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Environmental Criminal Liability

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ENVIRONMENTAL CRIMINAL LIABILITY

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I. INTRODUCTION

Change is the rule in environmental law. Each new session of Congress leaves its mark on environmental statutes and regulations. Politicians cannot ignore environmental issues; every member of the public is affected both physiologically and financially by environmental regulation. Business and environmentalists often maintain adverse and contentious positions, and each attempts to compel the government toward opposite ends. Consequently, environmental laws vacillate as the political climate changes.

The favorable economic conditions of the late 1980s produced unprecedented environmental legislative activity and enabled the 101st Congress to strengthen many environmental statutes.[1] During his 1988 presidential campaign, George Bush found it advantageous to stand on an environmental platform. These positions reversed, however, as the economy took a downturn and the Gulf War highlighted America's dependency on foreign oil. Environmental legislation stalled in the 102d

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[1] The 101st Congress was one of the most environmentally active congresses in the past two decades. Among other activity, this Congress passed the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified in scattered sections of 42 U.S.C.A. §§ 7401-7671 (West Supp. 1993) and the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990). *See also Great Expectations: Reviewing the 101st Congress*, 21 Envtl. L. Rep. 10008 (Jan. 1991).

Congress,[2] and President Bush seemed to view environmental legislation as detrimental to economic prosperity.[3]

Notwithstanding these developments, there is one trend in environmental law unlikely to change in the near future. Criminal enforcement of federal environmental statutes will continue to rise at all levels of government. Criminal sanctions are popular and are therefore safe for politicians to support. A United States Department of Justice (DOJ) poll of public attitudes on crime ranked unlawful environmental activities seventh, between violent crimes such as murder and rape, and other white collar crimes such as public corruption.[4] This strong public attitude probably encouraged the Pollution Prosecution Act of 1990,[5]

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[2] Despite extensive debate and stopgap measures, the reauthorizations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §§ 6901-6992k (West 1983 & Supp. 1993) and the Water Pollution Control Act (CWA), 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1993) failed to pass the 1st Session of the 102d Congress. *See Recent Developments in the Congress*, 21 Envtl. L. Rep. 10681 (Nov. 1991).

[3] The Bush Administration's National Energy Strategy (NES) revealed controversial solutions to the nation's foreign oil dependency that contributed to the Energy Bill's failure to pass Congress. *See No Energy Bill This Year? Good*, N.Y. TIMES, Nov. 18, 1991, at A14. Environmentalists were particularly angered over the NES's proposal to open the coastal plain of the Arctic National Wildlife Refuge to oil and gas development. *Recent Developments In The Congress*, 21 Envtl. L. Rep. 10214 (Apr. 1991). Additionally, under a proposal offered by President Bush's Council on Competitiveness, millions of acres of federally protected wetlands would be opened to development and farming. Michael Weisskopf, *On Bayou, Redefinition of Wetlands Is a Crucial Matter*, THE WASH. POST, Dec. 22, 1991, at A1.

[4] *Criminal Enforcement of Environmental Laws Seeks Deterrence Amid Need for Increased Coordination, Training, Public Awareness*, 17 Envtl. Rep. (BNA) 800, 806 (Sept. 26, 1986).

[5] Pub. L. No. 101-593, §§ 201-205, 104 Stat. 2954, 2962-63 (1990) (codified at 42 U.S.C.A. § 4321 (West Supp. 1993)).

which passed both the Senate and the House with broad bipartisan approval coupled with President Bush's support.[6]

Unlike regulatory controls that inflict heavy costs on business and manufacturing, criminal sanctions for environmental damages indirectly affect the economy. Imprisonment cannot be passed on to the consumer. Therefore, vacillations in the economy should have little political impact on environmental criminal liability.

Section II of this article discusses the Environmental Protection Agency (EPA) and DOJ's criminal enforcement programs. Section III covers criminal provisions in the federal environmental statutes, the development of the responsible corporate officer doctrine, and caselaw illustrating the increasing use of both. Finally, the Article examines the federal sentencing guidelines and their application to environmental crimes.

II. ENVIRONMENTAL CRIMINAL ENFORCEMENT

Initially, federal enforcement of environmental laws and regulations was not the EPA's main concern, and action in the area focused primarily on civil penalties. During the decade following its creation in 1970,[7] the EPA devoted much of its resources to developing regulations mandated by new environmental laws such as the Clean Air Act of 1970[8] and the 1972 Amendments to the CWA.[9] The EPA focused most of its remaining resources on defending itself in suits challenging the validity of these regulations or seeking to compel their promulgation.

Even without these concerns, criminal prosecutions for knowing

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[6] *See* 136 CONG. REC. S1636-37 (daily ed. Feb. 26, 1990).

[7] President Nixon combined fifteen separate governmental units to create the EPA. *See* Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1970), *reprinted in* 5 U.S.C. §§ 1, 2, 7 app. at 1343-45 (1988).

[8] 42 U.S.C. §§ 1857-1858a (1970) (current version at 42 U.S.C.A. §§ 7401-7671 (West 1986 & Supp. 1993)).

