Environmental Crimes: The Absence of "Intent" and The Complexities of Compliance

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INTRODUCTION

The past decade has brought a dramatic increase in the use of criminal enforcement to promote compliance with environmental laws and regulations. The Justice Department's Environmental Enforcement Section of its newly renamed Environment and Natural Resources Division has grown from 16 attorneys in 1981 to 135 today.[1] In 1987, a new Environmental Crimes Section was added, with 23 prosecutors dedicated to criminal enforcement of environmental violations.[2] United States Attorney's Offices in each of the 95 federal judicial districts of the United States and its territories are also authorized to prosecute environmental crimes. Several United States Attorney's Offices have established environmental crime task forces with investigators and prosecutors specializing in these cases.[3]

As a result of this commitment of resources, EPA reports that the number of successful prosecutions of federal environmental violations grew by 600 percent from fiscal year 1982 to fiscal year 1989.[4] From 1983 through 1989, the Justice Department brought 641 environmental indictments of 199 corporations and 344 individuals, including 101 corporations indicted in 1989 alone.[5]

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1. Stewart, *Enforcing the Laws of Justice, Defending the Laws of Nature: An Overview of DOJ's Environment and Natural Resources Division*, 38 FED. BAR NEWS & J. 38 (1991).

2. *Id.* at 39.

3. *See* U.S. DEPARTMENT OF JUSTICE MANUAL §§ 5-11.002, 11.110, 11.306, 11.312 (1991 Supp.).

4. ENFORCEMENT & COMPLIANCE MONITORING, EPA, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989, Appendix (Feb. 1990).

5. Stewart, *supra* note 1, at 39.

Many states have developed similar programs for criminal enforcement of environmental laws. Since 1985, the California District Attorneys Association has published a policy and training manual for county prosecutors' enforcement of local, state and federal environmental, worker safety, and public health statutes.[6] The district attorneys of some California counties have formed hazardous materials enforcement task forces, comprised of environmental health technicians, chemists, engineers, law enforcement officers and prosecutors, to coordinate resources for investigation and prosecution of environmental and public health violations.[7]

The trend toward increased use of criminal enforcement is not the result of a lax or reckless attitude on the part of American industry. To the contrary, the nation's businesses are devoting more resources than ever before to environmental compliance,[8] and air and water quality is demonstrably improved in many regions from what it was just a decade ago.[9] Moreover, the increase in criminal cases in this area is not due to "midnight dumpers."[10] Businesses facing criminal prosecution can include Fortune 100 companies whose environmental violations are wholly accidental.[11]

The current emphasis on criminal enforcement is a reaction to increased public concern over the impact of contaminants on

6. CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, THE COMPLETE GUIDE TO HAZARDOUS MATERIALS ENFORCEMENT AND LIABILITY (1990 ed.).

7. *See id.*; *see also* Seager, *Ecology Bar Reaps Harvest of Odd "Tricks"*, San Francisco Daily J., Feb. 18, 1991 at 1, col. 1.

8. *See Businesses Look to Quality Management to Help Boost Environmental Compliance*, 21 Env't. Rep. (BNA) 1648 (Jan. 11, 1991).

9. *See Progress and Challenges: Looking at EPA Today*, 16 EPA J. 15-28 (1990); *see also* Wilcher, *Looking Forward in the Office of Water*, 16 EPA J. 60-64 (1990).

10. For a classic "midnight dumper" scenario, *see* Seager, *Longest Pollution Sentence is Ordered*, San Francisco Daily J., March 22, 1991, at 3, col. 3. The defendant, a transient who called himself "The Paint Man," was sentenced to 32 months' imprisonment after pleading guilty on March 21, 1991 "to loading 146 55-gallon drums of highly flammable paints, solvents and thinners into rented trucks and abandoning them in parking lots throughout Southern California last year." People v. Campbell, No. BA025490 (Cal. Sup. Ct. Apr. 30, 1991). *See also* United States v. Ward, 676 F.2d 94 (4th Cir. 1982) (intentional dumping of PCB-laden waste oil).

