Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s

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INTRODUCTION

Nineteen-ninety was a record year for criminal prosecutions under the nation's environmental laws. The Environmental Crimes Section of the Department of Justice obtained 134 indictments during fiscal year 1990 — the most indictments of any year since the Department of Justice began its campaign to vigorously prosecute environmental crimes and a 33 percent increase over fiscal 1989.[1] Significantly, 78 percent of those indictments were returned against corporations and their top officers.[2] The Department of Justice reported an overall conviction rate of 95 percent.[3] More than half of the individuals convicted of environmental crimes were given prison sentences and nearly 85 percent of these were actually serving jail time at the end of 1990.[4]

The use of criminal sanctions to punish corporate managers who run afoul of the environmental laws is beginning to have its desired effect. Attorney General Richard Thornburgh recently stated that "we are finding that nothing so concentrates the mind of responsible management upon the environment as our putting

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1. *See Criminal Enforcement: 1990 Record Year for Criminal Enforcement of Environmental Violators, Justice Announces*, 21 Env't Rep. (BNA) 1397 (Nov. 23 1990).
2. *Id.*
3. *Id.*
4. *Id.*

their own pocketbooks and persons in jeopardy. Indeed, the sudden realization that culpable mismanagement might actually result in jail time concentrates such minds even more."[5]

The Department of Justice's high conviction rate for environmental crimes reflects more than that department's increased attention towards enforcement of federal environmental statutes. Throughout the 1980s, all three branches of the federal government — as well as state and local authorities — began to adopt a much tougher stance towards environmental violators, especially corporate officers and directors. Congress reauthorized or otherwise amended the major environmental statutes to upgrade most violations from misdemeanors to felonies.[6] The Department of Justice adopted a policy of conducting environmental criminal investigations with a goal of "identifying, prosecuting, and convicting the highest ranking, truly responsible corporate officials."[7] The courts made this goal more readily achievable by relaxing the burden of proof for most environmental crimes and by punishing convicted violators in accordance with very tough new sentencing guidelines established by the United States Sentencing Commission.[8]

There is every reason to believe that this trend will continue well into the twenty-first century. Federal enforcement officials interpret the American public's concern with environmental issues as a mandate to seek out and prosecute those corporate officers who choose to ignore environmental laws for economic gain. Moreover, enforcement agencies see criminal sanctions as a cost-effective method for assuring widespread compliance with environmental laws. By prosecuting a single local businessman, the government can send a message to the entire business community that environmental compliance should be a high priority. The Justice Department claims that criminal enforcement efforts have now reached the stage where they more than pay for themselves.[9] Over the past two fiscal years, the Environmental Crimes

5. Address by Attorney General Richard Thornburgh, 1991 Environmental Law Enforcement Conference, in New Orleans, La. (Jan. 8, 1991).

6. *See infra* notes 14-21 and accompanying text.

7. Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10478, 10480 (Dec. 1987).

8. *See infra* notes 57-93 and accompanying text.

9. *Criminal Enforcement: 1990 Record Year for Criminal Enforcement of Environmental Violators, Justice Announces*, *supra* note 1, at 1397.

Section imposed more than 40 million dollars in criminal fines[10] — bringing in more than two dollars for every dollar spent on criminal enforcement.[11] In an era when a federal judge rejects a plea bargain calling for the payment of a 100 million dollar criminal fine as too lenient,[12] there can be little doubt that federal enforcement efforts in the 1990s will be more than self-sustaining.

As we enter the last decade of the twentieth century, corporate officials who disregard their responsibilities under the environmental laws will find that there truly is nowhere to run and nowhere to hide. How can the vast majority of corporate officials who honestly want to comply with a complex, interlocking network of federal, state and local environmental requirements avoid criminal liability? The best way to avoid criminal liability for environmental violations is to adopt a corporate-wide program of strict compliance with all applicable environmental laws and regulations. The key to any such compliance policy is the development and execution of an environmental auditing program that aggressively seeks out potential environmental problems and corrects them before a violation can occur.

The creation of a strict environmental compliance program reduces the likelihood that a corporation and its officers will be prosecuted for inadvertent violations. Those corporations that fail to establish an environmental compliance policy also face the very real prospect of having an environmental compliance program not of their own design imposed upon them as the result of a criminal prosecution.

This article will review the government-wide trend toward strict enforcement of federal environmental laws in the 1980s and provide advice for structuring a comprehensive environmental compliance program in order to avoid criminal liability in the 1990s. Part I reviews recent efforts by all three branches of the federal government to toughen criminal enforcement of the environmental laws and assesses current proposals for even more stringent criminal sanctions. Part II explains how the adoption of a com-

10. Memorandum from Peggy Hutchins, Paralegal, Environmental Crimes Section, to Joseph G. Block, Chief, Environmental Crimes Section, DOJ (Feb. 11, 1991) (regarding Environmental Criminal Statistics FY83 Through FY90) [hereinafter Memorandum].

11. *Criminal enforcement: 1990 Record Year for Criminal Enforcement of Environmental Violators, Justice Announces*, *supra* note 1, at 1397.

12. *See* Lancaster, *Exxon Plea Bargain Thrown Out by Judge, $100 Million Oil Spill Fine Called Too Lenient*, Wash. Post, Apr. 25, 1991, at A1, col. 4.

prehensive environmental compliance policy will assist a corporation in avoiding criminal liability and outlines the basic elements of an effective compliance program.

I. THE 1980s: A GOVERNMENT-WIDE TREND TOWARD CRIMINAL LIABILITY AS A MAJOR TOOL OF ENVIRONMENTAL ENFORCEMENT

In 1980, the federal environmental laws were enforced primarily through the use of administrative and civil penalties. Criminal prosecutions were comparatively rare and those few individuals who were convicted of environmental crimes were invariably sentenced to probation. By 1990, the enforcement landscape had been altered dramatically. Two-year prison sentences and criminal fines in the hundreds of thousands of dollars are now the norm rather than the exception.[13] This sea change in environmental enforcement was brought about by the concerted efforts of all three branches of the federal government.

