
G. Nelson Smith III

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Pollution is a national problem that severely affects the health of our people, the welfare of our nation, and the efficient conduct of

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* Associate, Squire, Sanders and Dempsey, Cleveland, Ohio; J.D. University of Virginia 1986; University of Oslo, Certificate of Achievement, Oslo Norway 1981; B.S. Howard University 1982. Special thanks to my wife, Susan, for her love, patience, and support while I was preparing this article. The views expressed are solely those of the author and are not intended to represent the views of Squire, Sanders and Dempsey.

1. The term "pollution" has been defined in the Clean Water Act at 33 U.S.C. § 1362(19) (1988) as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." See also U.S. v. Ashland Oil and Transp. Co., 364 F. Supp. 349 (W.D. Ky. 1973), aff'd, 504 F.2d 1317 (6th Cir. 1974). However, pollution does not entail only refuse matter but may also include a valuable resource such as oil as explained by the Supreme Court in United States v. Standard Oil, 384 U.S. 224, 86 S. Ct. 1427 (1966). In Standard Oil, the appellant was indicted for discharging gasoline into navigable waters in violation of the proscription in Section 13 of the Rivers and Harbor Act of 1899. The district court dismissed the indictment on the grounds that refuse matter did not include commercially valuable material. The Supreme Court, however, reversed, holding that "the word refuse includes all foreign substances and pollutants" except as provided by Section 13, "those 'flowing from streets and sewers passing therefrom in a liquid state' into the water course." Standard Oil, 384 U.S. at 230, 86 S. Ct. at 1430.

There are other types of waste that have been disposed of in the United States and carry different names such as sludge or solid waste, both of which were defined in the RCRA at 42 U.S.C. § 6903 (1988). The term sludge was defined in § 6903(26A) as "any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial waste water treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects." Section 6903(27) defined the term solid waste as

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, included solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under 1342 of Title 33, or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923, 42 USC §§ 2011 et seq.).

For the purposes of this article, the term "pollution" will include solid waste, sludge, and pollution as defined in the CWA.
interstate commerce. In 1984, an Environmental Protection Agency (EPA) survey reported that there were 265 million tons of hazardous waste released in the United States each year. Consequently, there is now more public concern than ever before about pollution, which is threatening our free flowing rivers, lakes, and overall environment. To alleviate this problem, Congress has enacted many environmental statutes, and some members of Congress have offered solutions of their own. In 1972, Congress enacted amendments to the Federal Water Pollution Control Act (FWPCA), now known as the Clean Water Act (CWA). The objective of these amendments was to eliminate the discharge of pollutants into navigable waters by 1985. Four years later, Congress enacted the Resource Conservation and Recovery Act (RCRA) of 1976. This act was designed to be a multifaceted approach towards solving the many problems associated with the three to four billion tons of hazardous waste generated and discarded each year. The RCRA was also designed to accommodate the problems resulting from the anticipated eight percent annual increase in the volume of such waste. The government’s inability to enforce and ultimately deter corporate violators

6. An example is the solution offered by Senator Joseph Biden, Jr., of Delaware in A New Direction for Environmental Policy: Hazardous Waste Prevention, Not Disposal, 17 Envtl. L. Rep. 10400 (Oct. 1987). Senator Biden stated that the most effective way to deal with waste is to never create it in the first place. Here, the Senator emphasizes the need to focus on waste minimization and prevention rather than the "end of pipe" focus on waste disposal.
of the environmental laws has, however, severely diminished the potential effectiveness of these acts. There have been a host of enforcement problems: unpermitted discharges, false reports, failures to report, jimmed automobile pollution control devices, and sales of unregistered or mislabeled pesticides to name only a few. However, until recently the only enforcement procedures available to the government were civil in nature or carried only the threat of misdemeanor convictions.

When the lack of compliance with the environmental laws by corporations can be attributed to the difficulties corporations—private and municipal—have had organizing themselves for compliance and the difficulties of making the necessary commitments required to meet deadlines in a timely fashion, the EPA and the Department of Justice have sought civil penalties in the form of monetary penalties and injunctions.

There is, however, a second form of corporate resistance which has involved deplorable conduct—willful, substantial, and criminal-like violations of the pollution control laws. Responding to such reprehensible actions, the Justice Department and Congress have indicated their willingness to enact stringent laws providing for the criminal prosecution of corporate violators of environmental statutes. The purpose of this article is to identify how the government has sought to criminally prosecute corporations and corporate officials under RCRA and the CWA and to examine the methods which the government has used and will use to ultimately bring corporations into compliance with RCRA and the CWA.

I. BACKGROUND TO THE ENFORCEMENT PROBLEMS FACED BY THE GOVERNMENT

Prior to 1981, the enforcement of environmental statutes and regulations by prosecutors was almost exclusively through civil sanctions and injunctive relief. Resources were budgeted only for civil enforcement. Using appropriations in pursuing criminal prosecutions would have exhausted the EPA's budget and decreased the number of civil cases which the EPA could bring. The net effect of such a limited budget was that the criminal provisions of environmental statutes were seldom

13. See infra text accompanying notes 84-87.
16. Id. at 1136.
used by government officials; the EPA was more concerned with the quantity of prosecutions than with the more effective deterrence achieved through criminal prosecutions.\textsuperscript{17} For instance, only fifteen criminal cases were brought by the EPA between December 1972 and November 1974.\textsuperscript{18}

The problem of enforcement was complicated further by the corporate world’s awareness of the financial and internal constraints on the government. Rarely facing criminal sanctions, corporations saw fines as a cost of doing business. Corporate officers knew that the likelihood of getting caught was remote, since policing the activities of polluters and registrants on a large scale was extremely difficult.\textsuperscript{19} There was also an array of other enforcement problems that forced the EPA to rely primarily upon voluntary compliance by corporations or, in some cases, upon negotiation and public pressure as means of achieving compliance.\textsuperscript{20} In short, very little was done to compel corporate officials to comply with environmental laws.

At the end of the Carter Administration, the criminal enforcement of environmental laws became a focal point of the Justice Department.\textsuperscript{21} The impetus behind the government’s new willingness to prosecute environmental crimes during the 1980s was primarily the public’s growing belief that the government had no control over the disposal of the toxic waste in America.\textsuperscript{22} The extent of the toxic waste problem was best exemplified by the Assistant Attorney General, James W. Moorman (the Justice Department official in charge of enforcing the nation’s environmental laws):

\begin{quote}
We do not know where the millions of tons of stuff is going. We feel that the things that have turned up like the Love Canal and Kin-Buc situation are simply the tip of the iceberg. We do not have the capacity at this time to find out what is happening. In my view, it is simply a wide open situation, like the Wild West in the 1870’s, for toxic disposal.\textsuperscript{23}
\end{quote}

Moorman’s testimony strengthened the belief that there was a real and imminent threat to public health posed by environmental disasters. As

\begin{flushleft}
17. Id.
18. Id. at 1134 n.2.
\end{flushleft}
again noted by Moorman: ""[E]ssentially there is very little downside risk to anybody who illegally disposes of chemicals in such a way as to be harmful to the public health. . . . The public is basically unprotected. There just are not any lawmen out there, state or federal policing the subject.""^{24}

To control the toxic waste disposal problem, in 1980 the Land and Natural Resources Division of the Department of Justice created the Environmental Enforcement Section.^{25} The Section’s priority soon became criminal enforcement.^{26} On January 5, 1981, just one month after the signing of the Superfund legislation, the Office of Criminal Enforcement was created.^{27} Its charge was to implement the EPA’s commitment to ""actively . . . pursue criminal sanctions, [and] where appropriate, to enhance the effectiveness of the enforcement program.""^{28} In October of 1982, the EPA hired its first criminal investigators. Many of the investigators came to the EPA with a tremendous amount of law enforcement experience with other federal agencies.^{29} The cases that are developed by the EPA’s criminal investigators are referred to the Environmental Crimes Unit,^{30} which was formed with just three lawyers in 1983.^{31} The Environmental Crimes Unit organizes the national criminal enforcement movement, leads the development of policies and training programs, and counsels the EPA on the targeting of investigations.^{32}

With the formation of these groups, the number of criminal prosecutions increased modestly. In 1980, a substantial majority of the American public voted for President Reagan because they wanted less regulatory constraint on business.^{33} On August 14, 1981, Reagan signed Executive Order 12316, ""Responses to Environmental Damage."" Pursuant to Section 105 of CERCLA,^{34} the Executive Order gave Anne Burford, Reagan’s first EPA administrator, the duty to ensure that parties responsible for abandoned or inoperative waste sites would clean the

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24. Id.
26. Id.
27. Id.
30. Id.
32. Starr, supra note 29, at 15.
sites.\footnote{Ronald L. Clareloux, Note, The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy, 1983 Duke L.J. 1333, 1335 (1983).} The reason there was only a minimal increase in prosecutions was because Burford took the reduced regulatory constraint approach to the extreme.

On March 10, 1982, the House Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation began an investigation to learn exactly how the EPA was addressing hazardous waste problems.\footnote{Id.} As a result of the hearings, the subcommittee recognized that hazardous waste sites were neither fully nor immediately cleaned.\footnote{Id. at 1335-36.} The subcommittee also found that many of the companies responsible for the waste were not being held fully responsible for their share of the clean-up costs.\footnote{Id. at 1336.} For instance, in fiscal years 1983 and 1984, there was an average of only forty indictments per year.\footnote{Carr, supra note 31.}

As the economy continued to grow during the mid-1980s, several other factors led to the increase in environmental prosecutions:

(1) Environmental groups were successful in raising money and receiving favorable treatment from the mass media;
(2) middle and upper class Americans began to believe that more money was needed to preserve the environment;
(3) candidate [George] Bush actively courted moderate environmental groups and committed to a conservation agenda; and
(4) many catastrophic events occurred, such as the Exxon Valdez spill. Many people also became afraid of the potential risks such as ozone depletion and global climate change.\footnote{Id. at 6.}

Former Assistant Attorney General Donald A. Carr noted, "As a result of this confluence of trends there is unquestionably broad support at present for the concept of a 'hang em high' approach to environmental prosecution."\footnote{Id. at 7.} In fiscal year 1987, there were 127 indictments, nearly tripling the number in the previous year. In fiscal year 1988, there were eighty-six guilty pleas and convictions, and in fiscal year 1989, there were 107 convictions with fines totaling over twelve million dollars.\footnote{These figures were obtained from the Department of Justice's Environmental Crimes Section.} In fiscal year 1990, there were thirty-three percent more indictments than the previous year. These indictments resulted in a ninety-five percent conviction rate. Fifty-five percent of those convicted were sentenced to
As of January 1991, the Environmental Crimes Section, since its formation, had returned 761 indictments, resulting in 549 convictions. Over fifty-seven million dollars in penalties had been assessed and more than 348 years of jail time had been imposed.