[9] 33 U.S.C. §§ 1251-1387 (Supp. 1973) (current version at 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1993)).

violations of environmental laws were extremely difficult to maintain in the 1970s because of the statutes' complexity and lack of applicable caselaw. Only twenty-five criminal environmental cases were prosecuted by the DOJ during the 1970s.[10] As Congress passed new environmental laws and significant caselaw developed, the unlawful disposal of hazardous waste became a national concern.[11] In 1981 the EPA created the Office of Criminal Enforcement, which employed twenty-three full-time investigators by 1983.[12] There are currently fifty-four investigators in this office, and the Pollution Prosecution Act of 1990 promises to increase this number to two hundred by October 1995.[13]

Thirty-two United States' attorneys of the DOJ's Environment and Natural Resources Division[14] work closely with EPA investigators. Criminal enforcement actions are referred by the EPA to the DOJ for prosecution. In 1982 the EPA referred twenty criminal environmental cases to the DOJ.[15] By 1990 the number of referrals had increased to

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[10] Theodore L. Garrett & Carol E. Bruce, *Environmental Crimes Under the New Sentencing Guidelines*, *in* PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES 289, 291 (Phylis Skloot Bamberger ed., 1991).

[11] Of the environmental statutes passed during the 1970s, RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1993), had the most impact on turning what had been accepted disposal methods into illegal activities.

[12] James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 918 (1991) (citing EPA, 4 OFFICE OF ENFORCEMENT BULLETIN 3 (1990)).

[13] 42 U.S.C.A. § 4321 note § 202(a) (West Supp. 1993). The Pollution Prosecution Act also requires the EPA to "increase by fifty the number of civil investigators assigned to assist . . . in developing and prosecuting civil and administrative actions . . . . *See* Pub. L. No. 100-593, § 202(a)(5), 104 Stat. 2962 (1990).

[14] In an interesting maneuver, the DOJ adopted this new name for its Land and Natural Resources Division on the 20th Anniversary of Earth Day in 1990.

[15] Elliott P. Laws & Russell V. Randle, *Enforcement and Liabilities*, *in* ENVIRONMENTAL LAW HANDBOOK 3, 45-46 (J. Gordon Arbuckle et al. eds., 1991).

sixty-five with 134 indictments.[16] Notably seventy-eight of these indictments were against corporations and their top officials.[17] The EPA has long held that the deterrent effect of criminal penalties is strongest when used against corporations or their executives, and DOJ statistics show EPA practices this philosophy. A corporation facing criminal prosecution is not only stigmatized in the eyes of the consumer, but also in the business community. Additionally, executives seem to view incarceration with a particularly high degree of apprehension. Ex-EPA associate enforcement counsel Terrell E. Hunt suggests that criminal prosecutions provide the strongest deterrent in EPA's arsenal.[18] While some commentators argue that environmental criminal sanctions are excessive and severe,[19] the applicable caselaw fails to show that unwarranted or arbitrary criminal penalties are being imposed on polluters. To its credit, the EPA has not been capricious or arbitrary in its enforcement actions. DOJ treats all violators equally; even Disneyland had to pay EPA more than one half million dollars in penalties in 1990 for RCRA violations.[20]

The Pollution Prosecution Act (PPA)[21] opened the door for expanded and comprehensive enforcement of environmental laws. Besides quadrupling the number of criminal investigators assigned to the EPA, the PPA established the National Enforcement Training Institute to instruct federal and state investigators, private lawyers, and technical experts in

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[16] *Id.*

[17] Garrett & Bruce, *supra* note 10, at 292.

[18] *See Criminal Enforcement of Environmental Laws Seeks Deterrence Amid Need for Increased Coordination, Training, Public Awareness*, 18 Envtl. Rep. (BNA) 800, 802 (Sept. 26, 1986).

[19] *See* Benjamin S. Sharp, *Environmental Enforcement Excesses: Over-criminalization and Too Severe Punishment*, C617 ALI-ABA 179 (Apr. 11, 1991).

[20] *In re* Walt Disney Co., EPA Region VIII, RCRA (3008) VIII90-10, July 20, 1990.

[21] 42 U.S.C.A. § 4321 (West Supp. 1993).

federal environmental law.[22] When public and private persons who work with the environment are more aware of environmental laws, those laws take effect more quickly and comprehensively and begin to halt and rectify damage to the country's air, land, and water.

III. ENVIRONMENTAL CRIMINAL PROVISIONS

Today, virtually every major federal environmental statute provides for some form of criminal liability. Criminal liability under these laws can be divided into the following three categories: (1) knowing endangerment of human life from the mishandling of toxic substances; (2) knowing violations in mishandling hazardous substances and falsification of documents; and (3) other environmental crimes. The first two categories, involving toxic or hazardous substances, can result in felony charges. The third covers a broad range of environmental offenses that generally carry misdemeanor penalties.

Under the criminal provisions of the major environmental statutes, any "person" who commits a violation may be prosecuted.[23] "Person" is a broad term and applies to individuals, partnerships, government and private corporations, states, and municipalities.[24] Moreover, the statutes' criminal provisions include specific language identifying responsible corporate officers as persons subject to liability under those sections.[25]

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[22] 42 U.S.C.A. § 4321 note § 204 (West Supp. 1993).

[23] *See, e.g.*, CWA, 33 U.S.C.A. § 1319(c) (West Supp. 1993); Clean Air Act (CAA), 42 U.S.C.A. § 7413(c) (West Supp. 1993).

[24] *See, e.g.*, RCRA, 42 U.S.C. § 6903(15) (West 1983 & Supp. 1993); CWA, 33 U.S.C.A. § 1362(5) (West 1986 & Supp. 1993).