A. *Congress*

Throughout the 1980s, Congress systematically amended the major environmental statutes to enhance the penalties available to punish criminal violations. In 1980, Congress amended the Resource Conservation and Recovery Act ("RCRA") to make it a felony for any person to knowingly treat, store or dispose of hazardous waste without a permit.[14] This marked the first time Congress authorized the imposition of felony sanctions for violations of a federal environmental statute. Just four years later, Congress revisited RCRA and more than doubled the maximum possible prison term for the same class of violations by authorizing a sentence of up to five years.[15] Congress reauthorized the Comprehensive Environmental Response, Compensation, and Liability

13. *See, e.g.*, United States v. Borjohn Optical Technology, Inc., No. Cr. 89-256-WD (D. Mass. Nov. 7, 1990) (president of metal finishing company sentenced to 26 months in prison and fined $400,000 for criminal violation of Clean Water Act).

14. The Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 13, 94 Stat. 2334, 2339-40 (codified as amended at 42 U.S.C. § 6928(d)(1988)). Upon conviction, a defendant could be fined up to $50,000 for each day of the violation and/or be sentenced to up to two years in prison. These same penalties were available to punish anyone who knowingly transported hazardous waste to a disposal facility which did not have a permit.

15. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 232-34, 98 Stat. 3221, 3256-57 (codified as amended at 42 U.S.C. § 6928(d) (1988)).

Act in 1986 and elevated the knowing failure to report the release of a hazardous substance from a misdemeanor to a felony.[16] The following year Congress similarly amended the Clean Water Act to elevate many violations to the status of felonies.[17]

There is every reason to believe that Congress will continue to authorize increasingly stringent criminal penalties for violations of federal environmental statutes. This past November, Congress adopted the first major revisions to the Clean Air Act in over ten years and completely rewrote the Act's criminal penalty provisions.[18] Knowing violations of Clean Air Act permits are now punishable by a prison term of up to five years.[19] The knowing failure to comply with any of the Act's reporting requirements can result in two years in prison.[20] Finally, any person who knowingly releases a hazardous air pollutant and who knows that such a release will place another person in imminent danger of death or serious bodily injury can be imprisoned for up to fifteen years.[21]

As the recent amendments to the Clean Air Act indicate, Congress is favorably disposed towards new legislation which would provide additional severe criminal penalties for violations of environmental statutes which threaten human health. In the 101st Congress, Representative Charles Schumer (D-N.Y.) sponsored the Environmental Crimes Act of 1989, which would have authorized enhanced felony penalties for violations of more than twenty federal environmental statutes if those violations knowingly or recklessly caused a risk of imminent death or serious bodily injury to a human being or a risk of an environmental catastrophe.[22] An individual convicted of risking the imminent death of another human being could be sentenced to up to fifteen years in prison

16. The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 109, 100 Stat. 1613, 1632-33 (codified as amended at 42 U.S.C. § 9603(b)(3) (1988)). SARA authorizes a prison sentence of up to three years for failing to notify the appropriate federal agency of such a release or for submitting false or misleading information about such a release.

17. The Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 7, 42-43 (codified at 33 U.S.C. § 1319(c)(2)(B) (1988)) (establishing a prison term of up to three years for knowing violations of a variety of Clean Water Act provisions).

18. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2675-76 (codified as amended at 42 U.S.C.A. § 7413 (West Supp. 1991)).

19. *Id.* at § 701(c)(1).

20. *Id.* at § 701(c)(2).

21. *Id.* at § 701(c)(5)(A).

22. H.R. 3641, 101st Cong., 1st Sess., § 2 (1989) (to be codified at 18 U.S.C. § 731(a)).

and a fine of up to 250,000 dollars.[23] A corporation convicted of this offense could be fined up to 1 million dollars.[24] Penalties for repeat offenders were even more severe — thirty years in prison and a fine of up to 500,000 dollars for individuals, fines of up to 2 million dollars for corporations.[25]

In addition, the Schumer bill required convicted corporations to pay for an environmental audit conducted by a court-appointed independent expert.[26] In most circumstances, the court would be required to order the corporation to implement the independent expert's recommendations.[27] The House Criminal Justice Subcommittee reported the Schumer bill in early 1990,[28] but it was not considered by the House Judiciary Committee before the end of the 101st Congress. Representative Schumer is expected to reintroduce the bill early in the 102nd Congress.

B. *The Executive Branch*

In the early 1980s, the Department of Justice ("DOJ"), the Environmental Protection Agency ("EPA") and the Federal Bureau of Investigation ("FBI") launched a coordinated, nationwide effort to vigorously prosecute corporations and their officers for environmental crimes.[29] The DOJ's Land and Natural Resources Division (subsequently renamed the Environment and Natural Resources Division) established an Environmental Crimes Unit in 1981. The Crimes Unit was created specifically to work in coordination with EPA in the investigation and prosecution of federal environmental crimes. In addition, the Environment and Natural Resources Division plays a key role as a member of the National Environmental Enforcement Council, a joint project of the federal government and the National Association of Attorneys General, which coordinates environmental enforcement efforts between state and federal agencies.[30] Many United States Attor-

23. *Id.* (to be codified at 18 U.S.C. § 731(b)(1)(A)).

24. *Id.*

25. *Id.* (to be codified at 18 U.S.C. § 731(b)(1)(B)).

26. *Id.* (to be codified at 18 U.S.C. § 734(a)(2) and § 734(b)).

27. *Id.* (to be codified at 18 U.S.C. § 734(d)). *See also infra* notes 111-114 and accompanying text.

28. Shea, *House Panel Seeks Criminal Penalties*, 48 CONG. Q. WEEKLY REP. 990 (March 31, 1990).

29. *See generally* Marzulla, *Behind Bars: Prosecutors Sting Corporate Executives*, ENVTL. PROTECTION, Oct. 1990, at 12.