Over the next decade, members of the corporate community should expect those numbers to dramatically increase. In 1990, Congress passed the Pollution Prosecution Act (PPA). In discussions on the PPA, Senator Joseph Lieberman of Connecticut noted that having tough laws and regulations in place on environmental compliance is only part of the solution; a critical element of ensuring compliance is an effective enforcement system. He noted that part of the problem was that cases were investigated by the EPA only after the violations were uncovered and the harm was done. The result has been that the EPA has been reacting rather than focusing on suspected wrongdoing. He further reasoned that by hiring more criminal investigators, the EPA would be able to prosecute cases that would have greater deterrent value. Lieberman stated:

The backbone of EPA's criminal enforcement program is its investigators, who provide EPA with the ability to collect evidence about environmental violations. Yet, unbelievably, EPA has only approximately 50 criminal investigators throughout the Nation—in essence, less than one investigator for each State. Some individual States have devoted almost that many investigators to enforcement of state criminal environmental laws. And other law enforcement agencies, such as the Fish and Wildlife Service, have more than four times the number of investigators which EPA has.

The PPA calls for the EPA to have at least seventy-two criminal investigators by the end of fiscal year 1991, 110 by the end of fiscal year 1992, 123 by the end of fiscal year 1993, 160 by the end of fiscal year 1994, and not less than 200 criminal investigators by the end of fiscal year 1995. The role of the investigators will include tracking down witnesses and providing critical support for court cases.

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44. Id. at 5.
47. Id.
48. Id.
49. Id.
50. Id. at S12274.
II. PURPOSE BEHIND CRIMINAL ENVIRONMENTAL ENFORCEMENT

Without a doubt, the primary purpose for imposing criminal sanctions on environmental law violators is deterrence and rehabilitation of company personnel. Corporations who were not deterred by civil sanctions fear criminal prosecutions, and the threat of jail time sends a clear message to corporate executives that they are not immune to criminal sanctions. As noted by Joseph Block, Chief of the Environmental Crimes Division of the Department of Justice, "[I]ncarceration is the one cost of business that you can't pass to the consumer." Similarly, as Peter Beeson, formerly with the Department of Justice, explained, "[P]rosecution may be more effective for crime in the suites that it is for crime in the streets: 'Deterrence works best on people who have not had contact with criminal justice and for whom prosecution or even investigation will have severe personal consequences.'"

There are many reasons for supporting the use of criminal sanctions. Imprisoning corporate officials avoids the conception that the wealthy can avoid jail by paying insignificant fines. Imposing criminal sanctions on high level corporate officers indicates a public policy that the powerful have a great responsibility to society and, when they fail to meet their obligations, they should be subject to serious sanctions. The Justice Department contends that the reason corporations must be criminally punished for environmental wrongs is that many corporations knowingly refuse to take the appropriate action to correct or remedy a problem. At the same time, the Justice Department is aware that most noncompliance by corporations and corporate officials results from the lack of corporate organization and from the lack of appropriate procedures designed to meet deadlines in a timely fashion. Therefore, so long as a good faith effort is made by the corporation or corporate officials to comply with the environmental laws, the Justice Department usually seeks civil remedies in the form of monetary penalties and injunctions.

53. Id.
56. Id. at 44.
57. Id.
The Justice Department, however, has determined that criminal sanctions are more appropriate than civil sanctions when there are egregious and substantial violations of the environmental laws. In considering criminal prosecutions, the Justice Department has examined several factors over the years, including:

1. The gravity and extent of any health or environmental impact (actual or potential) of the conduct in question;
2. The timeliness and degree of disclosure made to the regulatory authorities;
3. The timeliness and degree of efforts made to control the problem or to mitigate its effects;
4. Any history of recurrent or persistent violations by the corporation, or a corporate image for "bad faith" or recidivism; and
5. Evidence of intentional corporate noncompliance as a result of an informed policy decision.

In other words, the Justice Department usually considers the harm caused to the public and to the environment, such as the type of discharge (e.g., carcinogens or toxins), or whether there were problems with reporting or disclosure. Particularly egregious acts have usually received widespread recognition and publicity. Because of the public exposure from the prosecution of such egregious cases, criminal sanctions under those circumstances were seen not only as good government but as good politics.

III. The Clean Water Act

A. General History

Although most of the criminal environmental statutes and amendments are relatively new, all of them developed from a long and rich

62. Id. at 21-22.
63. Moorman, supra note 12, at 27.
64. Id.
65. Tennille, supra note 61, at 21.
67. For example, the Resource Conservation and Recovery Act was initially passed in 1976, the Noise Control Act was passed in 1972, CERCLA became law in 1980, and the Clean Air Act became law in 1977.
tradition of legislative history. The Rivers and Harbors Act (RHA) and other water acts are the impetus behind many of these laws. As early as 1886, an act was passed making it a crime to empty "any ballast, stone, slate, gravel, earth, slack, rubbish, wreck, filth, slabs, edgings, sawdust, slag or cinders or other refuse or mill-waste of any kind into New York Harbor." Eight years later, another act was passed extending the reach of the 1886 act to prohibit deposits of "any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state" into harbors and rivers for which Congress had appropriated money. Finally in 1899, Congress combined these two statutes with two other statutes and passed Section 13 of the RHA. This act provided that it was unlawful to throw, discharge, or deposit any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state into the navigable waters of the United States. As outlined in United States v. Standard Oil, the purpose of the RHA was no more than an attempt to consolidate these prior acts into one relatively comprehensive act. The RHA was concerned with protecting fish, wildlife, and the environment, keeping them as free from pollution as possible. Both the legislature and the courts found that criminally prosecuting violators was an effective way of achieving this goal. The criminal prosecution of polluters was an approach that continued into the twentieth century.

68. See supra note 1.
70. Id. at 227, 86 S. Ct. at 1429, citing 28 Stat. 363 (1894). The Standard Oil court cited two other early acts passed by Congress in anticipation of water pollution being a potential problem. In 1888, an act was implemented to prevent obstructive and injurious deposits into the New York Harbor and adjacent waters, and to ban the discharge of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state. Id., citing 25 Stat. 209 (1888). An 1890 act made it unlawful to empty into navigable waters "any ballast, stone, slate, gravel, earth rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind... which shall tend to impede or obstruct navigation." Id., citing 26 Stat. 453 (1890). Each of the acts made it a crime to illegally discharge valuable material as well.

It shall not be lawful to throw, discharge, or deposit... any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state into any navigable water of the United States.

Id.
72. Id.
73. Standard Oil, 384 U.S. 224, 86 S. Ct. 1427.
75. The Holden court was called on to determine the criminal liability of a supervisor
Even activities that appeared to be accidental faced prosecution. *Hegglund v. United States* demonstrates how stringently criminal standards were applied against corporate officials. In *Hegglund*, the master of a motor tankship Bidwell, owned by Sun Oil Company, was convicted for discharging oil and permitting it to be discharged from his ship into the Calcasieu River in Louisiana in violation of 33 U.S.C. § 431 et. seq. On appeal, Hegglund's main contentions were that the act only prohibited intentional discharges of oil, and alternatively that the evidence did not show that he was negligent, rather that the escape of the oil was an unavoidable accident. Under 33 U.S.C. § 433, one exception to the imposition of criminal liability is provided “in case[s] of emergency imperiling life or property, or unavoidable accident, collision, or stranding and except as otherwise permitted by regulations.” The Fifth Circuit affirmed the lower court's conviction and held that if the escape of oil could have been foreseen or prevented, then the conviction would stand. The court reasoned that:

[I]f the Bidwell was a tight ship, duly inspected, and loaded without any previous reason to expect that oil would be discharged from her but that it did leak out unavoidably from some accidental or unknown cause, there would be a discharge through unavoidable accident. But if she was known to be likely

of the Washington Gas Company who either directly or indirectly discharged oil and tar in the Potomac River in violation of Section 901 of the D.C. Code. Id. at 322. Section 901 provided:

Deposits of Deleterious Matter.—No person shall allow any tar, oil, ammoniacal liquor, or other waste products of any gas works or works engaged in using such products, or any waste product whatever of any mechanical, chemical, manufacturing, or refining, establishment, to flow into or be deposited in Rock Creek or Potomac River, or any of its tributaries within the District of Columbia or conduit leading to the same.

The defendant in *Holden* argued that the only matter discharged into the Potomac was water-based, and assuming arguendo that tar had been deposited into the river, the small amount of tar was so de minimus that it would not meet the standards required by Section 901. The court rejected this argument and determined that even if there was only a small discharge of coal into the river, the intent of Congress was to punish all who polluted navigable waters. Here, the court held:

It was the manifest object of Congress, not simply to provide for the protection of the fish in the river, but for keeping the waters of the streams in the District as free from pollution as possible. Hence, it was declared by the statute that no person shall allow any tar, oil, ammoniacal liquor, or other waste products to flow into, or be deposited in, the rivers mentioned, or any of the tributaries, or into any pipe conduit leading to the same. The prohibition, therefore, is general and applies to all alike. There can be no question of the power of Congress over the subject.

