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CREATING AN ENVIRONMENTAL ETHIC IN CORPORATE AMERICA: THE BIG STICK OF JAIL TIME

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I. INTRODUCTION

CONVICTION and incarceration for environmental offenses? Not long ago this would have been virtually unheard of, with the most egregious conduct extracting no more than a slap on the wrist and a nominal fine.[1] The prosecutorial climate has undoubtedly changed, however, and since the early 1980's courts have systematically addressed environmental offenses. As one congressman noted, "Criminal sanctions are more appropriate than EPA rule-making. Criminal laws are tougher, more immutable and less subject to challenge once imposed."[2]

The current legal climate is less tolerant of environmental offenses, as evidenced by more frequent prosecutions and more severe sanctions meted out by the federal judiciary. For example, in fiscal 1989, federal courts imposed prison terms totaling almost thirty seven years and $11.1 million in fines for environmental crimes, compared with less than two years of sentences and $198,000 in fines five years earlier.[3] Prosecutors hope more aggressive criminal enforcement and the threat of actually serving jail time will deter would-be violators.[4]

And it's not simply corporations that are being indicted.[5] Indeed, no se-

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1. Courts were formerly unwilling to sentence first time white-collar offenders to prison. *See* Note, *Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1335 (1979).

2. Charles E. Schumer (D-NY), *cited in* Moore, *Collaring Business*, 22 NAT'L J. 960, 963 (1990).

3. Stipp, *Toxic Turpitude: Environmental Crime Can Land Executives In Prison These Days*, Wall St. J., Sept. 10, 1990, at 1, col. 1.

4. One EPA criminal enforcement official told *The Wall Street Journal* that "some people thought the agency would look strong if it got a criminal program going." Meier, *Dirty Job Against Heavy Odds, EPA Tries to Convict Polluters and Dumpers*, Wall St. J., Jan. 7, 1985, at 1, col. 4, at 18, col. 1.

5. In fiscal year 1986, 67 defendants were convicted or entered guilty pleas. Of the 67, only 22 were corporations. Seventeen were presidents or owners, eight were vice-presidents and four were directors or other officers. *Handling Environmental Investigations*, CORPORATE COUNSEL'S GUIDE TO ENVIRONMENTAL LAW (Bus. Laws, Inc.) §§ 5.003-.004 (1989).

nior corporate official is beyond the reach of the prosecutorial net. In May 1990, Paul Tudor Jones II, president of Tudor Investment Corp. and a prominent futures trader, pled guilty to criminal violations of the Clean Water Act after having filled wetlands to build a corporate retreat without a permit.[6] He paid $2 million in fines and was sentenced to an eighteen month probated sentence.

Moreover, in this new era of criminal penalties a cavalier attitude is a quick ticket to prison, as Robert and Scott McKiel discovered. The father and son team ran Astro Circuit Corp., an electronics company with about 300 employees. When confronted with evidence of illegally high concentrations of toxic metals in Astro's waste water, the younger McKiel retorted, "We're guilty. What are you going to do, put us in jail or something?"[7] Exactly. In addition to paying hefty fines, both father and son served jail time.

In drawing the battle line in environmental cases, Richard B. Stewart, Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice (Environment and Resources) said: "Those who would seek to illegally profit from the environmental consciousness of our citizens are warned — the risk you create for the environment will be matched by the risk you face of jail."[8] Significantly, his warning came on the heels of his announcement of a twenty-eight count indictment against Enviro-Analysts and John R. Reutz, its president, chief executive officer and owner.[9] If convicted as charged, Reutz individually faces over sixty-six years in prison and $3.84 million in criminal fines.[10]

Increased criminal prosecutions are the result of nearly a decade of cooperative work between Environment and Resources and the United States Environmental Protection Agency (EPA). In October 1982, the EPA hired its first criminal investigators.[11] The investigators were employed for their extensive criminal, rather than environmental backgrounds; they were primarily trained in large metropolitan police departments.[12] At approximately the same time, Environment and Resources created an Environmental Crimes Unit,[13] staffed by attorneys with both criminal and environmental experience.[14] Since 1982, the policy of the EPA emphasizes the use of criminal

6. *Tudor Investment's Jones Pleads Guilty to Filling Protected Maryland Wetlands*, Wall St. J., May 29, 1990, at B5, col. 3.

7. Stipp, *supra* note 3, at 5, col. 1.

8. *Justice Department Files Criminal Charges Against Pollution Testing Firm and its President*, Bus. Wire, Aug. 28, 1990.

9. *Id.*

10. *Id.*

11. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 381-82 (1986).

12. *Id.*

13. The Environmental Crimes Unit was upgraded to the status of "section" within Environment and Resources in 1987.

14. The Environmental Crimes Unit has doubled in size in its eight years of existence to 50 agents.

sanctions as part of the "EPA's overall enforcement effort."[15]

In addition, public opinion also surged in the early 1980's. In a public opinion poll taken in 1984, 60,000 people were asked to rank the severity of particular crimes. In seventh place, after murder, but ahead of heroin smuggling, was environmental crime.[16] The study indicated that the public considers industrial criminal polluters more nefarious public offenders than armed robbers and those who bribe public officials.[17] In response to this public opinion, Congress criminalized virtually every environmental statute and, in recent years, imposed tougher sanctions by upgrading environmental crimes from misdemeanors to felonies.[18] The prosecutorial climate has become so highly charged that "it has become impossible for prosecutors to decline cases."[19]

The powerful pressures associated with new public sentiment, coupled with stricter laws and a larger staff of willing and able investigators and prosecutors, make the threat of facing criminal charges for environmental offenses more real than ever. Perhaps more importantly, the prosecutorial burden is not very heavy.[20] No longer can an executive hide behind the shield of having delegated responsibilities to subordinates; indeed, the new legal climate requires executives to monitor closely all operations in order to attempt to avoid personal criminal liability for the offenses of the corporation.

This Article surveys the ever evolving arena of criminal enforcement of environmental laws. The first section reviews the environmental regulatory scheme. The second section analyzes individual criminal liability and the standards for imposing criminal sanctions, including the government's standards for seeking an indictment. The Article next considers the sentencing guidelines and the imposition of sentences in environmental crimes. The Article concludes with observations on the effects and future of the criminalization of environmental enforcement.

II. THE ENVIRONMENTAL REGULATROY SCHEME: AN OVERVIEW

The modern use of criminal sanctions to regulate environmental miscon-

15. Memorandum on Criminal Enforcement Priorities from EPA Associate Administer Robert Perry, *reprinted in* 13 Env't Rep. (BNA) 859 (Oct. 22, 1982).

16. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Jan. 1984, *cited in* Starr, *supra* note 11, at 380 n.1.