30. Habicht, *supra* note 7, at 10,479-80 n.15.

neys replicated these coordination efforts at the local level by forming Environmental Law Enforcement Coordinating Committees that meet periodically to share information on possible environmental crimes uncovered by local police departments, health inspectors and fire marshals.[31]

These coordinated prosecution efforts quickly produced results. Between October 1982 and September 1986, the Environmental Crimes Section returned over 215 indictments, of which 65 were against corporations; the remaining 150 indictments named individuals, often corporate officers, directors or employees.[32] In recognition of its success, Attorney General Edwin Meese III elevated the Environmental Crimes Unit to the status of a full Section within the Land and Natural Resources Division in April 1987. Hank Habicht, then Assistant Attorney General for Land and Natural Resources, removed any remaining doubts about DOJ's commitment to prosecuting environmental crimes when he stated: "It has been, and will continue to be, Justice Department policy to conduct environmental criminal investigations with an eye toward identifying, prosecuting, and convicting the highest ranking, truly responsible corporate officials."[33]

The Environmental Crimes Section's success in prosecuting environmental crimes is due, in large part, to the efforts of EPA criminal investigators. In January 1981, EPA established a separate Office of Criminal Enforcement and, for the first time, began to hire professional criminal investigators. Many of these first investigators came from other federal agencies and brought with them years of experience in traditional law enforcement techniques. Law enforcement powers were first conferred upon these EPA criminal investigators in June 1984, when they were temporarily designated as Special Deputy U.S. Marshals.[34] In 1988, Congress granted EPA investigators permanent law enforcement powers, including the authority to carry firearms and execute search and arrest warrants.[35] EPA currently has over sixty criminal investigators operating out of every EPA Regional Office.

31. Marzulla, *supra* note 29, at 16.

32. Habicht, *supra* note 7, at 10,480 (citing unpublished internal DOJ statistics).

33. *Id.*

34. *Id.* at 10,479.

35. Medical Waste Tracking Act, Pub. L. No. 100-582, § 4, 102 Stat. 2950, 2958-59 (1988) (codified at 18 U.S.C. § 3063 (1988)).

Late last year, Congress passed legislation to expand significantly EPA's criminal and civil enforcement capabilities. The Pollution Prosecution Act of 1990 directs EPA to hire additional criminal investigators every year for the next five years. By October 1995, EPA's Office of Criminal Investigations will have a staff of at least two hundred investigators.[36] The Act also directs the Administrator to increase the number of civil investigators by fifty.[37] In addition, the Act requires EPA to establish a National Enforcement Training Institute to train federal, state and local officials in the enforcement of the nation's environmental laws.[38]

The FBI has also played a major role in the federal government's campaign to vigorously enforce the nation's environmental laws. In 1982, EPA and the FBI signed a Memorandum of Understanding which called for the FBI to make environmental crimes a special priority.[39] Accordingly, the Bureau currently has approximately sixty agents assigned to the investigation of environmental crimes. FBI Director William Sessions believes that prosecuting corporations and their officers for environmental violations will make a difference in the national effort to protect the environment. "Tough criminal sanctions . . . should act as a strong deterrent to deliberate and careless polluters alike; they will force companies and individuals to install and maintain sound prevention systems; they will help guarantee accountability."[40]

The federal government's commitment to vigorous enforcement of the environmental laws has yielded impressive results. Since fiscal year 1983, the Environmental Crimes Section, working with EPA and the FBI, has recorded 774 indictments for criminal environmental law violations.[41] Corporations account for roughly one-third (214) of these indictments,[42] and corporate officers, directors and employees represent the bulk of the 533 individual defendants. Of the 774 indictments, 559 have resulted in guilty pleas or convictions.[43] Nearly 59 million dollars in criminal

36. The Pollution Prosecution Act of 1990, Pub. L. No. 101-593, § 202, 104 Stat. 2962, 2962-63.

37. *Id.* at § 203.

38. *Id.* at § 204.

39. Habicht, *supra* note 7, at 10,479 n.12.

40. Address by FBI Director William S. Sessions, at The Comstock Club, Sacramento, Cal. (Aug. 28, 1989).

41. *See* Memorandum, *supra* note 10.

42. *Id.*

43. *Id.*

fines have been assessed and more than 350 years of prison time have been imposed.[44] Individual defendants have already served over 157 years in prison.[45] These figures represent only the federal effort at prosecuting environmental crimes. State and local officials have achieved similarly impressive results.[46]

C. *The Judiciary*

The federal courts in the past decade have made two major contributions to the government's efforts to convict and punish corporate executives for criminal violations of environmental laws. To obtain a criminal conviction of a corporate officer under most of the federal environmental laws, the government must satisfy a *scienter* requirement by proving that the officer had knowledge of the environmental violation. In the past, this *scienter* requirement effectively shielded upper-level management from criminal liability. Over the past decade, however, federal courts have minimized this burden on the government by allowing juries to infer knowledge based upon an officer's position in the corporation. More importantly, the courts have embraced the sentencing guidelines established by the United States Sentencing Commission and have begun to impose very tough prison sentences for environmental violations. The first cases applying the sentencing guidelines to environmental crimes have now been challenged all the way to the Supreme Court and have survived appellate review.

1. Minimizing the *Scienter* Requirement

The courts have long recognized that criminal liability can be strictly imposed upon responsible corporate officials for violations of certain public health and welfare statutes. In *United States v. Dotterweich*,[47] the Supreme Court upheld the conviction of the president of a pharmaceutical company for a criminal violation of the Federal Food, Drug and Cosmetic Act ("FDCA"). The Court found that the FDCA was "a now familiar type of legislation whereby penalties serve as effective means of regulation. Such

44. *Id.*

45. *Id.*

46. Gold, *Increasingly, Prison Term Is the Price for Polluters*, N.Y. Times, Feb. 15, 1991, at B6, col. 3 (citing New York, New Jersey, Pennsylvania, Ohio and Arizona as states with particularly active criminal environmental enforcement programs).