[25] *See, e.g.*, CWA, 33 U.S.C.A. § 1319(c)(6) (West Supp. 1993); CAA, 42 U.S.C.A. § 7413(c)(6) (West Supp. 1993).

A. Knowing Endangerment

Knowing endangerment of life is the most egregious of environmental crimes and, accordingly, carries the most stringent penalties. Convicted offenders face penalties of up to fifteen years of imprisonment and a $250,000 fine.[25] Organizations convicted of knowing-endangerment are subject to fines of up to $1,000,000.[26] Of the federal environmental statutes only RCRA, CWA, and CAA carry the knowing-endangerment provisions.[27] Because of the extensive reach of these three statutes, virtually any polluter whose violation places "another person in imminent danger of death or serious bodily injury" can be convicted of knowing endangerment.[28]

All three statutes provide that the defendant must have actual knowledge that the conduct would likely cause death or serious injury. Importantly, circumstantial evidence may be used to show the defendant's knowledge and intent, "including evidence that the defendant took affirmative steps to shield himself from relevant information."[29] Therefore, corporate officials cannot avoid liability for knowing

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[25] RCRA, 42 U.S.C.A. § 6928(e) (West 1983 & Supp. 1993); CAA, 42 U.S.C.A. § 7413(c)(5)(A) (West Supp. 1993); CWA, 33 U.S.C.A. § 1319(c)(3)(A) (West Supp. 1993).

[26] RCRA, 42 U.S.C.A. § 6928(e) (West 1983 & Supp. 1993); CAA, 42 U.S.C.A. § 7413(c)(5)(A) (West Supp. 1993); CWA, 33 U.S.C.A. § 1319(c)(3)(A) (West Supp. 1993).

[27] RCRA, 42 U.S.C.A. § 6928(e) (West 1983 & Supp. 1993); CAA, 42 U.S.C.A. § 7413(c)(5)(A) (West Supp. 1993); CWA, 33 U.S.C.A. § 1319(c)(3) (West Supp. 1993).

[28] RCRA, 42 U.S.C.A. § 6928(e) (West 1983 & Supp. 1993); CAA, 42 U.S.C.A. § 7413(c)(5)(A) (West Supp. 1993); CWA, 33 U.S.C.A. § 1319(c)(3) (West Supp. 1993).

[29] RCRA, 42 U.S.C.A. § 6928(f)(2) (West 1983); CAA, 42 U.S.C.A. § 7413(c)(5)(B) (West Supp. 1993); CWA, 33 U.S.C.A. § 1319(c)(3)(B) (West Supp. 1993).

endangerment by simply ignoring information regarding employees' illegal and dangerous hazardous waste disposal.

Reported cases involving knowing endangerment charges are scarce. One would like to attribute this to a scarcity of polluters who knowingly threaten human life. Regardless, the cases involving knowing endangerment reveal intolerable behavior analogous to that behavior prosecuted under criminal assault and battery statutes and, accordingly, warrant similar criminal sanctions. In *United States v. Protex Industries, Inc.*[30] the Tenth Circuit Court of Appeals affirmed a drum recycling company's conviction under RCRA's knowing-endangerment provisions. Three Protex employees suffered solvent poisoning from the company's "woefully inadequate" safety precautions.[31] The court explained that "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."[32]

In *United States v. Rutana*[33] the Sixth Circuit Court of Appeals reversed a district court's lenient sentencing of a metal finishing plant's chief executive officer convicted under the knowing-endangerment provisions of the CWA. Both the Ohio Environmental Protection Agency and the city of Campbell, Ohio, repeatedly attempted to force Rutana's company to stop discharging illegal chemical wastewater into the city's sewer lines. The discharges were so toxic that a city employee was burned twice while sampling the company's wastewater. The district court reduced the sentence imposed by the federal sentencing guidelines because imprisoning Rutana would put his employees out of work.[34] The Sixth Circuit Court of Appeals found the reduction unwarranted, explaining "[w]e find nothing special about an industrial polluter who also happens to be an employer. The very nature of the crime dictates that

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[30] 874 F.2d 740 (10th Cir. 1989).

[31] *Id.* at 742.

[32] *Id.* at 744.

[33] 932 F.2d 1155 (6th Cir.), *cert. denied* 112 S. Ct. 300 (1991).

[34] *Rutana*, 932 F.2d at 1158.

many defendants will likely be employers, whose imprisonment may potentially impose hardship upon their employees and families."[35]

United States v. Villegas[36] reveals the difficulty courts face in determining the degree of knowledge, or mens rea, a defendant must have about the dangerous effects of his pollution before he can be convicted of knowing endangerment. In 1988 environmental authorities discovered glass vials containing human blood, some of them broken, on New Jersey and New York beaches. Villegas was the co-owner and vice president of a blood testing laboratory. Evidence revealed that he had dumped the vials into the Hudson River. A jury found Villegas guilty of two counts of knowing endangerment under the CWA. However, the court subsequently acquitted him of those charges, ruling that the evidence could not sustain the convictions.[37] The court admitted that "the defendant's conduct was irresponsible and . . . it had the potential to cause serious bodily injury."[38] Nevertheless, the court found that the evidence did "not support the conclusion that when he placed the vials in the Hudson River, Mr. Villegas knew there was a high probability that he was thereby placing another person in imminent danger of death or serious bodily injury."[39] The court distinguished a potential to cause harm from a high probability of danger in deciding whether Villegas was guilty of knowing endangerment.

