ POLICY STATEMENT

The EPA and the DOJ may measure the success of enforcement policies by the number of prosecutions. However, while indictments seem foremost on the EPA/DOJ agenda, prosecutors are afforded broad discretion in deciding whether to seek criminal prosecutions for environmental crimes. The DOJ recently published a policy statement that outlines the various factors

94. *Id.* at 374.
95. *Id.* at 372.
96. *Id.* at 373.
97. *Id.* at 381.

prosecutors may wish to consider when exercising their discretion in pursuing criminal sanctions.[98] When deciding whether to prosecute environmental violations either civilly or criminally, most prosecutors will generally look first to the criminal potential of the case.[99] Public sentiment against environmental violators cannot be underestimated, yet prosecutors must also consider the likelihood of indictment and convictions. Though public welfare offenses carry a lesser prosecutorial burden, an attorney must nevertheless convince a jury of a corporate officer's moral blameworthiness. When faced with tangible evidence of corporate good faith, the likelihood of a successful conviction decreases. The DOJ introduces its policy statement as an effort to encourage self-auditing, self-policing, and voluntary disclosure of environmental violations by the regulated community.[100] In addition, the DOJ acknowledges its own prosecutorial inclinations by stating that it does not want such prosecutions to undermine critical self-auditing. The DOJ designed the policy statement to promote consistency in the application of civil and criminal sanctions and to provide the regulated community with "a sense of how the federal government exercises its criminal prosecutorial discretion."[101] After examining the various factors included in the guidelines, it appears that intensive self-scrutiny is no longer merely a corporate option based on fiscal considerations. Self-policing is now the key means by which corporations can help to ensure that regulatory violations remain in a civil context.

A. *Voluntary Disclosure*

The policy statement notes that voluntary, timely, and complete disclosure is the first factor a prosecuting attorney will consider when exercising prosecutorial discretion.[102] Foremost in importance to the prosecutor's decision will be whether a violator[103] came forward before the EPA commenced any investigation, whether law enforcement or regulatory authorities were already aware of the violations, or whether disclosure is already required by law, regulation or permit.[104] Essentially, the DOJ wants regulated entities to come forward before the regulatory agencies are aware of a violation. Given the present atmosphere of increased civil and criminal penalties assessed against violators, it may be unrealistic to expect persons to alert the agencies to their violations in all instances. The policy statement, however, reminds the regulated community that delinquent or reluctant ad-

---

98. U.S. Dep't of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, United States Department of Justice (1991) [hereinafter DOJ Policy].

99. Habicht, *supra* note 34, at 10,481.

100. DOJ Policy, *supra* note 98, at 1.

101. *Id.* at 1-2.

102. *Id.* at 3.

103. The DOJ indicates that for the purposes of the policy statement, the terms "person" and "violator" are intended to refer to business and nonprofit entities as well as individuals. *Id.* at 3.

104. *Id.*

missions will be considered an aggravating factor in applying prosecutorial discretion.

The policy statement notes that the prosecutor should also consider the quality and quantity of the information provided. Therefore, while disclosure of a violation may be required, good faith and candor on the part of the violator should factor into the prosecuting attorney's decision.

B. Cooperation

This section of the policy statement reiterates the basic tenents of the provision on voluntary disclosures. The policy statement directs that the prosecutor should consider not only the timeliness of a person's disclosure but the promptness of the person's cooperation as well. Readily making the complete results of internal audits, investigations, and potential witnesses available to investigators will reflect favorably upon potential criminal defendants.[105]

C. Preventive Measures and Compliance Programs

The existence or implementation of a comprehensive self-auditing program is the third major factor that should weigh into a prosecutor's decision to seek criminal sanctions, according to the policy statement.[106] The policy statement notes that environmental compliance policies and information systems are generally standard in most environmentally regulated industries and should be constantly re-evaluated. Prosecutors will pay particular attention to whether corporate policies were implemented in good faith and in a timely manner. The notion that ex post facto compliance measures implemented after serious violations have already come to light will reflect less favorably on a business than programs initiated before a compliance problem arose is implicit in the policy statement. Likewise, half-hearted attempts at implementing a program with insufficient budgeting and minimal efforts at promulgating the program on an institution wide basis may even be considered aggravating circumstances in the exercise of prosecutorial discretion. Half-hearted programs may imply a lack of candor on the part of the corporation, which will almost always lead to a criminal prosecution.[107]