47. 320 U.S. 277 (1943).

legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing."[48] The Court recognized the hardship of imposing criminal liability on corporate officers who had no actual knowledge of criminal wrongdoing, but found that Congress chose to place this hardship "upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers . . . rather than to throw the hazard on the innocent public who are wholly helpless."[49] The Court failed, however, to delineate the boundaries of the responsible corporate officer doctrine established in *Dotterweich*.[50]

In *United States v. Park*,[51] the Court explained that the corporate officer doctrine allowed the imposition of criminal liability on corporate managers who had responsibility for ensuring compliance with FDCA.[52] Moreover, the Court held that FDCA imposed a duty on such corporate managers not only to seek out and remedy violations when they occurred, but also to implement measures that would prevent violations in the first place.[53] Thus, in order to impose criminal liability on a corporate officer under FDCA, the government need only prove that the manager had the responsibility and the power to prevent or correct a violation of the statute.[54] The Court did indicate, however, that corporate managers could defend an FDCA suit by establishing that they were powerless to prevent or correct the violation.[55]

The responsible corporate officer doctrine established by *Dotterweich* and delineated by *Parks* does not generally apply to the determination of criminal liability under most federal environmental laws. Unlike FDCA, most federal environmental statutes contain a *scienter* requirement and criminal liability can be imposed on corporate officers and managers only if the government

48. *Id.* at 280-81.

49. *Id.* at 285.

50. *Id.* ("It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. . . . In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.").

51. 421 U.S. 658 (1975).

52. *Id.* at 671-72.

53. *Id.* at 672.

54. *See Id.* at 671.

55. *Id.* at 673.

can establish that they knowingly violated the law.[56] Courts interpreting this *scienter* requirement, however, have minimized the burden of proof which the government must bear with regard to this issue.[57]

The Supreme Court has consistently rejected the argument that the government must prove that the defendant had actual knowledge of the statute or regulation allegedly violated. In *United States v. International Minerals & Chemical Corp.*,[58] the Court interpreted a statute which imposed criminal sanctions for knowingly violating Department of Transportation regulations governing the shipment of corrosive liquids. The Court squarely held that the government did not have to allege that the defendant had actual knowledge of the regulations, reasoning that where "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."[59] Accordingly, all the government need show in order to satisfy the *scienter* requirement is that the defendant was aware of the actions which allegedly violated the statute.

Over the past decade, the courts have further minimized the government's burden of proof in prosecuting environmental crimes by allowing juries to infer that corporate officers were aware of environmental violations. In *United States v. Johnson & Towers, Inc.*,[60] the Third Circuit held that a corporate manager could be held criminally liable under RCRA for disposing of hazardous waste without a permit only if the government could establish that he "knew or should have known that there had been no compliance with the permit requirement" of RCRA.[61] In remanding the case for further proceedings, the Third Circuit in-

56. *See, e.g.*, 42 U.S.C.A. § 6928(d)(1) (West Supp. 1991) (RCRA violated by knowing transportation of hazardous waste to a facility which does not have a permit); 42 U.S.C.A. § 9603(b) (West 1983 & Supp. 1991) (CERCLA violated by failure to report the release of a hazardous substance as soon as knowledge of such a release is acquired); 33 U.S.C.A. § 1319(c)(2)(A) (West Supp. 1991) (Clean Water Act violated by knowing violation of any applicable permit condition); 42 U.S.C.A. § 7413(c)(1) (West Supp. 1991) (Clean Air Act violated by knowingly violating any requirement of an applicable implementation plan).

57. *See generally* Seymour, *Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws*, 20 Env't Rep. (BNA) 337, 341-43 (June 9, 1989).

58. 402 U.S. 558 (1971).

59. *Id.* at 565.

60. 741 F.2d 662 (3d Cir. 1984), *cert. denied sub nom* Angel v. United States, 469 U.S. 1208 (1985).

61. *Id.* at 664-65.

structed the district court that knowledge of the permit requirement "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."[62]

The Eleventh Circuit has also held that a jury may infer that a corporate employee had knowledge of an environmental violation in a case involving improper disposal of hazardous waste under RCRA. In *United States v. Hayes International Corp.*,[63] the court reinstated a guilty verdict rendered against a corporation and one of its employees for knowingly transporting hazardous waste to a disposal facility which did not possess a RCRA permit. The court held that the *scienter* requirement compelled the government to prove that the defendants knew that the facility did not have the requisite RCRA permit.[64] "The government does not face an unacceptable burden of proof in proving that the defendant acted with knowledge of the permit status," the court held, because "in this regulatory context a defendant acts knowingly if he willfully fails to determine the permit status of the facility."[65] Moreover, the court, as in *Johnson & Towers*, held that the jury could infer guilty knowledge from circumstantial evidence such as the mere existence of the regulatory scheme.[66]

While the responsible corporate officer doctrine established in *Dotterweich* remains generally inapplicable to environmental crimes, *Johnson & Towers* and *Hayes* effectively eviscerate the *scienter* requirement that has thus far protected corporate officers and employees from strict liability for environmental crimes. Under this line of cases, a jury may infer that a corporate official knew or should have known of environmental violations solely on the basis of his position within the corporation. Moreover, a jury may infer that corporate officers possessed the requisite guilty knowledge from the mere failure to comply with the regulatory regime. This inferential undercutting of the *scienter* requirement has made it much easier for the government to convict corporate officials for environmental crimes.

62. *Id.* at 670.

63. 786 F.2d 1499 (11th Cir. 1986).

64. *Id.* at 1503-04.

65. *Id.* at 1504.

66. *Id.* at 1504-05. The court also indicated that jurors could infer that the defendants knew that the facility did not have a permit from the circumstances and terms of the transaction. The defendants in *Hayes* had contracted with a recycler to dispose of the waste at an unusually low price.

2. Implementing the Sentencing Guidelines

The judiciary's single greatest contribution to the crackdown on environmental crime, however, has been its implementation of the sentencing guidelines issued by the United States Sentencing Commission.[67] The Commission's guidelines for the sentencing of individuals went into effect on November 1, 1987, and they require federal judges to impose particularly harsh sentences for environmental crimes. "The question is no longer whether a defendant in environmental cases will go to prison, but rather for how long."[68] Moreover, "parole has been abolished to ensure that the sentence imposed by the court is the sentence the offender will serve."[69] Probation, once the norm for environmental crimes, is severely restricted under the guidelines.[70] An individual defendant convicted of an environmental crime today can expect a prison term of approximately two years and tens of thousands of dollars in criminal fines.