11. *See, e.g.*, United States v. Exxon Shipping Co., Nos. A-91-082-CV, A90-015-2CR, A-91-083-CV (D. Alaska), *reported in* 21 Envtl. L. Rep. Update No. 28 (Envtl. L. Inst.) (Oct. 14, 1991) (reporting approval of settlement and plea agreement in Valdez spill of more than $1 billion, including $125 million in criminal fines and restitution); *see also* United States v. Ashland Oil Co., 20 Env't Rep. Cas. (BNA) 1384 (Mar. 9, 1989) (criminal prosecution from negligence in causing oil spill).

public health and the environment, to more stringent and complex air, water and hazardous waste regulations, and to aggressive efforts by regulators and prosecutors to get the attention of industry by making polluters pay.[12] As United States Attorney General Richard Thornburgh has stated:

> The concept of "the environment as a Crime Victim" puts the issue of pollution in its proper context. It says that we believe as a nation and as prosecutors that a polluter is a criminal who has violated the rights and the sanctity of a living thing — the largest living organism in the known universe — the earth's environment.[13]

Few would dispute the importance of environmental protection or the use of criminal sanctions for environmental violations that are willful and intentional. But at present, there is no consensus about what constitutes an environmental crime, and virtually any environmental violation, however accidental, can become a criminal case. This uncertainty is attributable to four factors which attend, or are characteristic of, environmental violations. First, because environmental laws and regulations are exceedingly complex and stringent, and compliance is often influenced by events beyond a company's control, some violations are inevitable. Second, federal environmental crimes, and those of many states, require no proof of traditional criminal intent. Third, there is often tremendous media and public pressure for the prosecutor to take hard positions, regardless of the company's culpability or compliance history. Finally, until recently the Justice Department had failed to adopt guidelines to assist prosecutors in making uniform and fair decisions in determining whether to proceed criminally in enforcing environmental violations. On July 1, 1991, following considerable debate over the uncertainty of enforcement, the Justice Department published "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator." Although this publication is a step in the right direction, it fails to provide the guidance needed by prosecutors and industry,

12. *See* Starr & Kelly, *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10096 (Mar. 1990).

13. Remarks By Dick Thornburgh, Attorney General of the United States, Before the National Association of District Attorneys, Portland, Me. 1-2 (July 19, 1989).

or to clarify the criteria previously suggested by Justice Department Officials for Criminal Enforcement.[14]

This article will explore the interrelationship of these four factors, focusing in particular on the limited intent required to prove an environmental crime and the uncertainty this creates for American businesses and their environmental managers. Although companies can reduce the risk of exposure to criminal prosecution through effective environmental management, if the Justice Department's enforcement policy is intended to promote compliance, and not simply seek retribution, it must reduce the uncertainties surrounding criminal enforcement and provide incentives for good faith efforts at compliance.[15] Specifically, environmental crimes must be clearly defined so that companies and their management are not subject to criminal prosecution for accidents and for the acts of errant employees.

Part I of the article describes the criminal enforcement provisions of major federal environmental statutes, their interrelationship to regulatory provisions, and the extraordinary complexity and difficulty in ensuring compliance with them. Part II analyzes the role of four factors that are believed to contribute to the current uncertainty facing the regulated community and its managers regarding the types of environmental violations that may trigger criminal prosecution. Finally, Part III suggests ways in which companies can reduce the risk of criminal prosecution. The article concludes that ultimately compliance objectives can best be achieved with fair guidance from government on what constitutes an environmental crime.

I. CRIMINAL ENFORCEMENT PROVISIONS OF MAJOR FEDERAL ENVIRONMENTAL STATUTES

The principal federal statutes[16] providing criminal enforcement authority are the Federal Water Pollution Control Act (the "Clean

14. *See* notes 108-09, 111, 116 *infra*.

15. There is some recent evidence that EPA recognizes the importance of achieving compliance through voluntary, cooperative efforts with industry. *See* Reilly, *Seeking Voluntary Industry Action, to Ask Executives to Reduce Toxics*, INSIDE EPA, Vol. 12, No. 2 (1991); *New Initiative Will Be Significant Test for EPA's Pollution Prevention Plan*, INSIDE EPA, Vol. 12, No. 7 (1991).