17. *Id.*

18. For example, Congress created new felony sanctions in 1986 under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b) (1989) (imprisonment for not more than three years for knowingly failing to report release of hazardous substances), and again in 1987 under the Clean Water Act, 33 U.S.C. § 1319(c)(3) (Supp. 1990) (imprisonment for not more than 15 years for certain violations resulting in knowing endangerment of other persons).

19. Judson W. Starr, founder and former head of the Environmental Crimes Unit, *cited in* Weber, *Corporate Crime of the 90s: Prosecutors Are Aiming for the Boardroom in a Growing Push Against Polluters*, L.A. Times, Nov. 25, 1989, at 1, col. 1.

20. *See* discussion *infra* notes 102-25.

duct began in 1970 with the revitalization of the Refuse Act of 1899.[21] The Refuse Act was little used and largely unknown within the United States. It made a defendant liable for the discharge of refuse into any navigable water of the United States.[22] Prosecutors used the Refuse Act because they were frustrated by their inability effectively to prosecute blatant polluters. As with all public welfare statutes, the Refuse Act extended liability to corporate officers as well.[23]

The passage of the Federal Water Pollution Control Act Amendments of 1972 forced the Refuse Act back into relative obscurity, appearing infrequently since that time.[24] But its use in the early 1970s served a commendable purpose in notifying the regulated community that criminal sanctions were available if necessary. One commentator has recognized that the true impact of the Refuse Act is not the sanction by the court but the stigma of the publicity.[25] Nevertheless, the Department of Justice believes that criminal sanctions for environmental offenses have long been recognized as a powerful enforcement tool.[26]

Today, the environmental statutes each provide for civil remedies along with a criminal counterpart. For most of the 1970s and early 1980s, civil penalties were the primary tool of enforcement. However, because civil penalties did not appear to deter environmental misconduct sufficiently, criminal enforcement has assumed greater importance and more frequent application.[27] The theory is that sending responsible persons to prison ultimately will send a louder message[28] and arguably prevent greater degradation of the environment.

Nine statutes comprise the current federal environmental liturgy.[29] Two federal statutes are primarily responsible for control and disposal of hazard-

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21. The Refuse Act is the name commonly used for section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C § 407 (1980).

22. *Id.*

23. *See* Tripp & Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 ALB. L. REV. 60 (1970).

24. The government recently used the Refuse Act to prosecute the Exxon Valdez accident. *See* United States v. Exxon Corp., A90-015-CR (D. Alaska Feb. 27, 1990).

25. His comments were as follows:

> The primary value of the Refuse Act criminal sanction was, therefore, not its effect in deterring or punishing an offender through the imposition of monetary fines. Rather, its primary value lay in the invocation of the criminal sanction itself, and in the social opprobrium which attaches to anyone convicted of a crime. Industrial corporations, like anyone else, want to be regarded as responsible members of the community in which they operate, and a criminal conviction for polluting is not a highly valued mark of good citizenship.

Glenn, *The Crime of Pollution*, 11 AM. CRIM. L. REV. 835, 858 (1973), *cited in* Riesel, *Criminal Prosecution and Defense of Environmental Wrongs* 15 ENVTL. L. REP. 10,065, 10,067 (1985).

26. Address of Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division of the Department of Justice, Locke Purnell Rain Harrell breakfast (Sept. 26, 1990).

27. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 5 Toxics L. Rep. (BNA) 226, 229 (July 18, 1990).

28. Starr, *supra* note 11, at 383.

29. *See* attached Appendix (briefly outlining these statutes).

ous wastes: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[30] as amended by the Superfund Amendments and Reauthorizations Act (SARA)[31] and the Resource Conservation and Recovery Act (RCRA).[32] CERCLA, also known as Superfund, establishes a fund to pay for cleanup of hazardous waste sites. Under CERCLA, the EPA can seek reimbursement for costs associated with the clean-up of a facility.[33] Moreover, the EPA may seek or enter an order requiring responsible parties to clean up the site.[34] CERCLA includes criminal penalties for failure to properly disclose releases of hazardous substances.[35] RCRA prohibits unauthorized dumping of wastes and establishes the "cradle-to-grave" system for documenting the transportation and disposal of wastes.[36] RCRA also includes criminal provisions.[37] Like CERCLA and RCRA, the Clean Water Act,[38] the Rivers and Harbors Act,[39] the Emergency Planning and Community Right-To-Know Act,[40] the Federal Insecticide, Fungicide and Rodenticide Act,[41] the Toxic Substances Control Act,[42] the Ocean Dumping Act,[43] and the Clean Air Act[44] all contain criminal and civil provisions.

In addition to the threat of prosecution under environmental statutes, both corporations and officials are subject to the provisions of the criminal code, Title 18 of the United States Code. The government is not limited to applying only the criminal provisions of environmental statutes where more generalized penal provisions are applicable as well.[45] Indeed, several Title 18 offenses are regularly used to prosecute environmental crimes.[46]

III. INDIVIDUAL LIABILITY

In both the civil and criminal arenas, a corporate officer is rarely held personally liable for the corporation's wrongdoings solely because of his po-

30. 42 U.S.C. § 9604 (1989), as amended by the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 9604(e) (1989).
31. *Id.*
32. *Id.*
33. *Id.* § 9607 (1989).
34. *Id.* § 9606 (1989).
35. *Id.* § 9603(b) (1989).
36. *Id.* § 6928(d)(4) (1982 & Supp. 1990).
37. *Id.* § 6928(e) (1982 & Supp. 1990).
38. *See* 33 U.S.C. § 1319(c)(1) (1987 & Supp. 1990).
39. *See* 33 U.S.C. § 407 (1980).
40. 42 U.S.C. § 11001 (1989).
41. *See* 7 U.S.C. §§ 136-136y (1978 & Supp. 1990).
42. *See* 15 U.S.C. §§ 2601-2629 (1982 & Supp. 1990).
43. Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1401 (1987).
44. *See* 42 U.S.C § 7413(c) (1989).
45. Riesel, *supra* note 25, at 10,070.
46. *See, e.g.*, 18 U.S.C. § 371 (1979) (conspiracy); 18 U.S.C. § 1001 (1979) (false statement); 18 U.S.C. § 1341 (1979 & Supp. 1990) (mail fraud); 18 U.S.C. § 1343 (1979 & Supp. 1990) (wire fraud); 18 U.S.C § 1962 (1979 & Supp. 1990) (RICO); 18 U.S.C. § 287 (1979 & Supp. 1990) (false claim); 18 U.S.C. § 1623 (1979) (perjury); 18 U.S.C. § 1503 (1979 & Supp. 1990) (obstruction of justice); 18 U.S.C. § 2 (1979) (aiding and abetting); *see also* 49 U.S.C § 1809 (1981) (transportation of hazardous materials). For an example of the intertwinings of the environmental statutes and Title 18, see United States v. Goldfaden, CR3-89-362-R (N.D. Tex. Sept. 6, 1990) (superseding indictment).

sition within the corporation. A representative who has neither actively participated in, nor authorized a violation of the law, has historically been relieved from personal liability.[47] This rule is frequently followed but is not absolute, particularly with regard to public welfare regulations, including environmental statutes. Indeed, public welfare statutes dispense with the conventional requirement for criminal conduct—specific awareness of some wrongdoing.[48]

The criminal provisions of environmental statutes apply to any "person" who commits a violation.[49] This provision makes it clear that Congress intended that criminal sanctions be brought against those corporate officers with the ultimate responsibility for the violation, even when acting solely in a supervisory capacity. For example, the Clean Water Act expressly provides that a "person" is "any responsible corporate officer."[50] Thus, when considering individual liability for corporate acts, the pivotal question becomes who may be classified as a "responsible corporate officer." In this area, courts have been increasingly willing to impose personal liability despite the absence of direct or actual knowledge on the part of the corporate officer. In the environmental context then, a criminal mind is not always necessary to sustain a criminal conviction.