To illustrate how the guidelines work, it is instructive to see how a judge would have applied them in an actual case which arose before the guidelines went into effect. *United States v. Hayes International Corp.*[71] involved a rather typical RCRA violation. L.H. Beasley, a Hayes employee who was responsible for the disposal of hazardous wastes, entered into an oral contract with a representative of Performance Advantage, Inc. to dispose of a mixture of paint and solvents generated by Hayes as part of its airplane refurbishing business. "Wastes were transported from Hayes to Performance Advantage on eight occasions between January 1981 and March 1982."[72] Performance Advantage, which did not have the required RCRA permit, then illegally disposed of more than 600 drums of the waste generated by Hayes.[73]

67. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1990) [hereinafter GUIDELINES MANUAL].

68. Starr & Kelly, *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,096, 10,100 (Mar. 1990).

69. *Id.* at 10,097.

70. GUIDELINES MANUAL, *supra* note 67, at § 5B1.1 (probation authorized only if minimum term of imprisonment specified by the Sentencing Table is zero months or no more than six months).

71. 786 F.2d 1499 (11th Cir. 1986).

72. *Id.* at 1500-01.

73. *Id.* at 1501.

L.H. Beasley was charged with violating 42 U.S.C. § 6928(d)(1), which makes it a felony to knowingly transport hazardous waste to a disposal facility lacking a RCRA permit. The sentencing guidelines establish a base offense level of eight for this environmental crime.[74] A sentencing judge, however, would probably make two upward adjustments to this offense level to take into account the offense's special characteristics. Since there were eight separate shipments of waste, the sentencing judge could raise the offense level by up to six levels because the offense involved a repetitive discharge of a hazardous waste into the environment.[75] An additional four-level increase could be imposed because the offense involved the transportation of waste without a permit.[76] Mr. Beasley could therefore have an adjusted offense level of eighteen. Assuming that this was his first offense, a judge would then be required under the sentencing guidelines to sentence Beasley to a prison term of between 27 and 33 months.[77]

Moreover, the sentencing guidelines require a judge to impose criminal fines on individuals except in extraordinary circumstances.[78] For this offense, Beasley would probably be fined a minimum of either 6,000 dollars or the amount of his pecuniary gain, whichever was higher.[79] The maximum possible fine would be 60,000 dollars or twice the gross pecuniary loss caused by the offense or three times the gross pecuniary gain to all participants in the offense, whichever was higher.[80]

As should be evident, the federal sentencing guidelines "remove nearly all discretion that judges have traditionally enjoyed

74. GUIDELINES MANUAL, *supra* note 67, at § 2Q1.2(a) (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification). The federal guidelines reduce sentencing to little more than a mathematical calculation. Each offense is assigned a numerical value called a base offense level. The base offense level is then adjusted up or down a set number of levels to account for the specific characteristics of the crime and the culpability of the defendant. These adjustments result in a final numerical value called the total offense level. A judge determines the appropriate sentence by referring to a table which prescribes a narrow range of sentences for all crimes which have the same total offense level. *See generally*, Starr & Kelly, *supra* note 68, at 10,097-98.

75. GUIDELINES MANUAL, *supra* note 67, at § 2Q1.2(b)(1)(A).

76. *Id.* at § 2Q1.2(b)(4).

77. *Id.* at § 5A (Sentencing Table).

78. *Id.* at § 5E1.2(f) (judge may waive fine if defendant shows that he is not likely to become able to pay all or part of the fine or imposition of the fine would unduly burden the defendant's dependents).

79. *Id.* at § 5E1.2(c)(1).

80. *Id.* at § 5E1.2(c)(2).

at the sentencing stage."[81] This loss of discretion led to a number of challenges to the rules, but the Supreme Court has now upheld the constitutionality of the United States Sentencing Commission and the guidelines.[82] In addition, the Supreme Court has recently declined to hear the first case challenging the application of the guidelines to environmental crimes.[83]

United States v. Pozsgai[84] was one of the first major environmental crimes cases to be prosecuted under the new federal sentencing guidelines and was widely viewed as an indicator of how strictly the courts would adhere to the guidelines.[85] John Pozsgai was convicted on 41 counts of knowingly discharging fill material into a wetland in violation of the Clean Water Act and was sentenced to a three-year jail term and fined 202,000 dollars. Pozsgai, with the assistance of the Washington Legal Foundation, appealed, arguing that the trial court had misapplied the guidelines in calculating his sentence. In addition, Pozsgai argued that the imposition of such a harsh sentence constituted cruel and unusual punishment in violation of the Eighth Amendment.[86]

The Third Circuit affirmed the conviction without an opinion and without even scheduling oral argument.[87] Pozsgai sought review before the Supreme Court, again arguing that the application of the sentencing guidelines to his case violated the Eighth Amendment.[88] Despite the fact that the Department of Justice admitted that the brief it filed with the Third Circuit misrepresented photographic evidence introduced at Pozsgai's trial,[89] the Supreme Court declined to grant review. While there has been no definitive appellate ruling on the application of the sentencing guidelines to environmental crimes, *Pozsgai* should be interpreted

81. Starr & Kelly, *supra* note 68, at 10,096.

82. Mistretta v. United States, 109 S. Ct. 647 (1989).

83. *Supreme Court Denies Pozsgai Review, Lets Criminal Wetlands Conviction Stand*, 21 Env't Rep. (BNA) 1117 (Oct. 5, 1990).

84. No. Cr. 88-00450 (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 48 (1990).

85. *See also* United States v. Mills, No. 88 Crim. 03100-WEA (N.D. Fla. April 13, 1989), *appeal docketed*, No. 89-3325 (11th Cir. April 17, 1989) (defendants convicted of filling wetlands in violation of Clean Water Act sentenced to 21-month jail term).