76. 100 F.2d 68 (5th Cir. 1938).
to leak when loaded, the master could not claim an unavoidable accident when she did thus leak.\textsuperscript{77}

The prosecution contended that the ship was known to the master to be a leaky vessel, and that the defendant willfully loaded her, taking the chance of her leaking again. The master, however, argued that all riveted tankers are liable to leak through the strains put on the hull in discharging the water ballast and pumping in the oil, and that in this instance the escape of oil was due to unavoidable accident. The court in affirming the conviction noted:

While there was evidence to sustain the master's contention, there was also sufficient evidence to justify a contrary finding. Some of the witnesses, indeed say that all riveted tankers sometime leak, and the leaking is unavoidable, but this is contradicted by the experience of the Sun Oil Company, which has seventeen riveted tankers in service. Fifteen of them have not leaked. One has leaked once. The seventeenth, the Bidwell, now seventeen years old, has been reported as leaking and had been repaired either twice or thrice just previously to the occasion prosecuted for. Error is assigned on the admission of this evidence, but the evidence is clearly relevant and weighty. She was certainly leaking on both sides on the day in question. It is testified that the master remarked that she had been leaking during the five years he had commanded her. The Government witnesses say that riveted tankers do not generally leak. The Bidwell could be found to be a leaky ship, known as such to the master.\textsuperscript{78}

This strict doctrine of criminal liability for environmental statutes was expanded even further in \textit{The President Coolidge}.\textsuperscript{79} In \textit{The President Coolidge}, the appellants were convicted of violating 33 U.S.C. § 407 which made it unlawful to throw, discharge or deposit, either directly or indirectly, any refuse matter into any navigable water of the United States. What made this case so unique was that the defendant argued that it not only lacked the intent to discharge refuse, but that the owners and officers of the vessel had given express orders to its crew about the prohibition of dumping matter into the waters. The Ninth Circuit still held the ship accountable for its crew members' actions and for failing to prevent the commission of the forbidden act.\textsuperscript{80}

The purpose of Section 13 of the RHA was obvious—to attempt to challenge any type of behavior which could pollute the waters. Con-

\textsuperscript{77} Id. at 70.

\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{79} \textit{The President Coolidge. Dollar S.S. Co. v. United States, 101 F.2d 638 (9th Cir. 1939).}

\textsuperscript{80} Id.
gress and the courts justified their actions by reasoning that criminal environmental statutes were intended to protect the public interest and, therefore, should be classified as "public welfare statutes." Consequently, the RHA was classified as a public welfare statute. This classification justified Congress' belief that the standard of criminal liability should be less stringent than that applied in most criminal statutes.

In the nineteenth and early twentieth centuries, the federal government was prepared to prosecute anyone who discharged pollutants into the waters under the RHA. However, during the mid-twentieth century, an entirely different approach was taken. The approach virtually eliminated the use of the criminal provisions in water discharge cases. With the enactment of the Federal Water Pollution Control Act (FWPCA) in 1948, the government refocused its energy towards enforcing its provisions through the application of civil restraints. Little thought was given to using the criminal provisions of either the environmental statutes or traditional law.

Initially, criminal prosecutions were only brought under the FWPCA in unusual circumstances—either when compliance efforts revealed particularly outrageous or especially culpable behavior, when the entity refused to cooperate, or when the circumstances aroused unusual vigilance on the part of enforcement authorities. One such egregious case was United States v. Frezzo Brothers, Inc. In Frezzo Brothers, Guido and James Frezzo, were engaged in mushroom manufacturing and were convicted on six counts of willfully and negligently discharging a polluting compost into White Clay Creek in violation of 33 U.S.C. §§ 1311(a) and 1319(c). Specifically, the Frezzo's farm had a 114,000-gallon holding tank designed to contain water run-off from compost wharves and to recycle water back to the farm. The government, however, alleged that the holding tank was too small to contain the compost waste after a rainstorm and that the Frezzos had negligently discharged pollutants.

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   Historically, courts have held that statutes which proscribe common law offenses require specific intent as an essential element. However, in recent years a growing number of statutes have been enacted to proscribe what have been termed "public welfare offense." Due to the "very different antecedents and origins" of these statutes, courts have generally refused to infer specific intent as an essential element.
84. McMurry & Ramsey, supra note 15, at 1134.
into the stream on two different dates. The government further alleged that these actions were willful because a high concentration of compost was found in the creek on three other occasions when there was no evidence of rain. On appeal, the defendants argued that the evidence presented was insufficient as a matter of law to convict them. The Third Circuit disagreed, noting that "[t]he jury was entitled to infer from the totality of the circumstances surrounding the discharges that a willful act precipitated them. The Government did not have to present evidence of someone turning on a valve or diverting waste in order to establish a willful violation of the act." The defendant's conviction for negligently maintaining inadequate tanks was affirmed on the sufficiency of the evidence presented by the government.

In 1972, Congress dramatically amended the approach of the FWPCA. Under the 1948 version of the FWPCA, the concentration was primarily on the water quality control standards. The 1972 amendments to the FWPCA focused upon discharge control mechanisms. By focusing on the discharge rather than the water quality, Congress recognized the need to deter corporations and corporate officers from violating the laws simply as a cost of doing business. Congress stated that the 1948 version of the FWPCA provided sanctions that were wholly inadequate to encourage compliance. Under the 1972 amendments, the corporation or corporate officer was subject to $25,000 per day per violation and/or up to one year in jail for "knowing violations" of the FWPCA. For second convictions, the potential penalties doubled to up to $50,000 per day per violation and two years in jail. In enacting the increased

86. Frezzo Bros., 602 F.2d at 1129.
87. The government proved the willfulness of the conduct by relying on the samples collected, the absence of rain on those dates, and the elimination of other possible causes for the pollution. The trial judge noted:

Testimony was presented by several witnesses that on many occasions, commencing as far back as 1970, the defendants in this case had been investigated, visited, and confronted by a number of state and county employees concerning the fact that the stream in question was being polluted by runoff from the compost operation being conducted by the defendants on the Frezzo property.

89. Id. at 3671.
90. Id. at 3731.
91. Id.
criminal sanctions, Congress concluded that "if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions, and rapid access to the Federal District Court should accomplish the objective of compliance."\textsuperscript{92}

In 1977, Congress renamed the Federal Water Pollution Control Act as the Clean Water Act (CWA),\textsuperscript{93} and changed the regulatory focus to rigorous control of toxic pollutants.\textsuperscript{94} The CWA was enacted to restore and maintain the chemical and biological integrity of the nation's waters.\textsuperscript{95} It was under these circumstances that the criminal provisions of the FWPCA began to take shape. Although as noted earlier, it was not until some five years later that Congress appropriated money to criminally enforce the laws on the books.

B. "Negligence" or Knowledge Required Under the CWA

Intent is not required to convict a corporate official under the Clean Water Act. Under the CWA, a conviction can occur if a corporate official was negligent. While the possibility of being convicted for negligently polluting the waters has been a part of the law for years, the penalties for criminally violating the CWA have changed dramatically. Prior to 1987, 33 U.S.C. § 1319(c)(1) provided:

\begin{quote}
[A]ny person who willfully or negligently violates section 1311, 1312, 1315, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year or both.\textsuperscript{96}
\end{quote}

In 1987, Congress amended the CWA with the Water Quality Act.\textsuperscript{97} The 1987 amendment placed criminal, knowing violations and negligent violations into two separate categories. These two categories of violations are subject to different penalties.\textsuperscript{98} For negligent discharges, the penalties

\textsuperscript{92} Id.
\textsuperscript{93} Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 USC §§ 1251 et seq. (1988)).
\textsuperscript{94} J. Gordon Arbuckle et al., Environmental Law Handbook 177 (10th ed. 1989).
\textsuperscript{95} United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989).
\textsuperscript{96} 33 U.S.C. § 1319(c)(1) (1972) (emphasis added).
remained the same as they had been under the previous section.99 Yet, the penalties for a knowing violation increased to a doubling of the daily fine amount and/or imprisonment for up to three years.100 With the increase in penalties for knowing violations of the CWA and the expansion of criminally negligent violations, Congress concentrated on improving water quality in areas where mere compliance with nationwide minimum discharge standards did not necessarily meet the CWA's water quality goals.101

In express language, the CWA now states that pollution into navigable waters is forbidden unless the polluter has obtained a permit from the government.102 The corporate official or corporation may be convicted103 if it is proven that the defendant did not have a permit to discharge the pollutant.104 The statute does not require that the official or corporation intend a criminal act in order to be convicted of a statutory violation. The CWA only requires that the defendant negligently commit the act in question.105 The amendment which made negligent actions a separate criminal violation from a knowing violation under the CWA indicates that Congress is determined to deter and severely punish water pollution activities that are made as corporate business decisions.

C. The CWA's "Knowing Endangerment" Statute

In 1987, Congress enacted a nearly identical version of RCRA's knowing endangerment statute under the CWA.106 Like RCRA, the CWA provides that if a person "knows at the time that he places another person in imminent danger of death or serious bodily injury [the violator] shall be subject to a fine, not more than $250,000 or imprisonment for not more than 15 years or both."107 In the CWA context, knowing endangerment becomes an issue where: (1) water supplies are contaminated, (2) pretreatment requirements for toxics are deliberately violated, or (3) hazardous substances are dumped in sewers or waterways instead of being sent to a proper treatment, storage, and disposal facility under RCRA.108 Although there is little guidance on the interpretation of the

101. Arbuckle, supra note 94, at 228.
103. 33 U.S.C. §§ 1311(a) and 1319(c).
105. Id.
106. Arbuckle, supra note 94, at 228.
108. Arbuckle, supra note 94, at 228.
CWA's knowing endangerment provision, other CWA criminal cases seem to indicate that corporations can be vicariously convicted under the CWA's knowing endangerment statute as well. For example, in *Apex Oil Co. v. United States*, a corporation was engaged in transporting fuel oil and was convicted for failing to notify the United States government of a known spill in violation of 33 U.S.C. § 1321(b)(5). The appellant argued that only an individual or natural person and not a corporation could be a person in charge within the meaning of the statute. Hence, it could not be prosecuted. The Eighth Circuit, however, reasoned:

Indeed, such a construction of the statute would, in the case of a corporation bent upon evading the civil penalty of 1321(b)(6), provide an incentive not to report all small spills that are not likely to be detected or traced to their origin. It would pit the employee, on the pain of fine or conviction under 1321(b)(5), against his employer. The appellant's contention is counterproductive to the purposes of the Act."