A. The Responsible Corporate Officer Doctrine

Two cases provide the foundation for any discussion of the criminal intent of individuals in the environmental area: *United States v. Dotterweich*[51] and *United States v. Park*.[52] In each case the Supreme Court imposed criminal liability on corporate officers simply because the officers had a responsible relationship to the offense with which they were charged.

Pursuant to the Food, Drug and Cosmetic Act, the *Dotterweich* court upheld the conviction of Joseph H. Dotterweich, the president and general manager of a pharmaceutical company for shipping adulterated and mislabeled drugs.[53] Dotterweich did not have knowledge of the facts that resulted in the violation, nor did he actively participate in the distribution of the shipments. In support of its case the government argued that he was responsible solely because of his position in the company. The Supreme Court affirmed the conviction, ruling that a corporation's violation may be attributed to officers "standing in various relations" to the corporation.[54] The Court concluded that offenses are attributable to "all who have such a responsible

47. United States v. Sherpix, Inc., 512 F.2d 1361, 1372 (D.C. Cir. 1975) (quoting United States v. North American Van Lines, Inc., 202 F. Supp. 639, 644 (D.D.C. 1962)).

48. United States v. Dotterweich, 320 U.S. 277, 281 (1943) (Food, Drug & Cosmetic Act).

49. *E.g.*, Clean Water Act 33 U.S.C. § 1319(c) (1987 & Supp. 1990); 42 U.S.C. § 6928(d) (1982 & Supp. 1990) (RCRA).

50. 33 U.S.C. § 1319(c)(3) (1987 & Supp. 1990).

51. 320 U.S. 277 (1943).

52. 421 U.S. 658 (1975).

53. 320 U.S. at 278. *Dotterweich* was a 5-4 decision. Chief Justice Stone and Justices Frankfurter, Black, Douglas and Jackson comprised the majority. Justices Murphy, Roberts, Reed and Rutledge joined in the dissent.

54. *Id.* at 283.

share in the furtherance of the transaction which the statute outlaws. . . ."[55] In the interest of society, the burden is borne by "a person otherwise innocent but standing in responsible relation to public danger."[56]

Thus, the responsible corporate officer doctrine was born. At the time of the *Dotterweich* decision, the responsible corporate officer doctrine caused little concern because it appeared to be limited in its application.[57] Dotterweich was president of a small company and was responsible for all its operations.[58] Accordingly, while small businessmen — those tending to be involved in plant operations — were at risk, officials in larger companies perceived themselves as insulated. The president of a large company who was responsible for system-wide operations would certainly not be liable for violative conditions.

It was not until some thirty years later, in *United States v. Park*, that the Supreme Court was asked to address whether a senior officer in a large company who had delegated responsibility could be held liable. The individual indicted, John R. Park, was president of Acme Markets, a national food chain with hundreds of stores and some fourteen warehouses. Both the company and Park were charged with multiple violations of the Food and Drug Act, resulting from rodent infestation in two warehouses. The company pled guilty to all counts, but Park pled not guilty. Park's defense was that of delegation. He testified that "although all of Acme's employees were in a sense under his general direction, the company had an organizational structure for responsibilities for certain functions."[59] Rejecting the delegation defense, the Court found that the law imposed a duty to implement measures that ensure that violations will not occur, in addition to imposing an affirmative duty to seek out and remedy violations in the event they do occur.[60]

As draconian as the responsible corporate officer doctrine is in practice, a few obvious defenses have developed. Park testified that the responsibility for sanitation had been delegated to subordinates; yet he had been personally notified repeatedly that the measures were not sufficient. At trial he even admitted that the system for handling sanitation "wasn't working perfectly" and that he was in the position to implement change.[61] Thus, Park's problem was in his failure to monitor the corporate conduct and implement change as he witnessed the system failing. Park's conviction confirmed that any corporate officer could be convicted based on evidence of the position he holds, in addition to the conduct in which he may have been engaged.

Consequently, at first glance, when faced with the responsible corporate officer doctrine, a corporate officer will necessarily want to defend by con-

55. *Id.* at 284.
56. *Id.* at 281.
57. This is not to say that there were not subsequent indictments. Some convictions even led to jail terms. *See* United States v. Siler Drug Store Co., 376 F.2d 89 (6th Cir. 1967) (sentenced to one year imprisonment).
58. *See generally* 1 K. BRICKEY, CORPORATE CRIMINAL LIABILITY §§ 5:13 - 5:18 (1984) (discussion of responsible corporate officer doctrine).
59. *Park*, 421 U.S. at 663.
60. *Id.* at 672.
61. *Id.* at 664-65.

tending that he was powerless to effectuate change. In fact, only where the defendant offers proof that he was "without the power or capacity to affect the conditions which founded the charges" is there an additional burden placed on the government.[62] In other words, *Park* recognizes an objective impossibility defense,[63] by permitting a senior official to demonstrate that despite his negligence, he could not prevent the violations.[64] However, this defense can only be applied on a case-by-case basis, and has yet to be the foundation for an acquittal.[65]

Relying on *Park*, the Ninth Circuit, in *United States v. Starr*, rejected both the delegation and impossibility defenses where the defendant, Dean Starr, had not exercised the diligence and foresight expected under the circumstances—he did not adequately monitor the operations for which he delegated authority.[66] Affirming the conviction, the Ninth Circuit reasoned that Starr had ultimate responsibility for the operations at the warehouse and, therefore, responsibility for the conduct "out of which the violations grew."[67]

The food and drug cases remain the intellectual foundation for corporate officer criminal liability. In *Park* the Supreme Court determined that the prosecutor need only establish that the defendant-officer was in a position of responsibility and that he failed to exercise control over operations which created the violation.[68] Thus, if the officer has control over the activities, simple delegation is not enough to remove liability; post-delegation monitoring and insistence on compliance are mandatory under the case law. Indeed, no safe harbor exists. Both *Park* and *Starr* affirm the corporate officer's unenviable duty not only to monitor and exercise control over the affairs of the corporation, but to do so effectively. Failing to assume this difficult task can be as dangerous as failing to succeed at it.