86. *Application of Federal Sentencing Guidelines Challenged in Appeals of Two Water Act Cases*, 20 Env't Rep. (BNA) 1574 (Jan. 12, 1990).

87. *Third Circuit Denies Pozsgai Appeal*, 20 Env't Rep. (BNA) 1659 (Jan. 26, 1990).

88. *Landowner Seeks U.S. Supreme Court Review of Water Act Conviction for Filling Wetlands*, 21 Env't Rep. (BNA) 270 (May 25, 1990).

89. *Government Files Brief in Pozsgai Appeal Admitting Errors in Lower Court Proceedings*, 21 Env't Rep. (BNA) 505 (July 20, 1990).

as an indication that federal appeals courts will be reluctant to second-guess a trial court's interpretation of the guidelines.

The United States Sentencing Commission has recently submitted to Congress proposed guidelines to be used by federal judges in the sentencing of organizations.[90] Significantly, the Sentencing Commission chose to exclude environmental crimes from the criminal fine provisions of the proposed guidelines.[91] Instead the Sentencing Commission is forming a task force to study sentencing of such crimes and hopes to extend the guidelines to them by next year.[92] The proposed guidelines do, however, direct a sentencing judge to order corporate defendants to pay full restitution to victims of the offense[93] and to remedy the harm caused by the offense.[94] The costs of restitution and remediation for environmental crimes are likely to dwarf the enormous criminal fines envisioned by the proposed guidelines.

II. HONESTY IS THE BEST POLICY

The government-wide trend towards criminal liability as a major tool of environmental enforcement has one very simple purpose: to provide corporate officials with a powerful incentive to voluntarily comply with the environmental laws. As Richard Stewart, Assistant Attorney General in charge of the Environment and Natural Resources Division has said, "the message sent to corporate managers is clear: violate the environmental laws and you may save your company some money in the short run, but you personally may go to jail."[95] The good news is that corporate officials who institute strict environmental compliance programs and who promptly report and correct environmental violations which nonetheless occur face a dramatically reduced threat of criminal liability.

90. *See* United States Sentencing Commission's Notice of Amendments to the Sentencing Guidelines to Congress, 56 Fed. Reg. 22,762 (1991) (to be codified as Chapter Eight of the United States Sentencing Commission Guidelines Manual) [hereinafter Proposed Additions to Sentencing Guidelines]. These proposed guidelines will go into effect on November 1, 1991 unless Congress disapproves them.

91. *Id.* at § 8C2.1, 56 Fed. Reg. at 22,789.

92. *See Commission Excludes Environmental, Crimes from Sentencing Guidelines Sent to Congress*, 22 Env't Rep. (BNA) 11 (1991).

93. *See* Proposed Additions to Sentencing Guidelines, *supra* note 90, at § 8B1.1, 56 Fed. Reg. at 22,788.

94. *Id.* at § 8B1.2, 56 Fed. Reg. at 22,788.

95. Address by Assistant Attorney General Richard Stewart, 1991 Environmental Law Enforcement Conference in New Orleans, La. (Jan. 8, 1991).

A. *Avoiding Criminal Prosecution by Adopting a Comprehensive Environmental Compliance Program*

EPA enforcement policy since at least the mid-1980s has been "to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems."[96] EPA looks at three areas in determining whether the offending corporation made an honest and genuine effort to comply with the environmental laws: (1) whether the corporation took "reasonable precautions to avoid noncompliance" (*i.e.*, whether the corporation had a compliance program in effect at the time of the violation); (2) whether the corporation "expeditiously correct[ed] underlying environmental problems discovered through audits"; and (3) whether the corporation instituted new measures to prevent the recurrence of violations.[97] A corporate official who oversees an environmental compliance program that aggressively seeks out and corrects environmental problems through the use of environmental audits is therefore unlikely to be prosecuted for inadvertent or accidental violations.

The DOJ's Environmental Crimes Section has a similar policy of leniency towards corporations that voluntarily comply with the environmental laws. Hank Habicht, former Assistant Attorney General for Land and Natural Resources, summarized DOJ's environmental enforcement policy by saying, "a company is unlikely to be prosecuted if it has diligent reporting and environmental compliance policies and information systems; is forthcoming on a regular basis [i]n its dealings with the government; and, in addition, has a record of responding promptly — including, where appropriate, the disciplining of employees — when it detects contamination problems at its facilities."[98]

The DOJ is currently following this policy with regard to environmental violations at the Department of Energy (DOE) nuclear weapons facility at Rocky Flats, Colorado. In 1989, DOJ stated that if DOE and its cleanup contractor, Rockwell International, established an environmental compliance program for Rocky Flats, promptly reported the extent of the environmental violations there and took corrective actions consistent with the compli-

96. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007 (1986).
97. *Id.*
98. Habicht, *supra* note 7, at 10,481.

ance plan, DOJ's "general practice would be not to prosecute DOE employees or Rockwell or its employees" for conduct in accordance with the compliance plan.[99]

In short, implementing a strict environmental compliance program significantly reduces the chances of being prosecuted for violations that occur despite the corporation's best efforts. Those companies that choose not to implement an environmental compliance program are not only courting criminal prosecution, but also the prospect of having a compliance plan not of their own design imposed upon them as the result of an enforcement action.

The Department of Justice and EPA have consistently sought to have environmental auditing provisions inserted into consent decrees and settlement agreements terminating enforcement actions. It is EPA policy to propose such auditing provisions "where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future."[100] The Agency is most likely to seek to impose an environmental auditing program where a pattern of violations can be attributed to the lack of such a program or where similar noncompliance problems exist at other facilities operated by the same corporate parent.[101]

The Environmental Crimes Section has been particularly aggressive in seeking to impose environmental compliance programs on a company-wide basis. In one prominent case, Nabisco Brands pled guilty to criminal Clean Water Act charges and was placed on probation for three years. As a condition of probation, Nabisco agreed to forfeit a 250,000 dollar bond if any of its plants in the United States violated any federal, state or local environmental requirement.[102] The Clean Water Act charges were filed

99. Letter from Richard B. Stewart, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, to Admiral James D. Watkins, Secretary of Energy, and William K. Reilly, Administrator, Environmental Protection Agency (Sept. 14, 1989) (regarding prosecution of environmental violations at DOE facilities).