If actual injury had resulted from Villegas' actions, as in the *Protex* and *Rutana* cases, perhaps the court would have found that he necessarily knew his actions would place others in imminent danger of serious bodily injury. Future decisions will clarify just how dangerous conscious hazardous dumping must be to show that the accused possessed the necessary criminal intent, or *mens rea*, for a charge of knowing endangerment.

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[35] *Id.*

[36] 784 F. Supp. 6 (E.D.N.Y. 1991).

[37] *Id.* at 14.

[38] *Id.*

[39] *Id.* at 13.

B. Knowing Violations

Eleven federal environmental statutes provide criminal penalties for the knowing mishandling of hazardous substances and pesticides.[40] These statutes also address illegal recordkeeping and falsification of documents. Because of the scope of these statutes and regulations promulgated by the EPA, most criminal environmental offenses fall in the category of knowing violations. Moreover, other offenses may fall under the federal criminal code which provides for penalties of up to five years of imprisonment and a $10,000 fine for falsification of documents.[41] Unlike the knowing-endangerment violations, a polluter need not possess any knowledge of the illegal activities harmful effects in order to face criminal sanctions. In fact, under the familiar principle that ignorance of the law is no defense, a polluter who does not know certain activities are criminal can nonetheless face environmental criminal penalties.[42]

In *United States v. Dee*[43] the Fourth Circuit Court of Appeals

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[40] Toxic Substances Control Act, 15 U.S.C.A. § 2615(b) (West Supp. 1993); CWA, 33 U.S.C.A. § 1319(c)(2) (West Supp. 1993); Protection, Research, and Sanctuaries Act, 33 U.S.C.A. § 1415(b) (West 1978 & Supp. 1993); Act to Prevent Pollution From Ships, 33 U.S.C.A. § 1908(a) (West Supp. 1993); Shore Protection Act, 33 U.S.C.A. § 2609(c) (West 1986 & Supp. 1993); Safe Drinking Water Act, 42 U.S.C.A. § 300h-2(b) (West 1991 & Supp. 1993); RCRA, 42 U.S.C.A. § 6928(d) (West 1983 & Supp. 1993); CAA, 42 U.S.C.A. § 7413(c) (West Supp. 1993); CERCLA, 42 U.S.C.A. § 9603(b)-(d) (West 1983 & Supp. 1993); Continental Shelf Lands Act, 43 U.S.C.A. § 1350(c) (West Supp. 1991).

[41] *See* 18 U.S.C.A. § 1001 (West 1986 & Supp. 1993) ("Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, . . . or makes or uses any false writing or document . . . or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."). Other Title 18 offenses may be used in prosecuting environmental crimes. *See e.g.*, 18 U.S.C.A. § 371 (West 1986 & Supp. 1993) (conspiracy); 18 U.S.C.A. § 1341 (West Supp. 1993) (mail fraud); 18 U.S.C.A. § 1623 (West 1984 & Supp. 1993) (perjury).

[42] *E.g.*, United States v. Freed, 401 U.S. 601, 607-10 (1971).

[43] 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

affirmed the convictions of three government engineers for willful violations of RCRA's criminal provisions. The defendants were civilian employees of a chemical weapons plant. Evidence showed that they had illegally disposed chemical hazardous wastes at two locations on the government facility. The defendants first argued that, because there was insufficient evidence to show that they knew violating RCRA was a crime, they could not be charged with willful violations of the statute. In addition, the defendants claimed that they were unaware that the chemicals they managed were hazardous.[44]

The Court rejected the first argument because where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[45] The court then dismissed the second argument pointing to "overwhelming evidence that defendants were aware they were dealing with hazardous chemicals."[46] To be convicted of knowingly disposing of hazardous waste, the defendant must have known that the wastes were hazardous. Thus, "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered."[47] However, a defendant does not have to know that the wastes are classified as hazardous by the EPA, only that the wastes are hazardous in nature.[48]

Dee illustrates an important consideration in determining whether a polluter's violations of criminal environmental provisions were committed

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[44] *Dee,* 912 F.2d at 745.

[45] *Id.* (quoting United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971)).

[46] *Id.* at 745-46.

[47] *International Minerals*, 402 U.S. 558, 563-64 (1971).

[48] *Dee,* 912 F.2d at 745; *compare* United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985) (reversing a criminal conviction under the Toxic Substances Control Act, 15 U.S.C.A. §§ 2414, 2615(b) (West 1982 & Supp. 1993), where defendants could not knowingly violate the statute because the defendants did not know that buried containers contained PCBs).

knowingly. Judicial interpretation of criminal environmental law makes it clear that a defendant need only be aware of the illegal activity for the activity to be characterized as knowing or willful. The defendant does not need to be aware of the activity's illegality.[49] In other words, knowledge of the activity must be proven; whereas, knowledge of the law may be inferred.