The application of the principles found in *Dotterweich*, *Park* and *Starr* are

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62. *Id.* at 676.

63. The Supreme Court seemingly recognized the impossibility defense in 1964 when a warehouseman argued that the government was seeking to punish the one "who is, by the very nature of his business, powerless" to prevent food from being contaminated despite his standard of care. United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964). The Court did not decide on the claim because of the procedural posture of the case. *See also* United States v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969) (rejecting impossibility defense where evidence established that defendants had failed to take all necessary steps), *cert. denied*, 396 U.S. 1002 (1970); United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir. 1976) (instruction on objective impossibility not warranted where evidence was not present), *cert. denied*, 429 U.S. 828 (1976).

64. Note, *supra* note 1, at 1263.

65. The impossibility defense may never be a basis for acquittal because it is unlikely that the EPA would refer (or the Department of Justice would prosecute) a case without reasonable certainty that the individual was in a responsible position to prevent the violation and had some control over the alleged condition. Under those statutes with negligence based, lesser included offenses, evidence of objective impossibility alone, may be enough to establish criminal negligence. *See* Clean Water Act, 33 U.S.C. § 1319(c) (1987 & Supp. 1990) (imposes criminal liability for both negligent and willful violations).

66. United States v. Starr, 535 F.2d 512 (9th Cir. 1976).

67. *Id.* at 514-15.

68. *Park*, 421 U.S. at 676.

not just limited to food and drug cases.[69] Indeed, they demonstrate that senior officials may be held liable for corporation offenses even when there is no personal involvement in the offense. Some comfort can be taken, however, in the fact that the responsible corporate officer doctrine may be confined to cases brought under statutes that do not require a showing of willfulness or intent.[70]

B. The Mens Rea Requirement

When the statute itself requires *mens rea*, or a criminal mind, courts historically require an affirmative act demonstrating, at a minimum, acquiescence before holding individual corporate officers liable.[71] This standard suggests that the prosecutor must prove that the defendant acted deliberately and with awareness of the consequences of his actions, a more significant burden than that imposed under the "responsible corporate officer" doctrine.[72] Unlike cases utilizing the "responsible corporate officer" doctrine, a superior has not yet been held liable for the action or inaction of those whom he supervises absent the requisite intent or knowledge. Inquiry into facts necessary to establish *mens rea* must focus on what constitutes "intent" or "knowledge."

The law's required showing of "intent" or "knowledge" does not entirely eliminate the "responsible corporate officer" doctrine from applicability in cases brought under statutes requiring *scienter*.[73] Prosecutors need not prove that a defendant intended to break the law—courts have reduced the burden on the government by requiring only that the government demonstrate that the defendant's conduct was intentional and voluntary, as distinguished from accidental.[74] This is known as general, rather than specific, intent.[75]

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69. The *Dotterweich - Park* analysis has been cited in prosecutions involving other federal statutes. *See, e.g.*, United States v. Klehman, 397 F.2d 406 (7th Cir. 1968) (Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1276 (1982)); United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (Migratory Bird Treaty Act, 16 U.S.C. §§ 703-708) (1978 & Supp. 1990)); United States v. Frezzo Bros., 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (Federal Water Pollution Control Act, 33 U.S.C. §§ 1311-1319 (1987 & Supp. 1990)).

70. *E.g.*, Clean Water Act, 33 U.S.C. § 1319(c)(1988); Rivers and Harbors Appropriations Act, 33 U.S.C. § 411 (1988); Federal Hazardous Substances Act, 15 U.S.C. § 1264(1988). For example, a corporate officer in charge of overseeing Clean Water Act permit operations can face criminal charges based on negligent, rather than a knowing, discharge of a pollutant in violation of the permit. 33 U.S.C. § 1319(c)(1)(A) (1988). Because the Clean Water Act provides for prosecution of negligent conduct, one must assume those provisions of the Act addressed to "knowing" conduct required a demonstration of actual knowledge, direct participation or willful refusal to act.

71. *See generally* Seymour, *Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws*, 20 Env't Rep. (BNA) 337, 342 (June 9, 1989) (discussion of *Starr* and *Dotterweich*).

72. *Id.*

73. Simply defined in this context, scienter is defined as any "previous knowledge of a state of facts which it was his duty to guard against." BLACK'S LAW DICTIONARY 1207 (5th ed. 1979).

74. McGovern, Hughes & Seager, *Criminal Enforcement of Hazardous Waste Laws*, in HAZARDOUS WASTES IN REAL ESTATE TRANSACTIONS 13 (1990).

75. Janet Goldstein, Assistant U.S. Attorney, Environmental Prosecutions, Central Dis-

For example, in *United States v. Hoflin*,[76] Hoflin, the Director of the Public Works Department for the city of Ocean Shores, Washington, was prosecuted for violations arising from the disposal of two types of waste: spent paint from road maintenance and sludge removed from a city-owned kitchen. As a defense to one of the counts, Hoflin maintained that he did not know that Ocean Shores did not possess a permit to dispose of the paint. Interpreting subsection (2)(A) of 42 U.S.C. § 6928(d), the Ninth Circuit concluded that knowledge of the absence of a permit is unnecessary as a basis for criminal conviction under RCRA.[77] *Hoflin* thus reinforces the expansive notion that only "general," rather than "specific," intent may suffice to convict an official of an environmental crime.[78]

As stated earlier, where a statute operates to benefit and protect the public welfare, whether environmental or otherwise, courts will not require proof of intent to violate the specific law in issue. In *United States v. International Minerals & Chemical Corp.*,[79] the United States Supreme Court ruled that the government did not need to prove knowledge of the regulations in order to obtain a conviction under Interstate Commerce Commission regulations for the safe transportation of hazardous wastes.[80] The Court held that the government only needed to prove the defendants knowledge that the substance transported was a hazardous waste.[81] "[W]here. . .dangerous or deleterious devices or products or 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."[82]

Citing *International Minerals*, the Eleventh Circuit in *United States v. Hayes International Corporation*[83] determined that actual knowledge need not be proved to sustain a criminal conviction under RCRA.[84] Hayes operated an airplane refurbishing plant which generated hazardous waste. A Hayes employee contracted for the removal of the wastes. Both Hayes and the employee were convicted of violating RCRA provisions prohibiting the knowing transportation of hazardous waste to a facility without a permit. Nevertheless, the district court granted defendants' motion for judgment notwithstanding the verdict because neither Hayes nor the employee knew that the hauler lacked a permit.[85]

The court of appeals reversed and remanded, holding that the RCRA sec-

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trict of California, Los Angeles, California, has reiterated that environmental crimes *do not require specific intent*. Goldstein, *Handling Environmental Investigations*, in CORPORATE COUNSEL'S GUIDE TO ENVIRONMENTAL LAW (Bus. Laws, Inc.), § 5.008 (1989).