100. EPA Environmental Auditing Policy Statement, *supra* note 96, at 25,007.

101. *Id.*

102. *Nabisco Co. Plant Manager Sentenced After Guilty Pleas on Water Act Charges*, 17 Env't Rep. (BNA) 782 (Sept. 26, 1986). *See also* United States v. Nabisco Brands, Inc., Plea Agreement at ¶ 2.B. (W.D. Wash. May 7, 1986).

as a result of the actions of one rogue employee at a small Nabisco plant in the State of Washington.[103]

The United States Sentencing Commission has adopted a similar approach in its proposed guidelines for sentencing organizations. The proposed guidelines recommend that, as a condition of probation, convicted organizations "develop and submit to the court a program to prevent and detect violations of law, including a schedule for implementation."[104] The organization would have to make periodic reports to the court regarding its progress in implementing the compliance plan and submit to unannounced examinations of its records by experts engaged by the court.[105]

Representative Charles Schumer's environmental crimes legislation[106] would take this approach a step further by requiring a court to appoint an independent expert to conduct an environmental audit of a corporation convicted of certain environmental crimes. This court-appointed expert would have the power to investigate not only the specific incident which gave rise to the violation, but also to assess all other adverse environmental effects caused by the corporation and to make recommendations to reduce or eliminate these effects.[107] The Schumer bill requires the court to order the corporation to implement these recommendations unless the corporation can show, by clear and convincing evidence, that (1) the recommendations would not achieve the result they seek to bring about, (2) the recommendations would have adverse environmental effects which outweigh their environmental benefits, (3) the technology to carry out the recommendation is nonexistent, or (4) there is another way to achieve the equivalent result at less cost.[108]

The Department of Justice has endorsed in principle the concept of environmental auditing embodied in the Schumer bill, but it voiced a number of concerns regarding the use of court-ap-

103. *Nabisco Co. Plant Manager Sentenced After Guilty Pleas on Water Act Charges*, *supra* note 102, at 782.

104. Proposed Additions to Sentencing Guidelines, *supra* note 90, at § 8D1.4(c)(1), 56 Fed. Reg. at 22,796.

105. *Id.* at § 8D1.4(c)(3)-(4), 56 Fed. Reg. at 22,796.

106. *See supra* notes 22-28 and accompanying text.

107. H.R. 3641, 101st Cong., 1st Sess., § 2 (1989) (to be codified at 18 U.S.C. § 734(c)(3)).

108. *Id.* at § 2 (to be codified at 18 U.S.C. § 734(d)).

pointed experts to conduct such audits.[109] In particular, DOJ was concerned that the auditing provisions would violate the Constitution by conferring broad sentencing powers on a court-appointed expert whose decisions were not subject to *de novo* review by an Article III court.[110] The Department offered to work with Representative Schumer to resolve this issue and a new version of the legislation is expected to be introduced early in the 102nd Congress.

B. *Elements of a Comprehensive Environmental Compliance Program*

Rather than have a compliance plan imposed by a court in the wake of an enforcement action, corporations should design and implement comprehensive environmental compliance programs that seek to identify and correct potential environmental problems before violations occur. Any such program should make effective use of environmental audits and enlist the corporation's employees in a company-wide effort to comply with all federal, state and local environmental requirements.

1. Utilizing Environmental Audits to Avoid Criminal Liability

Corporations are unlikely to be prosecuted for environmental crimes if they properly structure an environmental auditing program. The key to an effective auditing program is the independence of the auditor. If the company chooses to use its own personnel to conduct environmental audits, the environmental auditor should be chosen from employees other than those who have responsibility for environmental compliance or operations. Federal enforcement agencies are likely to doubt that a company is making an honest and genuine effort to comply with the environmental laws if the company auditor is the same person who is in charge of environmental compliance.

The environmental auditor should report directly to a special environmental auditing committee that has the power to respond quickly and effectively to the results of any audit. The auditing committee should be comprised of the company's chief environ-

109. *Environmental Crimes Act: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 55-60 (1989) (prepared statement of George W. Van Cleve, Deputy Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice).

110. *Id.* at 57-60.

mental compliance officer, a senior manager from the company's operations division and a senior attorney from the general counsel's office. Most importantly, the auditing committee should have a representative on the board of directors. The presence of such high-level corporate officials on the auditing committee will demonstrate to state and federal enforcement agencies — as well as the company's employees — that the corporation has made a strong commitment to environmental compliance.

Companies whose operations are likely to have extensive environmental impacts should seriously consider retaining outside counsel and/or an environmental consultant to conduct periodic company-wide environmental audits. The use of an outside third party to review the company's environmental compliance efforts will ensure that the environmental audit is totally objective and may identify systemic problems not readily apparent to a member of the corporate bureaucracy.

Moreover, the use of outside counsel will help maintain the confidentiality of internal environmental audits. An assessment of a company's environmental compliance program prepared by an attorney will be absolutely protected from involuntary disclosure by the attorney-client privilege.[111] Companies should take great care in distributing the results of such environmental audits to ensure that the protection afforded by the privilege is not waived inadvertently. The attorney work-product doctrine also provides some additional protection for environmental audits prepared by outside counsel or consultants.[112] Unlike the attorney-client privilege, however, the protection afforded by the work-product doctrine can be overcome by a showing that the party seeking discovery has a substantial need for the material

111. *See, e.g.*, SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976) ("Corporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it.").