The court in *Apex Oil* held that "the corporation is no less 'in charge' of the oil facility than its employee. Further, the knowledge of the employees is the knowledge of the corporation." 111

The *Apex Oil* reasoning was supported three years later in *United States v. Little Rock Sewer Committee*, where a voluntary board was charged with making a false statement, representation, and certification in a monthly Discharge Monitoring Report in violation of old 33 U.S.C. § 1319(c)(2). The court noted that the Little Rock Sewer Committee was composed of five individuals who were appointed by the City of Little Rock's Board of Directors. The sewer plant superintendent was convicted of knowingly making false statements of material fact in a discharge monitoring report required to be filed with the EPA, and the issue presented was whether the committee could be held criminally liable for violation of the statute under a theory of respondeat superior. The Arkansas District Court, citing *Apex Oil*, recognized that "[b]ecause of the broad language of the court's decision in *Apex* regarding the imputation of knowledge in a criminal case to the corporation, that decision could arguably be cited as authority for the proposition that the knowledge of even a low echelon employee may be imputed to the corporation." 113

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110. Id. at 1293 (footnotes omitted).
111. Id. at 1295 (citation omitted).
113. Id. at 9.
The court distinguished *Apex Oil* by noting that the official convicted in the *Little Rock Sewer* case was not a low echelon employee but rather a high level supervisor. Therefore, reliance on the principle pronounced in *Apex Oil* was unnecessary. Finally, the defendants argued that they should not be held vicariously liable because, unlike the individuals involved in *Apex Oil*, they were civic minded individuals that were not in business for profit. The district court, however, determined that the board stood to benefit financially if in no other manner than from the reduced cost of operation resulting from the failure to take those steps and make those expenditures necessary to operate the facility in compliance with the standards. Concerning the issue of the board members being civic minded individuals serving on the board without compensation, the court held:

The evidence sustains this point, but it is essentially irrelevant to the question of the guilt or innocence of the named defendant. It must again be emphasized that the legal entity known as the Sewer Committee is the defendant, and it, not the individual members of the "Board," has been found guilty of violating the aforementioned statute.\(^\text{114}\)

Both the Congress and the courts have found this interpretation necessary to curb and ultimately deter corporate violations of the CWA.

**D. Other Issues Raised Under the CWA**

Many other issues have been raised under the criminal provisions of the CWA. The issues have all been resolved with one objective focus in mind—corporations and corporate officers will no longer be allowed to destroy the environment as a cost of doing business. If they do so, criminal penalties will follow.

1. **The Prerequisite of Civil Action Prior to Criminal Action**

According to Section 309(a)(3) of the CWA, criminal penalties can be imposed without a civil warning first being issued.\(^\text{115}\) Section 309(a)(3) sets forth two courses of action which are open to the Administrator

114. Id. at 10.
115. 33 U.S.C. § 1319(a)(3) states in pertinent part:

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of 1311, 1312, 1316, 1317, 1328, or 1345 of this title, or is in violation of any ... permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.
of the EPA when he becomes aware of a violation of the CWA. The Administrator must either file a civil action against the person he believes to be a violator or give such person an abatement order.\textsuperscript{116} However, there is conflicting legislative history with respect to whether a compliance order or a civil suit by the Administrator is a prerequisite to the government’s institution of criminal proceedings.\textsuperscript{117} In House debate, Representative Harsha indicated that the issuance of an abatement order was a necessary condition to the filing of a criminal action.\textsuperscript{118} This view was also expressed in the Senate’s consideration of the conference committee report where Senator Muskie acknowledged, “It is important to note however, that the provisions requiring the Administrator to issue an abatement order whenever there is a violation were mandatory in both the Senate bill and the House amendment, and the Conference agreement contemplates that the Administrator’s duty to issue an abatement order remains a mandatory one.”\textsuperscript{119}

Yet, the final House Committee Report clearly indicated that while the Administrator must act in the case of any violations, he has alternative methods of responding either by civil or criminal proceedings.\textsuperscript{120} The key portion of the House Committee Report provides:

> Whenever on the basis of any information available to him the Administrator finds that anyone is in violation of any of these requirements, he may take any of the following enforcement actions: (1) he shall issue an order requiring compliance; (2) he shall notify the person in alleged violation in such State of such finding . . . or (3) he shall bring a civil action; or (4) he shall cause to be instituted criminal proceedings.\textsuperscript{121}


\textsuperscript{117} \textit{United States v. Frezzo Bros., Inc.}, 602 F.2d 1123, 1126 (3d Cir. 1979).

\textsuperscript{118} \textit{Phelps Dodge}, 391 F. Supp. at 1183; here Representative Harsha stated:

> Assuming there was some discharge of pollutants contrary to this act and the Administrator notified the violating party as he is required under this act and told him what he was doing wrong and told him where it was happening, and ordered the violator to stop, and if the polluter did not obey that order, then the polluter becomes a willful violator and can be [criminally] charged under this section as a willful violator.

See also \textit{Frezzo Bros.}, 602 F.2d at 1126.


\textsuperscript{120} \textit{Phelps Dodge}, 391 F. Supp. at 1184; \textit{Frezzo Bros.}, 602 F.2d at 1126.

In short, there is nothing in the text of Section 309(c) which compels the conclusion that prior written notice or other administrative or civil remedies are prerequisites to criminal sanctions under the CWA. The Senate acceded to the House in not making civil enforcement mandatory upon the Administrator under Section 309. Therefore, the Administrator is not required to institute a civil action first and to order a correction by civil means before instituting criminal penalties.

2. Defining "Navigable Waters"

Under the CWA, much of the focus concerning criminal liability has also been on determining what constitutes "navigable waters." Congress did not explicitly define the term "waters of the United States." Yet, to implicitly determine the meaning of the questioned criminal provision, one needs to go no further than the definitions provided in the CWA itself. Congress defined the phrase "navigable waters" as broadly as possible. This is best illustrated in United States v. Ashland Oil and Transportation Co. In Ashland Oil, the defendant corporation was convicted for failing "immediately" to report the discharge of 3200 gallons of oil into the water of Little Cypress Creek on February 20, 1973. Little Cypress Creek was a tributary to the Pond River, and the Pond River was a tributary to the Green River. The Green River is navigable in fact at the point that the Pond River empties into it. Both the government and the defendants stipulated that only the Green River, and not the Pond River, was actually a navigable river in fact in terms of waterborne commerce. Here, Ashland Oil Company on appeal claimed that Congress did not have the Constitutional power to control the pollution of nonnavigable tributaries of navigable streams and that Congress had not sought to do so in the statute. In upholding the conviction, the Sixth Circuit held:

Obviously water pollution is a health threat to the water supply of the nation. It endangers our agriculture by rendering water unfit for irrigation. It can end the public use and enjoyment of our magnificent rivers and lakes for fishing, for boating, and for swimming. These health and welfare concerns are, of course, proper subjects for Congressional attention because of the many impacts upon interstate commerce generally. But water pollution

122. Frezzo Bros., 602 F.2d at 1126.
123. Id.
125. Id.
127. 504 F.2d 1317 (6th Cir. 1974).
is also a direct threat to navigation—the first interstate commerce system in this country’s history and still a very important one.\textsuperscript{128}

Similarly, in \textit{Phelps Dodge},\textsuperscript{129} the defendants filed a motion to dismiss an indictment for illegally polluting navigable waters. There, the defendants asserted that the phrase “waters of the United States” as used in the CWA was unconstitutionally vague and indefinite because it failed to give a fair warning of conduct that was criminal. Therefore, the appellants argued that the statute violated the Fifth Amendment. The district court rejected this argument and, like the court in \textit{Ashland Oil}, noted:

the Supreme Court is less inclined to strike down a congressional enactment on “vagueness” if it involves regulatory measures than it is if constitutionally protected acts or conduct of individuals are involved.

The term “waters of the United States” as used in the context of the Act and in keeping with the legislative intent means just what it says: “all waters of the United States including the territorial seas.”\textsuperscript{130}

The courts have since expanded the phrase “navigable waters” in criminal cases to include wetlands which are defined as “areas inundated or saturated with ground water including swamps, marshes and bogs.”\textsuperscript{131} The courts have also interpreted criminal violations under the CWA like its predecessor, the FWPCA, and included streams that were not navigable in fact.\textsuperscript{132} One court even noted that the CWA’s “legislative history makes it clear that the term [navigable waters], should be given the broadest possible constitutional interpretation.”\textsuperscript{133}

3. \textit{Individuals Subject to Prosecution}

Although Congress was concerned with deterring corporations and corporate officers from polluting the nation’s waterways, Congress also wanted to make sure that only those individuals with the ability and authority to prevent discharges into the waterways would be prosecuted. To the extent that guidance can be obtained from the legislative history, 33 U.S.C. § 1321(b)(5) suggests that liability is to be limited to those

\begin{footnotesize}
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\item \textsuperscript{128} Id. at 1325-26.
\item \textsuperscript{129} \textit{Phelps Dodge}, 391 F. Supp. 1181.
\item \textsuperscript{130} Id. at 1185.
\item \textsuperscript{131} United States v. Key West Towers, Inc., 696 F. Supp. 1467 (S.D. Fla. 1988).
\item \textsuperscript{133} Id. at 855, quoting Sen. Rep. No. 92-1236, 92d Cong., 2d Sess., 1972 U.S.C.C.A.N. at 3776, 3822.
\end{itemize}
\end{footnotesize}
responsible for a facility or vessel.\textsuperscript{134} Under the CWA, the person must have the capacity to make timely discovery of discharges and have the authority or power to direct the activities of persons who control the mechanisms causing the pollution.\textsuperscript{135} In short, the person must have the capacity to prevent or abate damage.\textsuperscript{136}

This rule only protects individuals. It does not eliminate the criminal vicarious liability of a corporation. While the legislative history of the FWPCA of 1972 and its amendments offers little real help with respect to the vicarious liability of corporations for the acts of its employees,\textsuperscript{137} it is reasonable to assume that, like the knowing endangerment provision, Congress intended to impose vicarious liability upon corporations as "owners" for the acts of their employees. Again, such vicarious liability is designed to assure compliance with the Act by employees of the company.\textsuperscript{138}

IV. THE RESOURCE CONSERVATION AND RECOVERY ACT

A. General History

Congress enacted the Resource Conservation and Recovery Act (RCRA) as a "cradle to grave" regulatory scheme which would provide "nationwide protection against the dangers of hazardous waste disposal."\textsuperscript{139} The committee reports accompanying the legislative consideration of RCRA contained numerous statements indicating the Congressional view that improper disposal of toxic materials was a serious problem.\textsuperscript{140} The original 1976 RCRA statute made the knowing disposal (but not treatment or storage) of toxic materials without a permit a misdemeanor.\textsuperscript{141} However, with the widespread negative publicity

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\item Apex Oil Co. v. United States, 530 F.2d 1291, 1294 (8th Cir.), cert. denied, 429 U.S. 827, 97 S. Ct. 84 (1976).
\item Id. at 1293, citing United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972).
\item Id.
\item United States v. Little Rock Sewer Committee, 460 F. Supp. 6, 8 (E.D. Ark. 1978).
\item Id.
\item Johnson & Towers, 741 F.2d at 667-68.
\end{enumerate}
\end{footnotesize}
given to sites such as Love Canal in New York and the Chemical Control site in New Jersey, the government knew that swift, strong action had to be taken against corporate polluters.142

Amendments made in 1980 to the 1976 Act expanded the criminal provisions of RCRA to cover both treatment and storage of hazardous materials, and a violation of the criminal provisions became a felony.143 The 1980 RCRA Amendments were significant in that they established the first felony sanctions for any federal environmental crime144 and the enactment of the first “endangerment” offense under federal law.145 The broad expansion of the penalties under RCRA was essential to provide a wide variety of mechanisms to stop the illegal disposal of hazardous waste.146

B. “Knowledge” Required Under RCRA

Virtually every environmental statute now provides for some form of criminal liability.147 Yet, it is the amendments to both RCRA and the CWA which indicate Congress’ intention to stringently enforce the criminal provisions of these and other environmental statutes.148 RCRA recognizes two types of criminal actions—knowing actions and knowing endangerment. What constitutes “knowledge” under RCRA for purposes of criminal liability is probably the most confusing aspect of the Act. The definition of “knowledge” changes dramatically depending upon how the issue is approached and who makes the interpretation.