Furthermore, a defendant cannot shield himself from criminal liability through willful blindness to an illegal activity. Willful blindness occurs when a defendant's suspicions of a criminal act are aroused, but the defendant makes no further inquiry into the activity in order to remain in ignorance.[50] Although the prosecution must prove the defendant's knowledge of the illegal activity, the prosecution need only show that the defendant deliberately remained in ignorance of the criminal activity. In proving willful blindness, circumstantial evidence may be used to show that the defendant should have known of the criminal activity but did not because the defendant deliberately avoided discovering the facts.[51] Willful blindness can be used to prove that a defendant handling an unknown substance, in effect, knew it was hazardous.[52]

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[49] *See, e.g., International Minerals*, 402 U.S. at 563; United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986); United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (4th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

[50] *See* MODEL PENAL CODE § 2.02 cmt. 3 (1985).

[51] *See* Stone v. United States, 113 F.2d 70, 75 (6th Cir. 1940) (explaining that "[s]cienter may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known.").

[52] *See* United States v. Vesterso, 828 F.2d 1234 (8th Cir. 1987) (holding defendants' deliberate ignorance that the lands they impounded were wetlands was not a defense).

C. The Responsible Corporate Officer Doctrine

One of the most intriguing and litigated issues in criminal environmental law is the responsible corporate officer doctrine. Under this doctrine corporate violations of criminal provisions may be attributed to corporate officers who have "a responsible share in the furtherance of the transaction which the statute outlaws. . . ."[53] If an officer has the power to prevent a violation of an environmental law, his failure to exercise that power may make him criminally liable for the violation. Prior to the doctrine, corporate officers could escape liability for their corporation's statutory violations through delegation or impossibility defenses in which the officer claimed that he did not have the intent necessary to be held liable for the criminal acts of the corporation. The officer argued that delegating the implementation of corrective measures to stop the acts insulated him from liability, or that his elevated position rendered him powerless to stop the acts.[54]

The delegation and impossibility defenses largely gave way to the responsible corporate officer doctrine as courts began to consider public health, safety, and welfare statutes. Courts found that statutes protecting the public health could be effectuated by placing liability for corporate violations of the statutes on those in the best position to end those violations-- the responsible corporate officers. In *United States v. Park*[55] the United States Supreme Court affirmed the conviction of a food distribution company's president for violations of the Federal Food, Drug, and Cosmetic Act.[56] The president delegated the responsibility to stop food in the company's care from being contaminated with rat poison. However, this delegation did not remove him from criminal liability for

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[53] United States v. Dotterweich, 320 U.S. 277, 284 (1943).

[54] *See generally* Frederick W. Addison & Elizabeth E. Mack, *Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time*, 44 SW. L.J. 1427, 1431-34 (1991).

[55] 421 U.S. 658 (1975).

[56] 21 U.S.C.A. §§ 301-394 (West 1972 & Supp. 1993).

the violations, because he failed to monitor employees whom he knew were committing violations. In outlining the basis for the responsible corporate officer doctrine, the Court explained:

> Thus [*United States v.*] *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission-- and this is by no means necessarily confined to a single corporate agent or employee-- the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will ensure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well being of the public that supports them.[57]

Cases indicate that responsible corporate officers are held to the same standard as literal polluters under the knowing-violation provisions of environmental statutes. The Ninth Circuit Court of Appeals addressed this issue in *United States v. Hoflin*.[58] Hoflin, the defendant, was the director of the Ocean Shores Public Works Department. His responsibilities included supervising the maintenance of roads and operating a sewage treatment plant. The criminal prosecution arose from the disposal of two types of waste generated by the city: paint left over from road maintenance and sludge removed from the kitchen of the city's golf course. Hoflin directed that drums containing the wastes be bulldozed into a hole at Ocean Shore's sewage treatment plant. This was done even though the plant director advised against it, warning that disposing of liquid wastes in that manner could jeopardize the plant's

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[57] *Dotterweich*, 421 U.S. at 672.

[58] 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

National Pollutant Discharge Elimination System (NPDES) permit.[59]

Not only did the burial of the waste violate the plant's NPDES permit, but the paint waste was also a hazardous substance under RCRA. Hazardous substances can only be disposed of at facilities with an EPA permit, which the sewage treatment plant did not have.[60] A jury found Hoflin guilty of violating RCRA's criminal provision.[61] Hoflin appealed his conviction, arguing that he was unaware of the plant's lack of a permit, and that such knowledge was an essential element of the offense charged. The Ninth Circuit dismissed this argument, reiterating that those who are responsible for hazardous waste disposal have an affirmative duty under RCRA to properly track wastes with the EPA and to insure disposal in EPA-permitted sites.[62] The court emphasized the serious public health concerns that spurred Congress to enact RCRA explaining that "[t]here can be little question that RCRA's purposes, like those of the Food and Drug Act, '. . . touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.'"[63]

Hoflin holds responsible corporate officers to the same standard of knowledge that literal polluters are held. If hazardous waste disposal falls under a corporate officer's responsibility, then it is that officer's duty to see that it is disposed of legally. As the court explained in *United States*

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[59] *Id.* at 1035. The National Pollutant Discharge Elimination System [NPDES] certificate is an operating permit issued pursuant to the Clean Water Act, 33 U.S.C.A. § 1342 (West Supp. 1993). Any person seeking to discharge a pollutant directly into the navigable waters of the United States must obtain an NPDES certificate either from the Administrator of the EPA or from a state agency authorized by the EPA.

[60] *See* 42 U.S.C.A. § 6925 (West 1983 & Supp. 1993).

[61] 42 U.S.C.A. § 6928(d)(2)(A) (West Supp. 1993) ("Any person who . . . knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a permit under this subchapter . . . shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years, or both.").