Specific questions the policy statement directs prosecutors to consider when evaluating mitigating factors that attach to compliance programs include:

> Was there was a strong institutional policy to comply with all environmental requirements? Had safeguards beyond those required by existing law been developed and implemented to prevent noncompliance from occurring? Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent, and remedy circumstances like those that led to the noncompliance? Were there procedures and safeguards to ensure the integrity of

105. DOJ Policy, *supra* note 98, at 4.
106. *Id.*
107. Habicht, *supra* note 34, at 10,481.

> any audit conducted? Did the audit evaluate all sources of pollution (*i.e.*, all media), including the possibility of cross-media transfers of pollutants? Were the auditor's recommendations implemented in a timely fashion? Were adequate resources committed to the auditing program and to implementing its recommendations? Was environmental compliance a standard by which employee and corporate departmental performance was judged?[108]

Clearly, only the adoption of policies that reflect a thorough commitment to environmental stewardship will induce leniency from the DOJ. The Department's primary targets are midnight dumpers and unscrupulous executives who cut corners at the expense of public health or put the environment in jeopardy. Serious compliance policies will serve to distinguish between conscientious corporate agents and those who truly merit treatment as criminals.

D. *Additional Factors Which May Be Relevant*

Three additional factors listed in the policy statement will have either a positive or negative effect on a prosecutor's decision. The prosecutor will look to the pervasiveness of the noncompliance, taking the "obviousness, seriousness, duration, history, and frequency" of such violations into account.[109] This section states that "noncompliance may indicate systemic or repeated participation in or condonation of criminal behavior."[110] Such a finding, when combined with evidence of an officer's position of authority in a company, could provide sufficient circumstantial evidence to impose individual criminal liability. Such a finding could also be used to rebut a defendant's assertions of employing good faith compliance procedures. Such programs would be considered unreliable if they failed to remedy repeated violations.

The policy statement also places significant importance on the existence of "effective internal disciplinary action."[111] The purpose of this factor is to encourage effective communication of a company's environmental policies to middle and lower level employees. The prosecutor will look for effective mechanisms by which a company creates awareness on the part of employees that environmental violations will not be condoned.[112] A policy of perks or rewards for employees who report regulatory violations and potential environmental risks might serve as a more positive means of achieving such awareness. Corporate officers should consider low level employees as their front line against environmental prosecution. For while executives formulate environmental policies, it is the floor managers and truck drivers who can break the laws that send executives to jail. Any executive with remote responsibility for environmental matters should don a hard-hat and walk the floor with those who must deal with compliance on a daily basis.

---

108. DOJ Policy, *supra* note 98, at 4-5.
109. *Id.* at 5.
110. *Id.*
111. *Id.*
112. *Id.*

Finally, the policy statement directs the prosecutor to consider "the extent of any efforts to remedy any ongoing noncompliance."[113] A prosecutor will favorably view those companies which act promptly and thoroughly to eliminate any noncompliance and cooperate fully with federal and state authorities to reach compliance agreements.[114]

E. DOJ Hypotheticals: The Best and Worst Scenarios

In addition to the guidelines outlined above, the Justice Department has provided several hypotheticals that are intended to illustrate the operation of the guidelines contained in the policy statement. The first hypothetical provides a model situation in which prosecutors should exercise leniency. In the first hypothetical, Company A discovers that some of its employees are illegally disposing of hazardous wastes during a regularly conducted comprehensive environmental audit. An internal company investigation confirms the audit information, at which time Company A discloses all pertinent information to the appropriate government agency, undertakes compliance planning with the agency, and begins appropriate remediation. Company A also corrects any false information previously submitted to the agency. Company A disciplines the employees involved in the violations, including any responsible supervisors and provides the agency with the names of the employees responsible for the violations. Finally, Company A reviews its environmental compliance program and corrects the weaknesses that allowed a violation to occur. Under these circumstances, the policy statement states that Company A stands a good chance of receiving prosecutorial leniency.[115]

At the opposite end of the spectrum is Company Z, portrayed in the second hypothetical. Company Z has a compliance program in theory but makes no effort to disseminate its content, train employees in its application, or oversee its implementation. Company Z fears that an employee may report environmental violations to the government. Faced with this threat, Company Z undertakes an environmental audit focusing only upon the particular violation and ignoring the possibility of other violations. Company Z reports the violation to the government, but makes no effort to negotiate with regulators regarding its violations. Company Z resists performing remedial work and refuses to pay monetary penalties. Company Z also fails to correct false information that has been submitted to regulatory agencies and makes no effort to strengthen its internal compliance procedures. Finally, Company Z refuses to cooperate with prosecutors in identifying employees responsible for the violations and resists disclosure of any documents related to the violations or the responsible employees. In these circumstances, the policy statement warns that leniency is unlikely. The policy statement notes that where Company Z has demonstrated no good faith efforts to address violations or punish responsible employees, criminal prosecution may be