In 1980, Congresswoman Barbara Mikulski of Maryland proposed an increase in the criminal penalty for violating RCRA from a misdemeanor to a felony. In doing so, Mikulski noted that “[d]esignating violations of RCRA as felonies will give us the deterrent we need. Violators will be more likely to be caught and prosecuted if my amendment is adopted because of the greater priority given to felonious offenses.”149 According to Mikulski, the amendment was recommended by the Justice Department, which agreed that if the crime was deemed a felony, the statute would serve as a greater deterrent and would make

143. Infra note 150.
144. Id.
146. H.R. Rep. No. 94-1491, supra note 139, at 6269; Johnson & Towers, 741 F.2d at 667.
147. Arbuckle, supra note 94, at 176.
148. Id. at 61.
chief executive officers more prudent in governing their companies.\textsuperscript{150} Furthermore, the Department of Justice believed that by increasing the penalty to a felony, the Department would receive more enforcement assistance from the Federal Bureau of Investigation. Congressman Florio of New Jersey stated that "[t]he FBI either has an official policy or unofficial policy of not becoming involved in misdemeanors. To this degree, if this is now upgraded to a felony, the Justice Department feels that it could get greater support of the resources of the FBI in tracking down these people."\textsuperscript{151}

On the question of the degree of knowledge required to convict a violator, Congressman Madigan of Illinois asked Mikulski the following hypothetical question:

In the event that the owner of some hazardous waste contracts with a trucking company to dispose of that waste, and the trucking company disposes of it in an illegal and felonious manner, I should like to know from the gentlewoman who has committed the felony. Has it been committed by the trucking company or by the persons who owned the waste that was to be disposed of, or by both?\textsuperscript{152}

The response was provided not by Mikulski but by Congressman Florio who replied:

Of course, the whole question will be determined by a court, and the feeling is that, on the actual person who violates the standard, which is reckless disregard, who should have known of the inappropriateness of the disposal. Obviously, these are factual matters and we have had instances in the past whereby someone has had a release ostensibly absolving them from any responsibility for inappropriate disposal; under this statute, of course, and a very strict standard of law in the criminal statutes, there will be a need to go beyond just the front of the release to find out whether that individual should have had knowledge as to the accuracy of adequacy of the disposal producer. So in effect what I am suggesting, not a direct answer, a factual determination will have to be made by the law enforcement agencies through the indictment process.\textsuperscript{153}

Madigan was not satisfied with the answer provided by Florio. Madigan then rephrased the question:

\begin{itemize}
  \item \textsuperscript{150} Id. at 3368.
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id.
\end{itemize}
All I am concerned about is that, if someone in good faith hires the services of a second party to dispose of hazardous waste under the impression that it is going to be disposed of in a legal way whether or not that person has any further responsibility under this particular amendment once the hazardous waste leaves his or her property.¹⁵⁴

Florio responded:
If the gentlewoman will yield further, the language of the amendments in defining "reckless disregard" states that the individual knows of existing circumstances, if he is aware that a substantial risk does exist, but disregarded that risk. Obviously, this is general language but of course we are always dealing with general language. It is a factual situation. The law enforcement officials will make a determination as to whether that individual was sufficiently callous in his disregard of the risk. It seems to me to use the example the gentleman used, if in fact one has an awareness of the hazardous propensities of a particular chemical, knows of the difficulties associated with disposal, and one notwithstanding that sells those materials to someone who comes up in a pickup truck and that person gives him a release, that very well may be, notwithstanding the conditions of the release that could be construed as reckless disregard.¹⁵⁵

The response seems to treat actual knowledge and reckless disregard identically. However, it actually implies that when the facts indicate that the defendant knew about many of the circumstances which would lead one to believe that a criminal violation is occurring or has occurred and the person does not stop the illegal activity, actual knowledge can be inferred. The key here is that there is some degree of knowledge that circumstances and the activity could cause harm to people and the environment. This argument is further supported by the Legislative History of the 1984 Amendment to RCRA:

The term "knowing" includes the concept of "willful blindness," so that it will not be possible for someone to avoid criminal responsibility by deliberately remaining ignorant about the material conditions and requirements of permits and of interim status regulation. The Judiciary Committee's amendment precludes any argument that section 3008(d)(2) imposes strict criminal liability and ensures the continuation of the culpability requirement of that provision.¹⁵⁶

¹⁵⁴. Id.
¹⁵⁵. Id.
Similarly, under RCRA's criminal statute (42 U.S.C. § 6928), knowledge is required and is spelled out explicitly in the statute.\textsuperscript{157} However, knowl-

\begin{footnotesize}
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\item The statute itself provides:
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\item Any person who—
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\item knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. 1411 et seq.],
\item knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—
\begin{enumerate}
\item without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. 1411 et seq.]; or
\item in knowing violation of any material condition or requirement of such permit; or
\item in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;
\end{enumerate}
\item knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;
\item knowingly generates, stores, treats transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after November 8, 1984) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;
\item knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;
\item knowingly exports a hazardous waste identified or listed under this subchapter—
\begin{enumerate}
\item without the consent of the receiving country or,
\item where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or
\end{enumerate}
\item knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter—
\begin{enumerate}
\item in knowing violation of any material condition or requirement of a permit under this subchapter; or
\item in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter; shall, upon conviction, be subject to a fine of not more than $50,000 for each
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edge does not require certainty; a defendant acts knowingly if he is aware "that the result is practically certain to follow from his conduct, whatever his desire may be to that result."  

To some courts, proving the requisite knowledge is not difficult. The RCRA statute at issue sets forth certain procedures transporters must follow to ensure that waste is sent only to facilities with permits; all transporters are presumed to be aware of these procedures. Consequently, a corporate official can be convicted of violating 42 U.S.C. § 6928(d)(2)(a) if he: (1) knowingly disposes of hazardous waste or causes others to dispose of a chemical waste and the substance is listed as hazardous by the EPA, (2) knows that the chemical waste had the potential to be harmful to others or to the environment and was not an innocuous substance like water, and (3) had not obtained a permit. Similarly, where the corporate official knows what the hazardous waste is and knows that the disposal site has no permit, he can be convicted of violating 42 U.S.C. § 6928(d)(1). There is a great deal of dispute about whether the violator must have knowledge that no permit has been obtained. Many courts have stated that no such knowledge is necessary. It is those courts' interpretation that, under RCRA and in this regulatory context, a defendant acts knowingly if he willfully fails to determine the permit status of the facility. Furthermore, the judge or jury may draw inferences from all of the attendant circumstances, including the existence of a regulatory scheme.

In attempting to crystalize exactly what the "knowledge" requirement is in criminal RCRA actions, the courts have actually further blurred an already gray line. For example, in United States v. Dee, three federal officials were convicted on four counts of illegally storing, treating and disposing of hazardous waste without a permit. The appellants

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159. Hayes Int'l, 786 F.2d at 1514.
160. Id.
161. United States v. Greer, 850 F.2d 1447, 1450 (11th Cir. 1988).
163. United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989).
164. Hayes Int'l, 786 F.2d at 1504.
165. Id. at 1505; see also Greer, 850 F.2d at 1453; Johnson & Towers, Inc., 741 F.2d at 669.
166. 912 F.2d 741 (4th Cir. 1990).
were civilian employees, engineers, of the United States Army at Aberdeen Proving Ground in Aberdeen, Maryland. They appealed their convictions, alleging that they did not knowingly commit a crime and that they were unaware that the chemicals they managed were hazardous waste. While the court acknowledged that ignorance of the law was no excuse, the court went one step further noting:

"[W]here as 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 . . . must be presumed to be aware of the regulation." Therefore, the government did not need to prove defendants knew the violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous waste.

Yet, in 1991, the First Circuit determined in United States v. MacDonald & Watson Waste Oil Co., that presumed knowledge is not enough to convict someone of violating RCRA. In MacDonald & Watson, the prosecution admitted that the government had no direct evidence that one of the defendants actually knew of the illegal shipments of hazardous waste for which the defendant was convicted. Rather, the prosecution argued that the defendant was the president and owner of the corporation that transported the illegal shipments and was a hands-on manager of a relatively small firm. Further, the government argued that the defendant, as the responsible corporate officer, was in a position to ensure that the company complied with RCRA but failed to do so in spite of two separate warnings from a consultant that other shipments of toluene-contaminated soil had been received from other customers. The government concluded that such failure violated the permit which had been issued.