[62] *Hoflin*, 880 F.2d at 1038-39.

[63] *Id.* at 1038 (quoting United States v. Dotterweich, 320 U.S. 277, 280 (1943)).

v. Dee,[64] ignorance of environmental criminal law is not a defense to an alleged violation. *Hoflin* holds that those ultimately responsible for environmental compliance are capable of the same degree of culpability as those committing the actual violations. Willful blindness cannot save a responsible corporate officer from culpability for an employee's violations. It is not a question of whether the officer knew of the violation, but whether the officer should have known of the violation. The responsible corporate officer doctrine as outlined in *United States v. Park* and *Hoflin* is widespread and shows no signs of diminishing.[65]

The government carries a small burden of proof of intent for knowing violations of environmental criminal provisions, regardless of whether the defendant is a midnight dumper, an owner or operator of a waste facility, a corporation, or a responsible corporate officer. Environmental statutes are based on the important concerns of public health, safety, and welfare. Courts interpret these statutes broadly to best effectuate the statutes' purposes. Because regulation of hazardous materials is pervasive and entrenched, courts are unreceptive to those in the hazardous waste business who plead ignorance of the law as a defense. The court system has put an affirmative duty on hazardous waste handlers to familiarize themselves with the environmental statutes.

To further insure that handlers of hazardous waste conduct their operations responsibly, two statutes have abandoned the knowledge requirement for criminal violations stemming from certain releases of

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[64] 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

[65] *See e.g.*, United States v. Baytank, Inc., 934 F.2d 599 (5th Cir. 1991); United States v. MacDonald & Watson Waste Oil co., 933 F.2d 35 (1st Cir. 1991); United States v. Carr, 880 F.2d 1550 (2d Cir. 1989); United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986); United States v. Ward, 676 F.2d 94 (4th Cir. 1982), *cert. denied*, 459 U.S. 835 (1982); United States v. Frezzo Bros., Inc., 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980): United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd.*, 578 F.2d 259 (9th Cir. 1978).

hazardous wastes. Under both the CAA[66] and the CWA,[67] negligent releases of hazardous substances that endanger human lives can lead to criminal liability. Additionally, the CWA criminalizes negligent permit violations and unpermitted discharges regardless of whether life is endangered.[68] These acts highlight Congress's intent to make certain that hazardous waste handlers do their job competently and safely.

United States v. Frezzo Brothers, Inc.[69] confirmed that negligent, unpermitted waste discharges as well as willful violations may result in criminal sanctions under the CWA. The Court in *Frezzo Brothers* found the defendants guilty of six counts of "willfully or negligently discharging pollutants into a navigable water of the United States without a permit."[70] The three convicted defendants were Frezzo, Inc. and its principal corporate officers. The defendants based their appeal in part on the trial judge's refusal to ask the jury for special verdicts on each count stipulating whether the defendants were guilty of willful or negligent violations. The defendants argued that a determination of willfulness or negligence would be relevant for sentencing. The Third Circuit disagreed and upheld the district court's actions, explaining that "there is no variance in the statutory penalty between willful and negligent violations. It therefore would have been within the judge's discretion to sentence the defendants to the statutory maximum had the jury returned a special

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[66] 42 U.S.C.A. § 7413(c)(4) (West Supp. 1993) ("Any person who negligently releases into the ambient air any hazardous air pollutant . . . and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both.").

[67] 33 U.S.C.A. § 1319(c)(1)(B) (West Supp. 1993) ("Any person who negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury . . . shall be punished by a fine of not less than $2,500 . . . or by imprisonment for not more than one year, or by both.").

[68] 33 U.S.C.A. § 1319(c)(1) (West Supp. 1993).

[69] 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1993).

[70] *Frezzo Bros.*, 602 F.2d at 1124.

verdict finding the defendants guilty of negligent violations only."[71] Thus, *Frezzo Brothers* firmly establishes that negligent criminal provisions apply to responsible corporate officers.

D. Other Environmental Crimes

This third category of environmental crimes focuses on handling pollutants other than hazardous substances. This category includes a broad spectrum of environmental offenses. For example, the Rivers and Harbors Appropriation Act of 1899[72] punishes the unpermitted obstruction or modification of navigable waters with a maximum $2,500 fine and imprisonment up to one year.[73] The Endangered Species Act[74] provides for imprisonment up to one year and a $25,000 fine for those who knowingly violate its provisions.[75] The same penalty awaits those who are convicted for violating the criminal provisions of the Noise Control Act.[76]

RCRA, the CWA, and the CAA contain criminal penalties for the mishandling of nontoxic substances as well as penalties for hazardous waste violations. RCRA provides criminal penalties for handlers of "used oil not identified or listed as a hazardous waste" who knowingly transport or dispose of the substance "in knowing violation of any material condition or requirement of a permit . . . [or] applicable regulations."[77] The criminal provisions of the CWA apply to unpermitted releases of "any pollutant or hazardous substance" into sewer systems or publicly owned

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[71] *Id.* at 1130.

[72] 33 U.S.C.A §§ 401-426p, 441-467n (West 1986 & Supp. 1993).

[73] *Id* § 406 (West Supp. 1993).

[74] 16 U.S.C.A. §§ 1531-1544 (West Supp. 1993).

[75] *Id.* § 1540(b).

[76] 42 U.S.C.A. § 4910(a) (West Supp. 1993).