16. *See* U.S. DEPARTMENT OF JUSTICE MANUAL, *supra* note 3, § 5-11.102, which identifies the principal statutes. The Environmental Crimes Section of the Justice Department's Environment and Natural Resources Division has authority to prosecute numerous other federal offenses involving environmental violations, including the Safe Drinking Water Act,

Water Act"),[17] the Clean Air Act,[18] the Toxic Substances Control Act,[19] the Resource Conservation and Recovery Act,[20] the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"),[21] and the Federal Insecticide, Fungicide and Rodenticide Act.[22] A summary of the criminal provisions of these statutes facilitates discussion of the ways in which some of them have been applied by prosecutors and the courts.

A. *The Clean Water Act*

The Clean Water Act makes it a crime to knowingly or negligently introduce a pollutant[23] into a navigable water[24] without a permit, or in violation of any effluent limitation, pretreatment standard, or permit condition.[25] Misdemeanor penalties apply to "negligent" violations, while "knowing" violations carry felony penalties of up to three years' imprisonment and a $50,000 fine per day of violation.[26] A third level of culpability, "knowing endangerment," carries the most severe penalties, providing for up to fifteen years' imprisonment, and fines of up to $250,000 for individuals and $1 million for corporations, where the violation would place another person in imminent danger of death or seri-

42 U.S.C. § 300f-300j (1988); the Rivers and Harbors Act, 33 U.S.C. § 401-49 (1988); the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1401-45 (1988); the Noise Control Act, 42 U.S.C. § 4901-18 (1988); the Atomic Energy Act of 1954, 42 U.S.C. § 2011-282; the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 791-98 (1988); the Deepwater Port Act of 1974, 33 U.S.C. § 1501-24 (1988); the Outer Continental Shelf Lands Act of 1954, 43 U.S.C. § 1334(a)(2) (1988); the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001-50 (1988); and the Hazardous Materials Transportation Act, 49 U.S.C. § 1801-12 and other scattered sections of 49 U.S.C. (1988). *See* U.S. DEPARTMENT OF JUSTICE MANUAL, *supra* note 3, at §§ 5-11.101-103.

17. 33 U.S.C.A. §§ 1251-76 (West 1986 & Supp. 1991).

18. 42 U.S.C.A. §§ 7401-42 (West 1983 & Supp. 1991).

19. 15 U.S.C.A. §§ 2601-29 (West 1982 & Supp. 1991).

20. 42 U.S.C.A. §§ 6901-87 (West 1983 & Supp. 1991).

21. 42 U.S.C.A. §§ 9601-57 (West 1983 & Supp. 1991).

22. 7 U.S.C.A. § 136-136(y) (West 1980 & Supp. 1991).

23. "Pollutant" is broadly defined to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal and agricultural waste." 33 U.S.C. § 1362(6) (1988).

24. "Navigable waters" has been interpreted to mean almost anything remotely connected to surface water — even seasonal surface water — without regard to actual navigability. *See* Leslie Salt Co. v. Froehlke, 578 F.2d 742, 754-55 (9th Cir. 1978).

25. 33 U.S.C.A. § 1319(c)(1)-(2) (West Supp. 1990).

26. *Id.*

ous bodily injury.[27] The Act also makes it a crime to knowingly make false material statements or representations in any application, record, report, plan, or other document filed or required to be maintained under the Act, or to knowingly tamper with any monitoring device or method required to be maintained under the Act.[28]

B. *The Clean Air Act*

The recently amended Clean Air Act provides criminal penalties for knowingly violating various regulatory provisions of the Act. Conduct for which criminal penalties may be imposed include violation of any applicable implementation plan, failure or refusal to comply with any emission standard or compliance order of the EPA Administrator, and the release of any hazardous air pollutant into the ambient air.[29] Penalties can include up to five years' imprisonment and fines of $50,000 per day of violation.[30] As in the case of the Clean Water Act, knowing releases of hazardous air pollutants resulting in endangerment of another person's life or serious bodily injury elevates the penalties to imprisonment of up to fifteen years and fines of $1,000,000.[31] Under the Clean Air Act, it is also a crime to knowingly make false statements on documents filed or required to be maintained, or to falsify, tamper with, or render inaccurate any monitoring device or method required to be maintained under the Act.[32]

C. *The Toxic Substances Control Act*

The Toxic Substances Control Act ("TSCA") provides criminal penalties of up to one year of imprisonment and fines of $25,000 per day of violation[33] for: (1) failing or refusing to comply with any rule or order issued under TSCA requiring testing of chemical substances or mixtures; (2) using for commercial purposes any chemical substance or mixture knowing that it was manufactured, processed, or distributed in commerce in violation of TSCA; and