76. 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143, 107 L.Ed.2d 1047 (1990).

77. *Id.* at 1037-38.

78. *See also* United States v. Neville Chemical Co., 888 F.2d 130 (9th Cir. 1989) (reaffirming *Hoflin*).

79. 402 U.S. 558 (1971).

80. *Id.* at 564-65.

81. *Id.*

82. *Id.* at 565.

83. 786 F.2d 1499 (11th Cir. 1986).

84. *Id.* at 1503.

85. *Id.* at 1500.

tion under which Hayes was prosecuted did not require actual knowledge of the illegality for conviction.[86] Instead, the government was required to prove that the defendant knew that the waste facility to which the contractor would take the waste lacked a permit.[87] The court explained, "a defendant acts knowingly if he willfully fails to determine the permit status of a facility."[88] The court further relieved the government's burden by concluding that knowledge could be inferred from circumstantial evidence: in this case, the mere fact that the disposal contract quoted an unusually low price.[89]

The *Hayes* decision opens the door for future prosecutions based on what a corporate officer "should know."[90] In holding that a defendant acts knowingly if he should have known about permit status, the Eleventh Circuit determined that "constructive knowledge" suffices to impose individual criminal liability. The court's reasoning virtually eliminates the government's already diminished burden of proving intent and drastically alters traditional norms for establishing criminal guilt.[91]

The Third Circuit has also embraced the conclusion that "constructive" knowledge satisfies the requirements of criminal intent. In *United States v. Johnson & Towers, Inc.*,[92] the corporation and two mid-level managers were charged with conspiracy to violate RCRA by disposing hazardous wastes into a ditch. The court held that employees who knowingly treat, store or dispose of hazardous waste may be held criminally liable if they knew that the corporation was required to obtain a permit and also that the corporation did not possess a permit.[93] As in *Hayes*, the Third Circuit ruled that knowledge could be inferred from circumstantial evidence.[94] The court noted that "knowledge, including that of the permit requirement, may be inferred . . . as to those individuals who hold the requisite responsible positions with the corporate defendant."[95]

The Second Circuit extended the reach of the constructive knowledge approach in *United States v. Carr*.[96] The Second Circuit concluded that constructive knowledge establishes culpability if a person "of relatively low rank" is "in a position to detect, prevent, and abate a release of hazardous substances."[97] Thus, criminal intent may be inferred even in the case of

86. *Id.* at 1503, 1505.
87. *Id.*
88. *Id.* at 1504.
89. *Id.*, *see also* U.S. v. Ward, 676 F.2d 94 (4th Cir. 1982) (intent to dump illegally inferred), *cert. denied*, 459 U.S. 835 (1982); U.S. v. Greer, 850 F.2d 1447 (11th Cir. 1988) (defendant convicted under CERCLA where he was active in day to day operations and had approved of prior disposals of hazardous wastes without a permit).
90. Nittoly, *Current Trends in the Prosecution of Environmental Offenses*, 5 Toxics L. Rep. (BNA) 161, 162 (July 4, 1990).
91. Although the precise issue has not yet been litigated, by requiring the government to demonstrate only "constructive knowledge," arguably, an accused's fifth amendment rights are substantially impaired, if not eliminated.
92. 741 F.2d 662 (3d Cir. 1984).
93. *Id.* at 669.
94. *Id.* at 670.
95. *Id.*
96. 880 F.2d 1550 (2d Cir. 1989) (CERCLA case).
97. *Id.* at 1554.

lower level supervisors who have "control over" activities that result in violations.

The importance of *Johnson & Towers*, *Hayes* and *Carr* cannot be overstated. While these cases do not employ the same reasoning as those following the "responsible corporate officer" doctrine, the burden of proof required of the government, as well as the results, are substantially the same. The cases establish criminal liability where the official, by reason of his position, knew or should have known of illegal activities. Moreover, the jury is allowed to infer this knowledge from circumstantial evidence. In short, these cases suggest that even where a statute requires *scienter*, the reckless, negligent or even inopportune decisions by a corporate officer may result in his prosecution.[98]

Because the requirement of criminal intent has been virtually eliminated from environmental prosecutions, many legal scholars are questioning what remains of basic constitutional protections.[99] The environmental laws are changing at a rapid pace, implying that conduct not previously considered criminal may now lead to prosecution and conviction.[100] Individuals have been and will continue to be convicted without ever having been aware of the crime. Thus, renewed emphasis must be placed on compliance, as well as the careful disposition of civil or administrative citations. Equally important is an understanding of the criteria that the government uses for determining whether to seek an indictment.

C. *Seeking An Indictment*

As in all criminal areas, the decision to prosecute an environmental offender rests within the unbridled discretion of the government's attorney. According to Richard B. Stewart,[101] when a case comes to the Department of Justice, the Environmental Crimes Section assigns a staff attorney to look at the issues and prepare a prosecution memorandum.[102] The assistant section chief and then the section chief review the memorandum.[103] Mr. Stewart ultimately reviews it himself, and he approves every decision to seek an indictment.[104] Ostensibly, the decision to seek an indictment rests not on whether an indictment can be obtained but on whether the government can get a felony conviction.[105] As a result Stewart explained, the conviction rate

98. Arkin, *Crime Against the Environment*, N.Y.L.J., Aug. 9, 1990, at 3.

99. *Id. See also* Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,065 (Mar. 1985); Weber, *Corporate Crime of the '90s: Prosecutors Are Aiming for the Boardroom in a Growing Push Against Polluters*, L.A. Times, Nov. 25, 1989, at 1, col. 1.

100. Arkin, *supra* note 98.

101. Mr. Stewart is Assistant Attorney General, Environment and Natural Resources Division, Department of Justice.

102. Address of Richard B. Stewart, Locke Purnell Rain Harrell Breakfast, Dallas, Tex. (Sept. 26, 1990).

103. *Id.*

104. *Id.*

105. *Id.*

for environmental crimes is above 95%.[106]

Currently, few clear policies apparently exist that can effectively serve as guidelines for corporations and officials. Indeed, a former federal prosecutor of environmental crimes has stated: "[t]he criminal prosecution of adultery and violation of environmental statutes have at least three things in common. Enforcement is selective and erratic and the consequences often are harsh."[107]

In an attempt to provide some guidance, the EPA published the following considerations that will ultimately affect the decision to pursue criminal sanctions: the existence of the proof of the requisite criminal intent, *where necessary*; the nature and seriousness of the offense; the deterrent effect of the prosecution; the subject's history of compliance; and whether an alternative remedy would be more practicable.[108] Not surprisingly, the EPA stresses that its primary goal, the one that affects prioritization more significantly than anything else, is to deter future misconduct.[109]

Along with the announced EPA guidelines, the Department of Justice has promulgated similar factors for determining whether to bring a criminal indictment, environmental or otherwise. They are as follows:

(a) federal law enforcement priorities;
(b) the nature and seriousness of the offense;
(c) the deterrent effect of the 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; and
(g) the probable sentence or other consequences if the person is convicted.[110]

The Department of Justice considers these factors after the EPA refers the case.