[77] *Id* § 6928(d)(7).

treatment works.[78] Finally, the CAA criminalizes knowing violations of source performance standards or "any rule, order, waiver, or permit promulgated," whether toxic or nontoxic substances are involved.[79]

III. THE FEDERAL SENTENCING GUIDELINES

Congress created the United States Sentencing Commission in the Sentencing Reform Act of 1984 and gave it responsibility for establishing numerical guidelines controlling the sentencing of those convicted of federal criminal offenses.[80] The purpose behind the guidelines was to reduce judicial discretion in sentencing and, accordingly, reduce the chances of differing sentences for similar offenses. The application of the current guidelines to environmental crimes poses some interesting and controversial issues.

Congress intended for the Sentencing Commission to develop the guidelines to "further the basic purposes of criminal punishment: Deterrence, incapacitation, just punishment, and rehabilitation."[81] For most criminal offenses, these purposes are indeed basic and the guidelines provide effective and uniform remedies. However, environmental crime entails concerns not germane to other crimes. For this reason, the remedies provided by the guidelines do not necessarily redress environmental crime in the manner most beneficial to the public. The guidelines do not provide for alternatives to incarceration, nor do they address remediation or mitigation of environmental harm.[82] On the other hand, sentencing procedures for environmental offenses predating the guidelines could mandate the remediation of the environmental damage as an alternative to fines or incarceration.

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[78] 33 U.S.C.A. § 1319(c)(1)(B) (West Supp. 1993).

[79] 42 U.S.C.A. § 7413(c)(1) (West Supp. 1993).

[80] 28 U.S.C.A. § 994(a) (West Supp. 1993).

[81] 18 U.S.C.A. app. 4, ch. 1, pt. A (West Supp. 1993).

[82] Sharp, *supra* note 19, at 183.

In *United States v. Key West Towers. Inc.*,[83] the District Court for the Southern District of Florida offered a defendant convicted of CWA violations a choice between paying a $250,000 fine or deeding over a two-acre freshwater pond to a charitable organization. The court noted that the fine would promote the deterrence theories behind a civil penalty, but decided that the "primary concern of protecting the pond and providing a pollution-free habitat for the migratory birds and wildlife" would be served by deeding the pond, which was the location of the defendant's violations, to a charitable land trust group.[84] Unlike other criminal activities that fall under the guidelines, environmental harm carries with it strong public and environmental interests in correcting the damage caused by the activity. As in *Key West Towers*, redress of environmental harm may be more important to society than the punishment of the defendant. Moreover, sentencing the defendant to remediation entails a punishment because remediation can be very expensive. The guidelines, however, do not provide for this type of alternative sentencing.

Another issue the guidelines raise is the shift in sentencing power from the judge to the prosecutor. This is especially relevant to environmental crime where federal prosecutors have a wide array of charges to utilize, each with a different penalty. For example, suppose a corporation fails to follow maintenance schedules for its wastewater discharge system, and, as a result, releases hazardous wastes into a public sewer system. If the corporation then fails to include the incident in its monitoring reports to the EPA, the government may bring a civil action against the corporation,[85] or it may prosecute under any of the criminal provisions of the CWA[86] and Title Eighteen of the United States Code.[87]

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[83] 720 F. Supp. 963, 965 (S.D. Fla. 1989).

[84] *Id.* at 966.

[85] *See* CWA, 33 U.S.C.A. § 1319(a)(2)(B) (West 1986 & Supp. 1993).

[86] *See* 33 U.S.C.A. § 1319(c) (West Supp. 1993) ("Negligent violations", "Knowing violations", "Knowing endangerment", and "False statements").

[87] 18 U.S.C.A. § 1001 (West Supp. 1993).

Moreover, depending on the circumstances, the charges may be leveled at the corporation, a responsible corporate officer, or both. Because the guidelines limit the judge's discretion in sentencing, the defendant's only substantial opportunity to mitigate its punishment, or obtain an alternative sentence to possible incarceration, is through bargaining with the prosecutor before going to court. Prosecutors, like judges, behave differently. Thus, punishment may vary even in identical factual circumstances because some polluters may be more effective in bargaining with the prosecutor. As one commentator wrote, "paradoxically, the shift of power to the prosecutor maintains the very disparity of treatment the Guidelines were designed to avoid."[88] Perhaps future amendments to the guidelines will address these issues.

A comprehensive discussion of the guidelines' application is well beyond the scope of this article. However, a general outline illustrates how seriously the guidelines treat environmental crime, and how their mechanical nature precludes judicial consideration of factors inherent in environmental law. The guidelines are based on a sentencing table.[89] The table is a grid with forty-three base offense levels on its vertical axis and six criminal history categories across its horizontal axis. Each federal crime has a corresponding base offense level. For example, environmental crimes fall under part Q of the Federal Sentencing Guidelines.[90] Part Q lists the base offense level of each particular crime and the corresponding specific offense characteristics that may increase the offense's level for the purposes of the sentencing table.

Environmental crimes are divided into the three categories discussed previously. Knowing endangerment resulting from the mishandling of toxic substances carries a base offense level of twenty-four; knowing violations involving toxic substances carries a base offense level of eight;

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[88] Sharp, *supra* note 19, at 184.

[89] U.S.S.G., 18 U.S.C.A. app. 4, ch. 5, pt. A (West Supp. 1993) (sentencing table).