112. The work-product doctrine protects from discovery documents prepared in anticipation of litigation by a party's attorney or consultant. FED. R. CIV. P. 26(b)(3). Courts have taken an expansive view of what constitutes "anticipation" of litigation and an environmental audit which identified existing violations would certainly be protected by the work-product privilege. *See, e.g.*, Stix Prods., Inc. v. United Merchants & Mfrs., Inc., 47 F.R.D. 334, 337 (S.D.N.Y. 1969) ("If the prospect of litigation is identifiable because of specific claims that have already arisen, the fact that, at the time the document is prepared, litigation is still a contingency has not been held to render the privilege inapplicable."). Moreover, courts have held that the work-product privilege applies to materials prepared in an effort to avoid future litigation. Herbert v. Lando, 73 F.R.D. 387, 402 (S.D.N.Y. 1977).

and cannot obtain it from another source without undue hardship.[113] However, courts have been generally unsympathetic to claims of undue hardship made by federal enforcement authorities seeking to discover the results of internal corporate investigations.[114]

Regardless of who performs an environmental audit, the investigation should go beyond the traditional approach of checking to see whether the corporation is in technical compliance with all of its environmental permits. In order to avoid criminal liability, an environmental audit should focus on the company's record-keeping practices and procedures with particular emphasis on tracking the flow of documents through the corporate bureaucracy. "Paper trails [should be] examined just as the government might review them, to trace the dispersion of 'knowledge' — a fluid term of art that can all too easily equate with liability — throughout the corporation."[115]

Many corporate officers have been reluctant to conduct environmental audits precisely because, under the *Johnson & Towers* and *Hayes* line of cases, a corporate official who became aware of an environmental violation through an environmental audit could be prosecuted for "knowingly" violating the applicable law. Federal environmental enforcement officials have reserved the right to request internal audits if they believe that such reports could contain information relevant to a criminal investigation.[116] Recently, however, the Department of Justice indicated that it was developing a policy which would limit the government's ability to use internal environmental audits in criminal prosecutions. Richard Stewart, Assistant Attorney General for the Environment and Natural Resources Division, was widely reported to be drafting standards for the Environmental Crimes Section which would have prohibited the use of internal environmental audits in crimi-

113. FED. R. CIV. P. 26(b)(3).

114. *See* Upjohn v. United States, 449 U.S. 383, 399-402 (1981).

115. Starr, *Avoiding Environmental Crimes*, 6 PRAC. REAL EST. L. 35, 41 (Sept. 1990).

116. EPA has adopted a policy of not routinely requesting that companies divulge the contents of internal environmental audits. However, EPA has stated that the Agency's "authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis . . . where the Government deems it to be material to a criminal investigation." EPA Environmental Auditing Policy Statement, *supra* note 96, at 25,007.

nal prosecutions so long as they were performed in good faith and the corporation took prompt remedial action.[117]

The final guidance document, however, fails to immunize internal environmental audits. Instead, Department of Justice attorneys are urged to consider the existence and scope of an environmental auditing program as a mitigating factor when deciding whether to prosecute a corporation for a criminal violation of an environmental statute. In reaching this decision, Department attorneys are directed to consider "whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner."[118] While the final guidance document falls far short of expectations, it was clearly aimed at minimizing the disincentive for corporate executives to conduct aggressive environmental audits.

Once an environmental audit has identified potential environmental problems, it is crucial that the corporation respond quickly and effectively. If actual violations are discovered, they should be reported promptly to the relevant state or federal agencies and the company should act immediately to correct the violation and establish new practices or procedures designed to prevent a recurrence of the violation. The company's audit review committee should establish an environmental response team with the authority to take immediate action to correct major environmental problems including, when necessary, disciplining responsible corporate employees. The audit committee should also review audits with an eye towards identifying and correcting corporate practices and procedures which tend to cause repeated minor violations.

117. Barrett, *Official Mulls Ways to Bar Prosecution of Polluters That Clean Up Their Acts*, Wall St. J., Dec. 26, 1990, at 12, col. 1.

118. U.S. DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR 4 (July 1, 1991). The existence of an environmental compliance or auditing program is just one of the three main factors DOJ attorneys are directed to consider in deciding whether to bring criminal charges against a corporate violator. DOJ attorneys are also urged to consider voluntary disclosure and subsequent cooperation with government investigators as major mitigating factors. *Id.* at 3-4. Additional relevant factors include the pervasiveness of noncompliance and the extent of efforts to remedy the violation. *Id.* at 5. Finally, Department attorneys may consider "whether there was an effective system of discipline for employees who violated company environmental compliance policies." *Id.*

2. The Importance of Employee Involvement

It is difficult to overemphasize the importance of involving a company's employees in its environmental compliance program. A large number of environmental violations can be avoided if employees are trained properly to recognize potential problems and bring them to the attention of responsible corporate officials. To this end, corporations should adopt a continuing education program for all employees — from the chief executive officer right on down to the night janitor — that emphasizes the need for environmental compliance. Every employee should clearly understand that the corporation has made environmental compliance a very high priority. Those employees who have direct responsibility for environmental compliance should meet regularly with state and federal regulators to keep up to date on changes in applicable laws and regulations.

A company should also consider other ways in which it can make environmental compliance part of the corporate culture. Employees' environmental compliance efforts should be evaluated as part of their overall job performance and should be considered when awarding bonuses, promotions and salary increases. Employees who believe that environmental compliance is an important goal of the corporation will be eager to assist a company and its officers in avoiding criminal liability for environmental violations.

Companies should also adopt an employee reporting system that encourages employees to bring potential environmental problems to the attention of corporate management. "The government's number one source for leads in its investigations is the employees of targeted companies."[119] Companies should consider establishing a hotline for employees to report environmental problems to upper-level management. In addition, corporations should consider rewarding employees who identify potential environmental problems if their information prevents a violation from occurring.

CONCLUSION

The 1980's saw a clear and unmistakable government-wide trend towards increasingly tougher criminal enforcement of environmental laws. There is every reason to believe that this trend

119. Starr, *supra* note 115, at 39.

will continue for the foreseeable future. The best way for corporations and their officers to avoid criminal liability in this enforcement climate is to establish a strict environmental compliance plan. This plan should include an aggressive environmental auditing program which encourages employees to ferret out and correct potential environmental problems before a violation can occur. Corporations which fail to establish such a compliance plan not only face the very real prospect of criminal prosecution, but they run the risk of having a compliance program not of their own design imposed upon them by federal enforcement agencies or the courts.