Another significant consideration for both the Department of Justice and the EPA is whether the violation impinges on the regulatory process.[111] The EPA's enforcement efforts rely heavily on industries' voluntary reporting.[112] "Violations that involve destruction or falsification of documents, or that otherwise threaten the integrity of the reporting system, provide the government with special incentives to prosecute."[113] Because of this policy, corpo-

106. *Id.*

107. Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,065 (Mar. 1985).

108. Kafin & Port, *Environmental Enforcement: Criminal Sanctions Lead to Higher Fines and Jail*, NAT'L L. J., July 23, 1990, at 20 (citing Memorandum from Robert M. Perry, Associate Administration of the EPA, to Regional Counsels, *Criminal Enforcement Priorities For the Environmental Protection Agency* (Oct. 12, 1982) (emphasis added)).

109. Kafin & Port, *supra* note 108, at 21.

110. U.S. Department of Justice, *Principles of Federal Prosecution* (1980) *cited in*, Seymour, *supra* note 71, at 343.

111. Kafin & Port, *supra* note 108, at 20.

112. *Id.*

113. *Id. See* Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,478 (Dec. 1987). This means that bad faith reporting and failure to report is a top enforcement priority. *See Conviction in Water Pollution*, N.Y. Times, May 25, 1990, at A20, col. 1. John Borowski, president

rations should implement comprehensive monitoring mechanisms based on periodic written reports, and corporate officials should be independently involved in the company's regular audit process. Unfortunately, after establishing such a program, the failure to execute it effectively can also be adverse evidence in a criminal prosecution.[114] Additionally, administrative compliance and resolution of alleged administrative violations must be handled carefully. Admissions of past violations, in Administrative Consent Orders or in other forms, can be the basis for actual or constructive knowledge as well as demonstrating a history of non-compliance.

F. Henry Habicht IV, former assistant attorney general in charge of Environment and Resources, believes that prosecuting high corporate officials will have a deterrent effect.[115] Effectively preying on corporate America's fear of incarceration and the associated stigma, including, in most cases, the complete destruction of an individual's professional career,[116] the EPA and the Department of Justice seek to weed out environmental offenders and deter future degradation of the environment.[117] The combination of the efforts by the Department of Justice, the EPA and the continued surge of public opinion ultimately means that the number of successful prosecutions will steadily increase. Thus, in light of the government's decreased burden at trial, the determination of *whether* to indict is critical.

D. The Environmental Crimes Act of 1990

The impact of environmental criminal statutes on corporate officials will only increase with The Environmental Crimes Act of 1990 now pending before Congress.[118] The legislation proposes to criminalize any "environmental offense" where the violator knowingly, recklessly or negligently en-

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of Borjohn Optical Technology, Inc. was recently convicted of a charge of "knowing endangerment" under the Clean Water Act for directing employees to dispose of toxic waste water in the local sewers. He knew that the dumping was illegal but considered it "like not counting tips for income tax." Stipp, *Toxic Turpitude: Environmental Crime Can Land Executives In Prison These Days*, Wall St. J., Sept. 10, 1990, at A1, col. 1.

114. Address of Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Locke Purnell Rain Harrell Breakfast, Dallas, Tex. (Sept. 26, 1990).

115. Habicht, *supra* note 113, at 10,480. The Justice Department and EPA strongly believe that members of the regulated community will be less likely to consider willful or calculated evasion of environmental standards when they know that discovery might lead to a prison term. It is no accident, therefore, that three times as many individuals have been prosecuted by the Environmental Crimes Section as corporate defendants . . . . It has been, and will continue to be, Justice Department policy to conduct environmental criminal investigations with an eye toward identifying, prosecuting and convicting the highest-ranking, truly responsible corporate officials.

116. Unlike a civil suit, the mere presentment of an indictment "will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo." United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979).

117. Habicht tempered his tone by noting that a company will probably not be prosecuted if it has diligent reporting and environmental compliance policies and information systems and has a record of responding promptly when problems or accidents occur. "Actions to conceal or to mislead the government, along with a substantive violation of pollution laws, will virtually guarantee felony indictment and conviction . . . ." Habicht, *supra* note 113, at 10,481.

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

dangers life or causes an "environmental catastrophe."[119] The sanctions vary depending on the offender's state of mind, ranging from one year in prison to thirty years incarceration and fines between $500,000 and $2 million.[120]

The proposed legislation would authorize judges to order convicted companies to hire an independent expert to conduct an environmental audit.[121] The audit would be used to determine how to eliminate factors causing the violation in an effort to avoid future violations.[122] The omnibus legislation seeks to enhance sentences by creating comprehensive criminal penalty provisions.[123]

This legislation, as presented, appears strikingly vague. Without clear definitions of the terms "environmental catastrophe" or "serious bodily injury," neither individuals nor corporations are provided notice of the conduct that the law seeks to prohibit. Indeed, violation of the environmental statutes now carries a serious penalty.[124] Consequently, the Fifth Amendment mandates that a statute give fair warning of the proscribed behavior.[125] As currently drafted, the Environmental Crimes Act of 1990 may not be able to withstand rigorous constitutional scrutiny.

E. The Sentencing Guidelines[126]

Pursuant to the 1984 Comprehensive Crime Control Act,[127] the United States Sentencing Commission, an independent commission in the judicial branch, drafted sentencing guidelines that impose a range of punishment available for federal crimes.[128] While the Sentencing Manual specifically addresses few crimes, environmental offenses are separately proscribed in Section 2Q of the Sentencing Guidelines.[129] Seven guidelines specifically address environmental crimes.[130]

The new guidelines seek to replace judicial subjectivity with objectivity;

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. Penalties vary, with a possibility of imprisonment for one to 30 years and fines ranging from $500,000 to $2 million. *Id.*
125. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").
126. For a discussion of the Sentencing Guidelines in general, see Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988). For a discussion of how the guidelines affect sentencing for environmental crimes, see Sharp & Shen, *The (Mis)application of Sentencing Guidelines to Environmental Crimes*, 5 Toxics L. Rep. (BNA) 189 (July 11, 1990).
127. 28 U.S.C. § 991(a) (1988).
128. The Guidelines became effective Nov. 1, 1989, affecting violations that occurred after November 1987.
129. UNITED STATES SENTENCING COMMISSION, *Federal Sentencing Guidelines Manual* 10 (West 1989).
130. *Id.* §§ 2Q1.1-2Q2.2. Most environmental offenses fall under § 2Q1.2 — Mishandling of hazardous or toxic substances or pesticides; record keeping, tampering and falsification — and § 2Q1.3 — Mishandling of other environmental pollutants; record keeping, tampering and falsification.