[90] U.S.S.G. § 2Q1 (1993).

and other environmental crimes carry a base level of six.[91] This translates into a minimum sentence of fifty-one months' imprisonment for a conviction of knowing endangerment, two months for knowing violations, and no mandatory sentence for other environmental crimes.

The low minimum sentences for the last two categories are somewhat deceiving because increases in the base offense levels of environmental crimes will likely be commonplace under guideline sentencing. For example, under the specific offense characteristics, any knowing violation under the CWA which also results in a discharge of a hazardous substance increases the base offense level by four.[92] Additionally, if the discharge violates the defendant's NPDES permit, the base offense level increases by four.[93] In most cases involving knowing mishandling of toxic substances, toxic substances are released into the environment in violation of a permit. Therefore, these common offenses necessarily carry a base offense level of sixteen, which translates into a mandatory twenty-one month sentence for a first-time offender exclusive of any fines the court may impose.

The Sixth Circuit Court of Appeals outlined the intricacies involved in guideline sentencing of an environmental criminal defendant in *United States v. Rutana*.[94] In that case a probation officer had prepared a presentence report which calculated the defendant's offense level according to the guidelines:

> The [presentence] report's calculation of the offense level, which is not disputed on appeal, is as follows:
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> (1) Base offense level of eight (8) for mishandling of hazardous or toxic substances, under U.S.S.G. § 2Q1.2(a).

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[91] U.S.S.G. §§ 2Q1.1 to 2Q1.3 (1993).

[92] U.S.S.G. § 2Q1.2(b)(1)(B) (1993).

[93] U.S.S.G. § 2Q1.2(b)(4) (1993).

[94] 932 F.2d 1155 (6th Cir.), *cert. denied*, 112 S. Ct. 300 (1991). *See supra* notes 33-35 and accompanying text.

(2) Increase by six (6) levels, for repetitive discharge, under U.S.S.G. § 2Q1.2(b)(1)(A).

(3) Increase by four (4) levels, for disruption of a public utility, under U.S.S.G. § 2Q1.2(b)(3).

(4) Increase by two (2) levels, for playing a leadership role in the activity, under U.S.S.G. § 3B1.1(c).

(5) Decrease by two (2) levels, for acceptance of responsibility, under U.S.S.G. § 3E1.1(a).[95]

As discussed earlier, *Rutana* illustrates the inflexibility of the guidelines. The district court departed downward twelve levels from the offense level of eighteen called for by the guidelines as shown above. The court gave Rutana a base offense level of six, rather than eighteen, because Rutana's incarceration would place his employees' jobs in jeopardy and because Rutana was already subject to "harsh" fines.[96] Rejecting this departure, the court of appeals held that Rutana's position as an employer was not sufficiently unusual to warrant a departure from the guidelines.[97] Moreover, the court explained that the "imposition of a 'harsh' fine is not a proper basis for departure from the guidelines. The guidelines have already taken fines, even large ones, into consideration."[98] *Rutana* makes it clear that, absent extraordinary circumstances, under the guidelines, a federal judge must send a defendant convicted of an environmental crime involving toxic substances to jail. This message should encourage polluters facing criminal charges to work with their

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[95] *Rutana,* 932 F.2d at 1157. This calculation was based on the 1989 guidelines. The offense level of eighteen stemmed from a knowing-endangerment conviction and carried a minimum sentence of twenty-seven months' imprisonment. Today under the guidelines the same offense carries a minimum of fifty-one months' imprisonment.

[96] *Id.* at 1158.

[97] *Id.*

[98] *Id.* at 1159.

prosecutors.

The EPA appears to understand the shortcomings in the guidelines' application to environmental crimes and is making recommendations for their development and modification. To date, these recommendations have largely resulted in increased penalties for environmental crimes.[99] However, because the EPA recognizes the advantages in allowing corporations to continue operating efficiently following criminal convictions while ensuring future compliance with environmental laws, it is exploring alternative penalties. For example, in *United States v. Pennwalt Corp.*[100] the judge would not accept the plea agreement until the chief executive officer of the defendant corporation attended the sentencing hearing for criminal violations of the CWA to answer questions.[101]

V. CONCLUSION

The Pollution Prosection Act of 1990[102] underscores the government's commitment to the enforcement of criminal environmental laws. Corporations handling both toxic and nontoxic wastes will be under increasing government scrutiny and must familiarize themselves with environmental statutes or face possible criminal sanctions. Because of the public concerns inherent in environmental legislation, courts are not receptive to negligent or ignorant violations of these laws and are often willing to place criminal liability for violations on the corporate officers ultimately responsible for the corporation's noncompliance. Under the federal sentencing guidelines, the courts have little alternative to sending

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[99] The latest base offense levels, increasing the minimum sentence for knowing endangerment, were recommended to the Sentencing Commission by the EPA. *See* James S. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, n.20 (1991).

[100] No. CR-88-55T (W.D. Wash. filed Aug. 9, 1989).

[101] *Judge Accepts Pennwalt Plea Agreements*, 20 Envtl. Rep. (BNA) 703 (Aug. 18, 1989).

[102] 42 U.S.C.A. § 4321 (West Supp. 1993).

polluters to jail. Trends in environmental law dictate that those responsible for handling hazardous wastes, especially executives controlling its disposal, take affirmative steps to familiarize themselves with the laws and to work within them.