27. 33 U.S.C.A. § 1319(c)(3) (West Supp. 1990).
28. 33 U.S.C.A. § 1319(c)(4) (West Supp. 1990).
29. 42 U.S.C.A. § 7413(c)(1) (West Supp. 1991).
30. *Id.* The Act also now provides misdemeanor penalties for "negligent" releases of hazardous air pollutants into the ambient air. *Id.* at § 7413(c)(4).
31. *Id.* at § 7413(c)(5).
32. *Id.* at § 7413(c)(2).
33. 15 U.S.C. § 2615(b) (1988).

(3) failing or refusing to establish or maintain records required by TSCA or permit access to or copying of them, or to submit reports, or permit entry for inspections required under TSCA.[34]

D. *The Resource Conservation and Recovery Act*

The Resource Conservation and Recovery Act ("RCRA"), perhaps the most complex of all federal environmental statutes, makes it a crime to: (1) knowingly transport or cause to be transported any hazardous waste to a facility without a permit; (2) treat, store, or dispose of any hazardous waste without a permit or in violation of a permit; (3) make a false material statement, representation or omission in any application, report or other document required under RCRA; or (4) transport or cause to be transported without a permit any hazardous waste.[35] Violations carry penalties of up to two to five years' imprisonment and fines of up to $50,000 per day of violation.[36] Like the Clean Water Act, RCRA provides penalties of up to fifteen years' imprisonment, and fines of up to $250,000 for individuals and $1 million for corporations, in the case of "knowing endangerment."[37]

E. *The Federal Insecticide, Fungicide and Rodenticide Act*

The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")[38] establishes misdemeanor penalties for knowing violation of regulatory provisions of the Act providing for registration and labelling of pesticides, including falsification and failure to submit required information.[39] FIFRA also prohibits knowing distribution of unregistered pesticides and knowing use of pesticides in a manner inconsistent with the product's labelling.[40] Violations carry penalties of up to one year imprisonment and a $50,000 fine.[41] The Act also expressly provides for vicarious liability of any person or entity based on the acts, omissions, or fail-

34. 15 U.S.C. § 2614(1)-(4) (1988).
35. 42 U.S.C. § 6928(d) (1988).
36. *Id.*
37. 42 U.S.C. § 6928(e) (1988).
38. 7 U.S.C.A. § 136-36(y) (West 1980 & Supp. 1991).
39. 7 U.S.C.A. § 136i(b) (West Supp. 1991).
40. *Id.*
41. *Id.*

ure of "any officer, agent or other person acting for or employed by" that person or entity, in violation of FIFRA.[42]

F. *The Comprehensive Environmental Response, Compensation, and Liability Act*

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[43] as amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"),[44] makes it a crime to knowingly falsify, destroy or "render unavailable or unreadable" any records required to be maintained under the Act or under EPA regulations promulgated pursuant to the Act.[45] CERCLA also imposes criminal penalties for failure to report a release of a hazardous substance,[46] and for submitting false claims for reimbursement of response costs from the Hazardous Substance Superfund.[47] Penalties for these violations include imprisonment for up to three years (five years for second offenses), and fines of up to $250,000 (individuals) or $500,000 (organizations).[48]

II. FACTORS CONTRIBUTING TO CURRENT UNCERTAINTY AS TO WHETHER AN ENVIRONMENTAL VIOLATION WILL BE SUBJECT TO CRIMINAL PROSECUTION

A. *Complexities of Environmental Compliance*

Criminal provisions of federal environmental statutes are broad, convoluted and complex. Compliance with the regulatory provisions therefore demands a high degree of technical and legal sophistication. As a result, even the most sophisticated and conscientious company will occasionally find itself out of compliance and at risk of criminal prosecution.

42. *Id.* at § 136i(b)(4); *see also* 7 U.S.C. § 2 (1988) (defining "person" as including "individuals, associations, partnerships, corporations and trusts").

43. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C.A. §§ 9601-57 (West 1983 & Supp. 1991)).

44. Pub. L. No. 99-499, 100 Stat. 1615 (1986) (codified as amended at 42 U.S.C.A. §§ 9601-57 (West 1983 & Supp. 1991)).

45. 42 U.S.C.A. § 9603(d) (Supp. 1991).