judges must impose a certain sentence on a convicted environmental offender.[131] It matters not whether the individual is the president and chief executive officer of the corporation or simply the maintenance person.[132]

Generally, the application of the guidelines involves determining the "base offense level" for a specific crime, and adding in any "specific offense characteristics" identified in the guidelines.[133] For example, if the offense otherwise involved a discharge or release of a hazardous substance, then the base level offense increases four levels.[134] Adjustments are then calculated taking into account the defendant's role in the offense,[135] acceptance of responsibility for the offense[136] and efforts to obstruct justice.[137] Finally, the defendant's criminal history factors into the equation, leaving the judge with a raw mathematical score.[138] The judge applies this score (or level) to a matrix which indicates a sentencing guideline range from which the judge cannot depart without clearly justifying the departure.[139] At least one appeals court has confirmed that departures from the guidelines are considered the exception rather than the rule.[140]

Most significantly, the guidelines have severly curtailed the opportunity to hand out a probated sentence. The judge has discretion to impose probation *only* if either the minimum term of imprisonment is at least one but not more than six months, provided that the court imposes a condition of intermittent confinement, or the minimum term within the permissible range is three months.[141] Because most environmental crimes lead to a base offense level of more than six months, most environmental defendants will be ineligible for probation.[142] In other words, not only are more individuals facing indictment and conviction, but the penalties are more severe as well.[143] The likelihood of serving a prison term is greater than ever, even for a first

131. The United States Supreme Court has held that the guidelines are constitutional in *Mistretta v. United States*, 109 S. Ct. 647, 102 L.Ed.2d 714 (1989).

132. Kafin & Port, *supra* note 108, at 21.

133. UNITED STATES SENTENCING COMMISSION, *supra* note 129, at § 1B1.1.

134. *Id.* § 2Q1.2(b)(1)(B).

135. For example, § 3B1.1(a) allows an addition of 4 levels if the defendant was an organizer or leader of a criminal activity that involved five or more persons. *Id.* § 3B1.1(a).

136. A court may adjust downward two levels if a "defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct . . . ." *Id.* § 3E1.1.

137. *Id.* § 3C1.1.

138. For a look at one court's consideration of the evidence to be considered in arriving at the appropriate offense level, see United States v. Bogas, 731 F. Supp. 242 (N.D. Ohio 1990).

139. Any departure from the guideline range is subject to appellate review. 18 U.S.C. § 3742 (1988).

140. United States v. Uca, 867 F.2d 783, 787 (3d Cir. 1989).

141. UNITED STATES SENTENCING COMMISSION, *supra* note 129, § 5C1.1(c).

142. *But see Bogas*, 731 F. Supp. at 252 (four years probation after pleading guilty to criminal charges involving failure to report disposal of hazardous waste).

143. If the guidelines provide a sentence that would exceed the statutory maximum, then the statutory maximum controls. *See* 18 U.S.C. § 3559(b) (1988); UNITED STATES SENTENCING COMMISSION, *supra* note 129, § 5G1.1 (statutory maximum governs as to imprisonment term). For example, the Clean Water Act sets a statutory maximum of three years for "knowing" crimes that do not rise to the level of knowing endangerment. 33 U.S.C. § 1319(c)(2) (1988).

offense.[144]

IV. CONCLUSION

Criminal sanctions are swiftly joining civil remedies as tools of environmental enforcement. Corporations and officers alike risk facing indictment and conviction for environmental wrongdoing. Even environmental accidents can lead to a prison term if a senior official, with diligence, could have foreseen the occurrence or held a position to effectuate change which could have prevented the accident.

Environmental audit procedures provide some insulation for the corporation and its officers. Through internal auditing procedures, a corporation and its officers can monitor the effectiveness of compliance efforts. Systematic monitoring through auditing will ultimately reduce exposure to liability.

In the event auditing reveals a breakdown in compliance or compliance procedures, the corporation should act swiftly. Delays in correcting problems can evidence lack of concern and, ultimately, intent sufficient for conviction. Indeed, corporations that demonstrate strong compliance records and a willingness to act rapidly when necessary are less likely targets for criminal enforcement.

The threat of criminal prosecution based on an officer's position of responsibility or his constructive knowledge creates a minefield through which corporate America must walk daily. The combination of the criminalization of the environmental statutes, the strong public opinion against environmental offenders and the sentencing guidelines — virtually removing the possibility of a probated sentence — forces corporations and their officers to take notice of environmental regulations. The government's diminished burden of proof and the existence of few effective defenses result in remarkably high conviction rates. Thus far, the environmental statutes, judicial decisions, and regulations do not define any clearly delineated "safe harbor" for corporate conduct. Instead, current developments reveal that the government has elected to employ the big stick of conviction and jail time in order to forge an environmental ethic for corporate America.

144. Plea agreements are still available, although the government cannot promise a particular sentence.

APPENDIX

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA)

(aka Ocean Dumping Act)

FEDERAL CITATION: 33 U.S.C. § 1401 *et seq.* (1988)
PRIMARY FEDERAL REGULATIONS: 40 C.F.R. Part 220
STATUTORY SUMMARY: Governs dumping of material into ocean waters
CRIMINAL PROVISIONS: 33 U.S.C. §§ 1411 and 1415(b)
- unpermitted transportation of any material for the purpose of dumping it into ocean waters

ELEMENTS OF BASIC CRIME:
(1) any person
(2) knowingly transported from the U.S.
(3) material
(4) for the purpose of dumping it
(5) into ocean waters

CLEAN WATER ACT (CWA)

FEDERAL CITATION: 33 U.S.C. § 1251 *et seq.* (1988)
PRIMARY FEDERAL REGULATIONS: 40 C.F.R. Part 401 *et seq.* (pretreatment standards)
STATUTORY SUMMARY: Governs discharge of pollutants into waters of the U.S.
CRIMINAL PROVISIONS: 33 U.S.C. §§ 1319(c) and 1321(b)(5)
- unpermitted (NPDES or 404) discharge of any pollutant into waters of the U.S. (c)(1) and (2)
- discharge of any pollutant into POTW in violation of pretreatment standards (c)(1) and (2)
- introduction into sewer system any pollutant which could cause personal injury/property damage or cause POTW to violate its NPDES permit (c)(1) and (2)
- knowing endangerment, *i.e.*, placement of serious bodily injury during knowing discharge of pollutants (c)(3)
- false statement/tampering with monitoring device (c)(4)
- failure to notify U.S. agency of oil or hazardous substances discharge into navigable water of U.S. [33 U.S.C. § 1321(b)(5)]