---

113. DOJ Policy, *supra* note 98, at 5.
114. *Id.* at 6.
115. *Id.* at 8.

appropriate.[116]

A broad range of possibilities exist between the two extreme hypotheticals in which a prosecutor could exercise leniency, according to the policy statement.[117] Some examples include a situation similar to Company A's, except that the company performs a limited audit as an effort to avoid prosecution. The policy statement notes that this situation may give rise to prosecution of a lesser charge or a decision to prosecute the individuals rather than the company.[118] Additionally, the policy statement points out that where a company refuses to reveal any information regarding individual violators, the likelihood of criminal prosecution of the company substantially increases.[119]

In another example, a company conducts an environmental audit and corrects discovered violations without informing the government of the violations. The policy statement notes that under certain statutes, such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[120] failure to report is a felony itself.[121] The policy statement also points out that companies that report violations may be adversely affected by those that do not because the companies that do report violations may have their emissions or discharges decreased while the unreported violator's remain unchanged.[122] Additionally, the guidelines state that failure to report undermines the effectiveness of the regulatory system.[123] For all the foregoing reasons, the policy statement warns that criminal prosecution of a company guilty of nonreporting is likely.[124]

The policy statement states that mitigating efforts on the part of a company will be recognized and evaluated in all cases.[125] Additionally, the policy statement notes that the greater the showing of good faith, the more likely the prosecutor is to exercise leniency. Ultimately, however, the policy statement notes that the decision to prosecute rests entirely with the prosecutor and that the guidelines explained above are intended only as internal guidance to attorneys at the DOJ.[126] The policy statement may not be used to establish any legally enforceable right or benefit.[127]

The DOJ policy statement illustrates that strict adherence to reporting and permit requirements and absolute candor in communications with regulatory agencies remain the best defenses against criminal environmental liability. Voluntary compliance and disclosure efforts may be overshadowed by

116. *Id.* at 10.
117. *Id.*
118. DOJ Policy, *supra* note 98, at 10.
119. *Id.* at 11.
120. 42 U.S.C. §§ 9601-9675 (1988).
121. DOJ Policy, *supra* note 98, at 12. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(5) (1988); CERCLA, 42 U.S.C. § 9603(b) (1988).
122. DOJ Policy, *supra* note 98, at 12.
123. *Id.* at 11.
124. *Id.* at 12.
125. *Id.* at 14.
126. *Id.*
127. DOJ Policy, *supra* note 98, at 14-15.

the EPA and the DOJ forecasts of ever increasing environmental prosecutions. Nevertheless, good faith compliance efforts and tangible evidence of a good attitude appear to be a corporate officer's best hope in avoiding criminal environmental prosecution. If vigorous compliance efforts do not entirely immunize corporations from criminal liability, they will at least serve as an effective form of damage control when a judge considers increasing a sentence based on federal sentencing guidelines.

V. CONCLUSION

The responsible corporate officer doctrine, with its origins firmly rooted in public welfare legislation, appears to be emerging as a viable theory of liability in the environmental context. The divergence of court opinion on the doctrine's application to environmental crimes has created an uncertainty and potential for liability of which corporate officers should be aware.

Concurrent with the emergence of the responsible corporate officer doctrine in the environmental context is the increasing adherence by courts to federal sentencing guidelines. Strict compliance with the sentencing guidelines signals an end to probation, community service, and suspended sentences and the dawning of an era where corporate officers face significant jail fines for violations of environmental laws.

In an atmosphere of greater potential for liability and increased prosecution and sentencing, adoption and implementation of programs of voluntary compliance and disclosure may be difficult steps for the corporate officer. The recent DOJ policy statement, however, illustrates the notion that good faith compliance efforts and absolute candor in communications with regulatory agencies will be rewarded by prosecutorial leniency. Given the enormity of the regulated community, it appears that voluntary, good faith reporting and compliance will continue to be the cornerstone of any national environmental program. Corporations and corporate officers should take advantage of the cooperation and compliance route to avoid potential criminal liability.