The trial court agreed with the government. However, the First Circuit reversed, outlining that actual knowledge—not presumptive knowledge—was required. The circuit court supported its argument by reasoning that the cases relied upon to develop the responsible corporate officer doctrine—namely, United States v. Dotterweich and United States v. Park—were actually misdemeanor cases. Moreover, the cases

167. Id. at 745.
169. 933 F.2d 35 (1st Cir. 1991).
170. Id. at 50.
171. Id.
172. 320 U.S. 277, 64 S. Ct. 134 (1943).
were prosecuted under the Food, Drug and Cosmetic Act,\(^{174}\) relating to the handling or shipping of misbranded drugs or food. The statute applied in \textit{Dotterweich} and \textit{Park}, however, had no knowledge requirement. Conversely, the knowledge requirement is expressly provided in RCRA.\(^{175}\) From a policy perspective, the court reasoned further that actual knowledge is especially needed "where, as here, the crime is a felony carrying possible imprisonment of five years and, for a second offense, ten."\(^{176}\) The court then held, "We have found no case, and the government cites none, where a jury was instructed that the defendant could be convicted of a federal crime expressly requiring knowledge as an element, solely by reason of a conclusive or 'mandatory' presumption of knowledge of the facts constituting the offense."\(^{177}\)

\textit{MacDonald} & \textit{Watson} articulates a view that is completely opposite that of the view taken by most other courts. \textit{MacDonald} & \textit{Watson} takes the contrary view that actual and not presumptive knowledge is required to convict someone under a statute where the "knowledge" element is explicitly mentioned in the statute. If this view is adopted by other circuits, it will be much more difficult for the government to convict corporate officers. The government will no longer be able to rely upon the collective knowledge of employees to establish circumstantial knowledge. Instead, each corporate officer's knowledge will have to be individually identified.

\textbf{C. RCRA's "Knowing Endangerment" Statute}

Congress' commitment to the environment is further exemplified by its establishment of the knowing endangerment criminal sanction recently implemented by RCRA and the CWA.\(^{178}\) In 1980, Congress enacted the knowing endangerment provision of RCRA.\(^{179}\) The purpose of this provision was to provide enhanced felony penalties for certain life-threatening conduct, while at the same time assuring to the fullest extent possible that persons were not prosecuted or convicted unjustly for making difficult business decisions where such judgments were not made with the necessary scienter.\(^{180}\) Initially, the House of Representatives

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\(^{175}\) United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 52 (1st Cir. 1991).
\(^{176}\) Id.
\(^{179}\) 42 U.S.C. § 6928(e).
proposed amending RCRA to include a general reckless endangerment provision.\textsuperscript{181} However, the House bill was rejected by the Senate. Consequently, the conference committee suggested a substitute proposal establishing a knowing endangerment provision.\textsuperscript{182} This proposal was accepted by the Senate. The knowledge required by the knowing endangerment provision is actual knowledge. The actual knowledge can be established by either direct or circumstantial evidence; however, for individuals, constructive or vicarious knowledge is insufficient to support a conviction.\textsuperscript{183}

This knowing endangerment provision makes it an offense to knowingly place another person in "imminent danger" of death or serious bodily injury while committing a predicate offense under 42 U.S.C. § 6928(d) and engaging in conduct that demonstrates a lack of concern for the individual(s) being endangered.\textsuperscript{184} "Imminent danger" means "the existence of a condition or combination of conditions which could reasonably be expected to cause death or serious bodily injury unless the condition is remedied."\textsuperscript{185}

Determining whether a person violated 42 U.S.C. § 6928(e) requires a two-step inquiry. The first step involves a showing that the defendant knowingly engaged in conduct which violates certain prohibitions or interim standards.\textsuperscript{186} If he did so, the next inquiry is whether his knowledge at the time of the violation satisfies one of the two "tiers" of culpability that may subject him to prosecution for felonious endangerment.\textsuperscript{187} Therefore, the knowledge that the defendant should have had, could have had, or would have had under various circumstances does not suffice if he did not actually have the requisite knowledge about the danger at the time he acted.\textsuperscript{188} According to the legislative history, it was not Congress' intention "either to create criminal liability or to impose enhanced penalties for errors in judgment made without the necessary scienter, however dire may be the danger in fact created."\textsuperscript{189} Thus, a supervisor who personally lacked the necessary knowledge would not be criminally liable under the knowing endangerment statute for knowledge his subordinates possessed.\textsuperscript{190}

\begin{thebibliography}{180}
\bibitem{181} Id.
\bibitem{182} Id.
\bibitem{183} Id.
\bibitem{184} Id.
\bibitem{185} United States v. Protex Indus., Inc., 874 F.2d 740, 744 (10th Cir. 1989).
\bibitem{186} Supra note 180.
\bibitem{187} Id.
\bibitem{188} Id.
\bibitem{189} Id. at 38, 1980 U.S.C.C.A.N. at 5037-38.
\end{thebibliography}
endangerment provision is to protect the public from knowing and unjustified conduct which threatens life or serious bodily harm.\textsuperscript{191} Consequently, a person could be prosecuted under this section even if no concrete harm actually came to others.\textsuperscript{192}

There are two types of knowing endangerment provisions. The first provision covers conduct manifesting an unjustified and inexcusable disregard for human life.\textsuperscript{193} This conduct must include a conscious disregard for human life that is neither excusable nor justified by countervailing considerations.\textsuperscript{194} The initial penalty for such a violation was up to $250,000 fine and/or up to two years in jail.\textsuperscript{195} Conduct that is even more egregious is classified as "manifesting an extreme indifference to human life."\textsuperscript{196} This type of conduct was initially punishable by a fine of up to $250,000 and up to five years imprisonment.\textsuperscript{197} The penalty has now been increased to fifteen years imprisonment.\textsuperscript{198} An example of an egregious action would be the dumping of poisonous waste into what the defendant knows is a drinking water supply. Such an act would be considered egregious even if death or injury does not result.\textsuperscript{199} The need for such stringent penalties was justified by Congresswoman Mikulski:

Hazardous waste violations have had a tremendous effect not just on a few individuals, but on whole cities and ecosystems. Because of the dumping of toxic chemicals in Louisville, Kentucky's sewer system, that city's sewage treatment plant was unable to function properly, causing untreated sewage to enter into the Ohio River and endanger the drinking water supplies of cities downriver. The James River, and to a lesser degree the entire Chesapeake Bay ecosystem, was contaminated because kepone was dumped into the water.\textsuperscript{200}

Because of the severity of the penalties, Congress found it necessary to make the offense as precise and carefully drawn as possible.\textsuperscript{201} The net effect of this concern is that the knowing endangerment charge is not appropriate when the charge involves second guessing of the wisdom of judgments made on the basis of what was known at the time, where

\begin{flushleft}
\textsuperscript{191} Supra note 180, at 38, 1980 U.S.C.C.A.N. at 5038.
\textsuperscript{192} Id.
\textsuperscript{193} Id., 1980 U.S.C.C.A.N. at 5037.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} 42 U.S.C. § 6928(e).
\textsuperscript{199} Supra note 180.
\textsuperscript{200} 126 Cong. Rec., supra note 149.
\textsuperscript{201} Supra note 180.
\end{flushleft}
the person acted without the necessary element of scienter or knowledge.\textsuperscript{202}

Although supervisors could not be held vicariously liable under the RCRA knowing endangerment statute, a different question which arises out of this context is whether or not a corporation can be held criminally liable for the acts of its employees under section 6928(e). This question was recently answered by the Tenth Circuit in the case of \textit{United States v. Protex Industries, Inc.}\textsuperscript{203} In Protex, the defendant operated a drum recycling facility where it purchased and used fifty-five gallon drums, many of which previously contained toxic materials.\textsuperscript{204} The defendant cleaned and repainted the drums and used them to store and ship other products it manufactured.\textsuperscript{205} The EPA conducted a two-year investigation and, ultimately, the corporation was indicted for knowingly placing three of its employees in imminent danger as a result of inadequate safety provisions to protect the employees from the toxic chemicals in the drum recycling facility.\textsuperscript{206}

Protex appealed, alleging that RCRA’s knowing endangerment provision is unconstitutionally vague.\textsuperscript{207} The court rejected this argument

\textsuperscript{202}. Id.
\textsuperscript{203}. 874 F.2d 740 (10th Cir. 1989).
\textsuperscript{204}. Id. at 741.
\textsuperscript{205}. Id.
\textsuperscript{206}. Id. at 741-42. Specifically, government experts testified that the employees were at an increased risk of suffering solvent poisoning.
\textsuperscript{207}. Id. First, Protex argued that the trial court erred in allowing the knowing endangerment counts to go to the jury, despite the alleged absence of any evidence showing the employees were placed in imminent danger or faced serious bodily injury as defined in 42 U.S.C. § 6928(f)(6). Secondly, the defendant alleged that the jury was improperly instructed that an individual was placed in imminent danger if it could reasonably be expected that the set of circumstances would cause death or serious bodily injury. This instruction, the appellant contended, did not track the language of the statute and it unconstitutionally expanded the definition beyond the intent of Congress. Finally, the defendants argued that the court erred in refusing to give a requested instruction in Protex’s defense that the government failed to meet its duty to provide results of any on site inspections to Protex, as required by 42 U.S.C. § 6927(a). The Tenth Circuit rejected all three of these arguments and affirmed the lower court’s conviction.

Specifically, regarding Protex’s first argument that the enhanced risk of contracting some type of indeterminate type of cancer at some unspecified time in the future is not sufficient to constitute serious bodily injury, the court reasoned that this argument “demonstrate[d] a callousness toward the severe physical effect the prolonged exposure to toxic chemicals may cause or has caused to the three former employees.” Id. at 743. The court of appeals also failed to recognize Protex’s second argument that the phrase “imminent danger” was unconstitutionally vague and that the legislative history of the statute indicated an intent on the part of Congress to narrowly restrict the incidences in which a party may be found guilty of knowing endangerment and to limit its applications only to those actions which caused the most severe injury. Here, the court acknowledged:

Defendant is unable to articulate why it could have understood that the RCRA
as it had rejected other similar arguments in the past—on public interest grounds. Again, the court emphasized balancing the interest of the public with the chilling effect the statute would have on corporations. The court saw no ambiguity in the statute and reasoned that corporations can be convicted vicariously under RCRA’s knowing endangerment statute for actions of their employees.

D. Other Issues Raised Under RCRA

1. Defining “Owner” or “Operator”

As under the CWA, the issue of whether one is required to be an owner or operator in order to be found criminally liable has also arisen under RCRA. The jurisprudence indicates that the definition of “owner” or “operator” under RCRA could be a bit more expansive than it is under either the CWA or the Clean Air Act (CAA). In *United States v. Johnson & Towers, Inc.*, the defendant corporation and two of its employees, a foreman and the service manager in the trucking department, were indicted for illegally pumping hazardous waste from the company’s plant into a trench without a RCRA permit. According to the indictment, federal agents saw workers pump waste into the trench over a three-day period, and on the third day observed toxic chemicals flowing into the creek.