ELEMENTS OF BASIC CRIME:
(1) any person
(2) knowingly discharged
(3) a pollutant
(4) from a point source
(5) into waters of the U.S.
(6) without an NPDES permit

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)
(aka Solid Waste Disposal Act)

FEDERAL CITATION: 42 U.S.C. § 6901 *et seq.* (1982 & Supp. V 1987)
PRIMARY FEDERAL REGULATIONS: 40 C.F.R. Parts 261 (identification of hazardous waste)
STATUTORY SUMMARY: Governs transportation, storage, treatment and disposal of hazardous waste.
CRIMINAL PROVISIONS: 42 U.S.C. §§ 6928 (d) and (3)
- transportation of hazardous waste to a unpermitted facility (d)(1)
- treatment/storage/disposal of hazardous waste without or in violation of a permit (d)(2)
- omission of information or false statement (d)(3)
- destruction or alteration of/failure to keep required records (d)(4)
- transportation of hazardous waste without a manifest (d)(5)
- exportation of hazardous waste to another country without its consent (d)(6)
- storage/treatment/transportation of used oil in violation of permit (d)(7)
- knowing endangerment, *i.e.*, placement of another in imminent danger of death or serious bodily injury during transportation, storage, treatment or disposal of hazardous waste (3)

ELEMENTS OF BASIC CRIME: (1) any person
(2) knowingly disposed of
(3) *hazardous* waste
(4) proof of criminal intent

EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

FEDERAL CITATION: 42 U.S.C. §§ 11001 *et seq.* (Supp. V 1987)
PRIMARY FEDERAL REGULATIONS: 40 C.F.R. Part 300 and Part 355
STATUTORY SUMMARY: Enacted following the Bhopal, India disaster. The act covers four areas—(1) Emergency planning, (2) Emergency notification, (3) Community right-to-know reporting regarding chemicals and, (4) Emissions inventory.
CRIMINAL PROVISIONS: 42 U.S.C. § 11045(b)(4)
- any person knowingly and willfully failing to provide notice required by 42 U.S.C. § 11004

ELEMENTS OF BASIC CRIME: (1) any person
(2) knowingly and willfully
(3) fails to provide notice

(4) of a release
(5) at a facility
(6) the Release requires notification under CERCLA

RIVERS AND HARBORS ACT
(aka Refuse Act)

FEDERAL CITATION: 33 U.S.C. § 401 *et seq.* (1988)
PRIMARY FEDERAL REGULATIONS: 33 C.F.R. Parts 320 through 324
STATUTORY SUMMARY: Governs any construction near or obstruction of U.S. navigable waters
CRIMINAL PROVISIONS: 33 U.S.C. §§ 406, 407 and 411
- unauthorized construction of any dam or dike in any navigable water of the U.S.
- unauthorized building of any pier, breakwater or jetty in any navigable river or other water of the U.S.
- unauthorized excavation, fill, or alteration of any navigable water of the U.S.
- unpermitted discharge or depositing of any refuse into any navigable water of the U.S.
- unpermitted depositing of any material on the bank of any navigable water

ELEMENTS OF BASIC CRIME: (1) any person
(2) disposed of refuse
(3) into a navigable water of the U.S.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT [CERCLA)
(aka Superfund)

FEDERAL CITATION: 42 U.S.C. § 9601 *et seq.* (1982 & Supp. V 1987)
PRIMARY FEDERAL REGULATIONS: 40 C.F.R. Part 302 (identification of hazardous substances)
STATUTORY SUMMARY: Governs the notification and clean up of spill or releases of hazardous substances into the environment
CRIMINAL PROVISIONS: 42 U.S.C. § 9603(b)
- failure to notify immediately the appropriate U.S. agency upon learning of the release of a hazardous substance into the environment
- submission of false/misleading information in any notification of release into that environment

ELEMENTS OF BASIC CRIME: (1) any person in charge of a vessel or facility
(2) from which a reportable quantity
(3) of a hazardous substance

(4) was released into the environment
(5) failed to notify immediately the National Response Center
(6) as soon as he had knowledge of the release

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)

FEDERAL CITATION: 7 U.S.C. § 136 *et seq.* (1988)
PRIMARY FEDERAL REGULATIONS: 40 C.F.R. Parts 162 and 165
STATUTORY SUMMARY: Governs use of pesticides
CRIMINAL PROVISIONS: 7 U.S.C. §§ 136j and 136l
- distribution/sale/shipment of an unregistered pesticide (1)(A)
- removal/alteration/destruction of any required labelling (2)(A)
- refusal to keep records or to allow inspection/sampling (2)(B)
- improper use of a restricted use pesticide (2)(F)
- use of any pesticide in a manner inconsistent with its labelling (2)(G)
- use of any cancelled pesticide (2)(K)

ELEMENTS OF BASIC CRIME: (1) any commercial applicator, distributor, private applicator or person
(2) knowingly used a pesticide
(3) in a manner inconsistent with its label

TOXIC SUBSTANCES CONTROL ACT (TSCA)

FEDERAL CITATION: 15 U.S.C. § 2601 *et seq.* (1988)
PRIMARY FEDERAL REGULATIONS: 40 C.F.R. Part 761
STATUTORY SUMMARY: Governs storage and disposal of polychlorinated biphenyls (PCBs)
CRIMINAL PROVISIONS: 15 U.S.C. § 2615(b)
- failure to place warning labels on PCB articles, containers, storage areas or transport vehicles (40 C.F.R. § 761.40)
- improper disposal of PCB articles, liquid, or contaminated soil/clean up debris (40 C.F.R. § 761.60)
- storage of any PCB article or container for over a year; storage of any PCB article or liquid in an improper storage container or area; failure to date stored PCB articles or containers (40 C.F.R. § 761.65)
- failure to keep proper records of re-

moval/storage/disposal of PCB articles or containers (40 C.F.R. § 761.180)

ELEMENTS OF BASIC CRIME: (1) any person
(2) knowingly/willfully disposed of
(3) a PCB transformer
(4) in violation of regulations

CLEAN AIR ACT (CAA)

FEDERAL CITATION: 42 U.S.C. § 7401 *et seq.* (1982 & Supp. 1987)
PRIMARY FEDERAL REGULATIONS: 40 C.F.R. Part 61
STATUTORY SUMMARY: Governs emission of hazardous air pollutants
CRIMINAL PROVISIONS: 42 U.S.C. § 7413(c)

- additional violation of any implementation plan more than 30 days after notification of violation by the EPA Administrator (1)(A)
- operation of any new stationary source in violation of applicable standards of performance (1)(C)
- release of other designated hazardous air pollutant in violation of emission standards (1)(C)
- false statement/tampering with monitoring device (2)