Johnson and Towers pled guilty to the RCRA counts, while the employees pled not guilty and moved to dismiss the three RCRA counts against them. The employees specifically argued that the word “person” as used under the act should be interpreted narrowly because in two

forbade it from placing its employees in a situation “substantially certain” to cause danger of death or serious bodily injury, but why it could not have understood that it should not place its employees in situations “reasonably expected” to cause death or serious bodily injury. . . . The gist of the “knowing endangerment” provision of the RCRA is that a party will be criminally liable if, in violating other provisions of the RCRA, it places others in danger of great harm and it has knowledge of that danger.

Id. at 744.

The appellant’s third contention that Protex should have received the results of the EPA’s 1984 and 1985 investigation prior to the 1986 indictment was also rejected by the court which held:

Any information the government might provide pursuant to its duty under section 6927 to Protex was simply surplusage for purposes of Protex’s potential criminal liability. Further, even if the government had notified Protex of the violations discovered after the 1984 and 1985 inspections, Protex’s subsequent remedial activity would not have abrogated its criminal liability for those violations. Instead, it would only help to prevent further criminal violations.

Id. at 746.

208. 741 F.2d 662 (3d Cir. 1984).
similar statutes, the CAA and the CWA, Congress added to its definition of “person” the category of “any responsible corporate officer,” thus raising some doubt as to whether “person” was to be given its common sense meaning. The United States District Court of New Jersey agreed with the employees’ interpretation and concluded that the RCRA criminal provisions applied only to “owners and operators,” i.e., those obligated under the statute to obtain a permit. Consequently, the district court held that since neither employee was an owner or operator, the motion to dismiss the RCRA charges would be granted. On appeal, the Third Circuit reversed the lower court and remanded the case without actually tackling the alleged inconsistencies between the CAA/CWA and RCRA.209

To be convicted under RCRA, the person need only be an officer, that is, a person capable of making decisions on behalf of or within the company.210 However, an employee without decisionmaking authority cannot be convicted as an owner or operator under RCRA. Having the ability to make a decision does not mean that the officer must make a knowing decision to be convicted. The status of an individual’s knowledge is irrelevant in the scheme of determining who is an “owner or operator.”

This raises the issue of what constitutes “capable of making decisions.” Several potential scenarios come to mind. Under RCRA, the following persons could be considered operators:

(a) persons who are intimately versed in and responsible for corporate operations where the offenses occurred;211
(b) persons who have direct responsibility for day-to-day operations;
(c) persons responsible for filing environmental compliance forms;
(d) persons involved in submitting applications for permits.212

In short, it must be shown that a person had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or

209. The court noted:
Without passing on the meaning of “any person” in the Clean Air or Clean Water Act, which are not the subject of this appeal, we note that the addition in those acts of “any responsible officer” seems to expand rather than limit the class of potential defendants. As the Supreme Court said in United States v. Dotterweich, 320 U.S. 277, 282, 64 S. Ct. 134, 137 (1943), an exercise of draftsmanship intended to broaden the scope of a criminal provision “can hardly be found ground for relieving from such liability the individual agents of the corporation.”
Id. at 665 n.3.
212. Id.
even the president of a corporation is not enough. The government must prove that the person had a responsibility to supervise the activities in question.\(^{213}\)

2. Defining "Hazardous Waste"

RCRA also defines the term "hazardous waste" for purposes of corporate criminal liability rather expansively. In many cases, defendants have attempted to argue that materials in question were not waste since they were still usable.\(^{214}\) Those defendants did not fully understand the principles of RCRA. Broadly, RCRA sets forth different types of hazardous waste. On one hand, there are wastes listed by the EPA as hazardous.\(^{215}\) On the other hand, there are wastes that have characteristics which make them hazardous.\(^{216}\)

Determining when a hazardous substance becomes waste can cause some problems under RCRA. The EPA commentary indicates that hazardous substances become hazardous waste when "their intended use has ceased and they begin to be accumulated or stored for disposal, reuse or reclamation."\(^{217}\) The material also becomes waste when it has been used for its intended purpose, and is either discarded or can no longer be used for that purpose.\(^{218}\) Finally, if the expiration date has been reached on a hazardous substance, the substance may become a hazardous waste. Failure to have the requisite RCRA permit under any of these circumstances could subject a corporate officer to criminal liability.\(^{219}\)

\(^{213}\) Id.


\(^{217}\) 45 Fed. Reg. 33,095 col. 3 (1980); Uretek, 543 A.2d at 716.

\(^{218}\) Uretek, 543 A.2d at 716.

\(^{219}\) United States v. Dee, 912 F.2d 741, 746-77 (4th Cir. 1990). Also see Uretek, 543 A.2d 709. In Uretek, the defendants, Uretek and its vice president were convicted of knowingly storing hazardous waste without a permit in violation of state RCRA laws. The defendants were convicted under the following statute:

Any person who knowingly transports hazardous waste to a facility which does not have a permit required under the Resource Conservation and Recovery Act of 1976, or who knowingly treats, stores, or disposes of any hazardous waste without a permit required under such act, or who knowingly violates any material condition or requirement of such permit, shall be fined not more than fifty thousand dollars for each day of violation or imprisoned not more than two years or both.

Uretek, 543 A.2d at 710 n.1. On appeal, the appellants argued that there was insufficient evidence to convict them because the state failed to prove that solvents stored in the drums were "spent." The Supreme Court of Connecticut determined that although there
V. PROSECUTORIAL DISCRETION IN SEEKING CRIMINAL SANCTIONS

Probably the most frequent complaint raised by corporations and corporate officials during RCRA and CWA prosecutions has been the lack of uniformity and guidance by prosecutors and the Justice Department as to what constitutes a criminal violation of the environmental laws. Under general Department of Justice policy, prosecutors have almost unbounded discretion in making such decisions. The federal government has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. Corporate officials perceive this wide latitude as a problem causing prosecutors to become more concerned with prosecuting than with compliance.

For example, in the criminal environmental context the Justice Department and the EPA have primarily concentrated on false reporting cases and cases where the violators have failed to obtain the permits was no regulation which officially defined the word "spent," the court could nevertheless rely upon the EPA commentary concerning the interpretation of RCRA and its regulation. Here, the court began with the Congressional premise that for those materials which are listed as spent solvents, they generally become spent materials when their intended use has ceased and when they begin to be stored for disposal, re-use, or reclamation.

The Connecticut Supreme Court then held that "a solvent is spent when it has been used for its original intended purpose, and is either (a) discarded or (b) can no longer be used for that purpose" and noted that:

Uretek's proposed definition of "spent" solvent would allow a generator or user of hazardous waste to store such material indefinitely as long as there is a remote possibility that it might be reused in the distant future. Such a construction of "spent" is clearly inconsistent with the Congressional goal in the RCRA of providing "cradle to grave" regulation of hazardous wastes.

Id. at 716.
220. McMurry & Ramsey, supra note 15, at 1161.
221. Id., quoting United States Department of Justice, Principles of Prosecution (1980).
222. As noted by James Frezzo, one of the convicted brothers in United States v. Frezzo Bros., Inc., 602 F.2d 1123 (3d Cir. 1979),

If the environmental control agencies would come forward and tell business this is what we want, this is what we need, and then put a deadline on it . . . you'd have to be a complete fool not to comply. You cannot operate a business in underhanded methods daily. . . . So rather than spending all the time and money trying to put a case together like you're going first to prosecute us, if they would have loaned that amount of money when I asked for it, we would have solved the problem then.

The Environmental Protection Agency should have had an area meeting with the mushroom industry, explained to the growers: "This is what the problem is, this is what the guidelines are" . . . give the grower 90 or 180 days to come in compliance. I compare it to driving down the highway. . . . You see the sign that says 55 miles an hour, and you're driving 65, you know you're breaking the law. But if there's no sign, how do you know when you break the law?

DiMento, supra note 52, at 4.
required by law. These types of prosecutions are high priority because they have the ability to affect the entire environmental regulatory program. Depending upon the specific policy considerations, prosecutors use their broad discretion when determining the remedy or punishment to seek. The government can seek either civil or criminal sanctions. Yet, some government officials seek civil sanctions for egregious violations while others seek criminal sanctions for rather minor infractions. This inconsistency spawns the criticism by corporate officials.

There is indeed merit in both the government’s and the corporate officials' arguments for and against the use of criminal sanctions. In facing potential criminal sanctions, corporations are compelled to take steps to comply with environmental laws. Corporations must recognize that unlike other crimes, the devastation of the environment has far-reaching and long-lasting effects on everyone. As noted by United States District Court Judge Charles Allen in United States v. Distler, “Businessmen and industries who pollute our environment are guilty of great crimes against man, nature and themselves.” If allowed to continue, these crimes would create “effects . . . irreversible by any known technology.” Corporations must also realize that the public takes these crimes very seriously. The National Survey of Crime Severity, sponsored by the Justice Department, conducted a poll in 1977 and asked 60,000 people to rank the seriousness of criminal activity. Participants ranked a pollution incident resulting in deaths as the seventh most severe crime, ahead of crimes like skyjacking and drug smuggling. In fact, pollution of a city's water system in which there were no specified adverse health results ranked sixty-fourth, ahead of roughly seventy other crimes.

On the other hand, prosecutors must give more weight to the term “good faith” when they determine whether or not they intend to seek criminal or civil sanctions against corporate officials. If the Department of Justice fails to give more guidance to its prosecutors, the potential for overly zealous prosecutors will remain. Rather than deter corporate officials from violating environmental laws, prosecutors would then actually “chill” the behavior of corporations that do comply. This chilling effect is real, as evidenced by comments made by one of the prosecutors in United States v. Frezzo Brothers. The prosecutor in that case stated,

224. Id.
226. DiMento, supra note 52, at 7.
227. Id.
"I think that a lot depends on the prosecutor's inclination. I developed a view that pollution incidents were almost always willful."230 In short, without some type of internal policy or standards as to what "good faith" means, both corporations and the government may be "grabbing for straws" to determine its definition.

The Department of Justice recognized the need for clarifying when a corporation or corporate officer could expect to be criminally prosecuted. On July 1, 1991, the department issued a position paper entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator."231 One of the reasons for issuing the paper was that many companies attempted to comply with the law by establishing intensive internal auditing systems or employing consultants and lawyers to critique management, systems, and regulatory requirements. Many prosecutors were using these "voluntary self audits" to prosecute corporations. Consequently, those that sought to do everything within their power to bring a facility into compliance actually expanded their exposure to criminal sanctions.

The Justice Department saw such prosecutions as counterproductive, and decided that it needed a policy that did "not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure."232 The memo provided that the department prosecutors should consider several factors, to the extent they are applicable, along with other relevant factors when the law and evidence would be sufficient for prosecution.233 The factors to be considered are:

A. Voluntary Disclosure

Here it is emphasized that voluntary disclosure is considered if the disclosure is complete, timely, and voluntary. The department also considers whether the person came forward promptly after discovering the non-compliance and the quantity and quality of information provided. Particular consideration is given when the disclosure substantially aides the government investigation and the disclosure is made before a law enforcement or regulatory authority obtains knowledge of the noncompliance. If a disclosure is required by law, regulation, or permit, it is not considered voluntary.

B. Cooperation

After a voluntary disclosure or even after the government has

231. Hereinafter the memorandum shall be referred to as July 1 Memo.
232. July 1 Memo.
233. Id. at 2.
learned of a violation, the Justice Department looks favorably on those individuals who fully and promptly cooperate.

C. Preventive Measures and Compliance Programs

The Justice Department also looks favorably on those corporations that have regular, intensive, and comprehensive environmental compliance programs. They emphasize the importance of having a compliance or audit program which includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in a good faith and timely manner. In reviewing the compliance or audit program, the Justice Department will ask:

1. Was there a strong institutional policy to comply with all environmental requirements?
2. Have safeguards beyond those required by existing law been developed and implemented to prevent non-compliance from occurring?
3. Were there regular procedures, including internal or external compliance and management audits, to detect, prevent, and remedy circumstances like those that led to the noncompliance?
4. Were there procedures and safeguards to ensure the integrity of any audit conducted?
5. Did the audit evaluate all sources of pollution (i.e., all media), including the possibility of cross-media transfers of pollutants?
6. Were the auditor’s recommendations implemented in a timely fashion?
7. Were adequate resources committed to the auditing program and to implementing its recommendations? and
8. Was environmental compliance a standard by which employee and corporate departmental performance was judged?

Justice Department prosecutors were also instructed to consider the persuasiveness of non-compliance—whether internal disciplinary action was taken and the subsequent compliance efforts made.

To further clear up any ambiguities, the department gave an example of a situation which satisfied the foregoing criteria and merited consequent prosecutorial leniency:

1. Company A regularly conducts a comprehensive audit of its compliance with environmental requirements.

234. Id. at 3-5.
2. The audit uncovers information about employees' disposing of hazardous wastes by dumping them in an unpermitted location.

3. An internal company investigation confirms the audit information. (Depending upon the nature of the audit, this follow-up investigation may be unnecessary.)

4. Prior to the violations the company had a sound compliance program, which included clear policies, employee training, and a hotline for suspected violations.

5. As soon as the company confirms the violations, it discloses all pertinent information to the appropriate government agency; it undertakes compliance planning with that agency; and it carries out satisfactory remediation measures.

6. The company also undertakes to correct any false information previously submitted to the government in relation to the violations.

7. Internally the company disciplines the employees actually involved in the violations, including any supervisor who was lax in preventing or detecting the activity. Also, the company reviews its compliance program to determine how the violations slipped by and corrects the weaknesses found by that review.

8. The company discloses to the government the names of the employees actually responsible for the violations, and it cooperates with the government by providing documentation necessary to the investigation of those persons.²³⁵

According to the Justice Department, under these circumstances, Company A would stand a good chance of being favorably considered for prosecutorial leniency, to the extent of not being criminally prosecuted at all. The degree of any leniency, however, may turn upon other relevant factors not specifically dealt with in these guidelines.

The department also gave an example where the possibility of prosecutorial leniency was remote:

1. Because an employee has threatened to report a violation to federal authorities, the company is afraid that investigators may begin looking at it. An audit is undertaken, but it focuses only upon the particular violation, ignoring the possibility that the violation may be indicative of widespread activities in the organization.

2. After completing the audit, Company Z reports the violation discovered to the government.

3. The company had a compliance program, but it was ef-

²³⁵ Id. at 7-8.
fectively no more than a collection of paper. No effort is made to disseminate its content, impress upon employees its significance, train employees in its application, or oversee its implementation.

4. Even after “discovery” of the violation the company makes no effort to strengthen its compliance procedures.

5. The company makes no effort to come to terms with regulators regarding its violations. It resists any remedial work and refuses to pay any monetary sanctions.

6. Because of the non-compliance, information submitted to regulators over the years has been materially inaccurate, painting a substantially false picture of the company’s true compliance situation. The company fails to take any steps to correct that inaccuracy.

7. The company does not cooperate with prosecutors in identifying those employees (including managers) who actually were involved in the violation, and it resists disclosure of any documents relating either to the violations or to the responsible employees.236

The department also provided further examples which illustrated situations where the presence, absence, or degree of any criterion may affect the prosecution’s exercise of discretion.237

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236. Id. at 8-9.
237. The examples given by the Department of Justice were the following:

1. In a situation otherwise similar to that of Company A, above, Company B performs an audit that is very limited in scope and probably reflects no more than an effort to avoid prosecution. Despite that background, Company B is cooperative in terms of both bringing itself into compliance and providing information regarding the crime and its perpetrators. The result could be any of a number of outcomes, including prosecution of a lesser charge or a decision to prosecute the individuals rather than the company.

2. Again the situation is similar to Company A’s, but Company C refuses to reveal any information regarding the individual violators. The likelihood of the government’s prosecuting the company [is] substantially increased.

3. In another situation similar to Company A’s, Company D chooses to “sit on” the audit and take corrective action without telling the government. The government learns of the situation months or years after the fact.

A complicating fact here is that environmental regulatory programs are self policing; they include a substantial number of report requirements. If reports which in fact presented false information are allowed to stand uncorrected, the reliability of this system is undermined. They also may lead to adverse and unfair impacts upon other members of the regulated community. For example, Company D failed to report discharges of X contaminant into a municipal sewer system, discharges that were terminated as a result of an audit. The sewer authority, though, knowing only that there have been excessive loadings of X, but not knowing that Company D was a source, tightens limitations upon all
Interestingly, the Department of Justice refused to state that the criteria used must be followed by prosecutors. Moreover, although following the exact recommendations of the memorandum may protect a corporate officer from the potential of criminal sanctions, the corporation or corporate officer is still subject to civil fines and penalties. Also, the voluntary audit and disclosure may be used by the government if such information is revealed to them.

known sources of X. Thus, all those sources incur additional treatment expenses, but Company D is unaffected. Had Company D revealed its audit results, the other companies would not have suffered unnecessary expenses.

In some situations, moreover, failure to report is a crime. See, e.g., 33 U.S.C. § 2321(b)(5) and 42 U.S.C. § 9603(b). To illustrate the effect of this factor, consider Company E, which conducts a thorough audit and finds that hazardous wastes have been disposed of by dumping them on the ground. The company cleans up the area and tightens up its compliance program, but does not reveal the situation to regulators. Assuming that a reportable quantity of a legal obligation under 42 U.S.C. § 9603(b) to report that release as soon as it had knowledge of it, thereby allowing regulators the opportunity to assure proper clean up. Company E's knowing failure to report the release upon learning of it is itself a felony.

In the case of both Company D and Company E, consideration would be given by prosecutors for remedial efforts; hence prosecution of fewer or lesser charges might result. However, because Company D's silence adversely affected others who are entitled to fair regulatory treatment and because Company E derived those legally responsible for evaluating cleanup needs of the ability to carry out their functions, the likelihood of their totally escaping criminal prosecution is significantly reduced.

4. Company F's situation is similar to that of Company B. However, with regard to the various violations shown by the audit, it concentrates upon correcting only the easier, less expensive, less significant among them. Its lackadaisical approach to correction does not make it a strong candidate for leniency.

5. Company G is similar to Company D in that it performs an audit and finds violations, but does not bring them to the government's attention. Those violations do not involve failures to comply with reporting requirements. The company undertakes a program of gradually correcting its violations. When the government learns of the situation, Company G still has not remedied its most significant violations, but claims that it certainly planned to get to them. Company G could receive some consideration for its efforts, but its failure to disclose and the slowness of its remedial work probably means that it cannot expect a substantial degree of leniency.

6. Comprehensive audits are considered positive efforts toward good faith compliance. However, such audits are not indispensable to enforcement leniency. Company H's situation is essentially identical to that of Company A, except for the fact that it does not undertake a comprehensive audit. It does not have a formal audit program, but, as part of its efforts to ensure compliance, does realize that it is committing an environmental violation. It thereafter takes steps otherwise identical to those of Company A in terms of compliance efforts and cooperation. Company H is also a likely candidate for leniency, including possibly no criminal prosecution.

Id. at 10-13.
To ensure removing a facility or corporate officials from potential criminal liability, corporations should also consider: (1) a declaration by management that compliance with all environmental laws and regulations is a top corporate priority; (2) development of an internal reporting system to assure that the responsible officers are fully informed as to the statutes of compliance with pollution control laws and regulations so that they can make the necessary efforts to achieve and maintain compliance; (3) development of an external reporting system to assure corporate compliance with all reporting or disclosure obligations; and (4) establishment of educational programs for all potentially affected individuals, from the chief executive officer down to low-level employees. Such educational programs might include periodic classes or seminars on the relevant requirements and issuance and regular update of corporate environmental policy manuals. The objective is to make it obvious to prosecutors that despite the violation, the corporation is taking steps to correct the problem.

VI. Conclusion

For the first time, the general public is beginning to take seriously the imminent threat of polluted waters and a polluted environment. As a result of the recent oil spills such as the Exxon disaster in Valdez, Alaska, and the virtually simultaneous spills in Delaware, Pennsylvania, and Texas, the public outcry for more stringent penalties has been louder than ever before. Consequently, the government is attempting to respond by implementing stronger criminal penalties, such as the increased felony sanctions and the implementation of the knowing endangerment statutes under the CWA and RCRA. However, one questions whether Congress and the Justice Department have adequately explained who will be prosecuted under RCRA and the CWA. Further, one wonders how the laws will be implemented, and whether they will deter corporate violations of land and water environmental statutes. Only time will answer these questions and ultimately determine whether corporate violators will be held accountable for their unlawful assaults on the environment rather than be allowed to absorb civil penalties as just another cost of doing business.

238. Tennille, supra note 61, at 22.
239. Id.