46. *Id.* at § 9603(b).

47. *Id.* at § 9612(b)(1); *see also* § 9611.

48. *Id.* at §§ 9603(b) & (d); § 9612(b)(1).

1. The Resource Conservation and Recovery Act

The complex and often convoluted analysis required to achieve compliance, and hence avoid criminal liability, under these statutes may be illustrated by the process of determining whether a material is a hazardous waste under RCRA. The process begins with the question of whether the material is a waste. RCRA defines waste to include any "solid waste" (including liquids and gasses),[49] which EPA defines as "discarded material,"[50] which is in turn defined as any material that is "abandoned," "recycled," or "inherently waste-like."[51] Each of these terms is also defined. A material is "abandoned" if it is "disposed of" (i.e. spilled, leaked, or otherwise placed into or on land or water so that any of its constituents may enter the environment or be emitted into the air or discharged to surface or groundwater) or if it is burned or incinerated, or accumulated, stored, or treated before or instead of disposal, burning or incineration.[52] The definitions of "recycled" and "inherently waste-like" materials are similarly complex.[53] It is therefore not difficult to understand why the United States Court of Appeals for the D.C. Circuit has branded the process of determining whether a material is a "solid waste" a "mind-numbing journey through RCRA."[54]

But this is not the end of the analysis. After determining whether the material is a "solid waste" under RCRA, the next step is to determine whether it is a "hazardous waste." The term is defined by RCRA as:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed.[55]

EPA has promulgated regulations for determining whether a solid waste fits the statutory definition for "hazardous waste". Under

49. 42 U.S.C § 6903(27) (1988).
50. 40 C.F.R. § 261.2(a) (1990).
51. 40 C.F.R. § 261.2(a)(2) (1990).
52. 40 C.F.R. §§ 260.10, 261.2(b) (1990).
53. 40 C.F.R. § 261.2(c), (d) (1990).
54. American Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987).
55. 42 U.S.C. § 6903(5) (1988).

the regulations, it is a "hazardous waste" if it is expressly listed by EPA or if it possesses characteristics of ignitability, corrosivity, reactivity, or toxicity, based on specific testing protocols and levels identified in the regulations.[56] The technical complexity of the statute leaves the most sophisticated corporations at risk of mischaracterizing some wastes and consequently transporting, treating, storing, or disposing of them in violation of RCRA.

2. The California Hazardous Waste Control Law

Many states have enacted similarly complex criminal enforcement provisions in environmental statutes.[57] In California, for example, the Hazardous Waste Control Law ("HWCL")[58] serves as the state counterpart to RCRA and provides district attorneys with analogous enforcement authority and penalties.[59] Although California's HWCL adopts RCRA's definitions of hazardous waste, it augments and modifies these definitions,[60] adding further to the existing complexity. HWCL requires businesses in California to perform yet another level of analysis to determine whether treatment, storage, transportation or disposal of a particular waste is regulated under federal law, state law, or both.

B. *Minimal Scienter Requirements for Criminal Liability*

Although RCRA, the Clean Water Act, the Clean Air Act and CERCLA require that felony violations be committed "knowingly," proof of traditional criminal intent is not required. Furthermore, since "knowledge" may be inferred from circumstantial evidence, criminal prosecution can be based on virtually *any* environmental violation, even if it is unintentional or it

56. 40 C.F.R. § 261.10-261.24 (1990); *see also* United States v. Hayes Int'l. Corp., 786 F.2d 1499, 1501 n.1 (11th Cir. 1986) (noting "some confusion [in the court] below concerning whether the wastes in this case qualified as listed wastes as well as characteristic wastes").

57. For a state-by-state compilation of environmental crimes, penalties, and intent requirements, see J. McElfish, *State Hazardous Waste Crimes*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,465, 10,467-77 (Dec. 1987).

58. CAL. HEALTH & SAFETY CODE § 25,189.5 (West Supp. 1990) (providing penalties of up to 3 years' imprisonment and fines up to $250,000 per day of violation for knowingly treating, storing, transporting or disposing, or causing the treatment, storage, transportation or disposal, of hazardous waste without a permit or in violation of a permit when death or serious bodily injury has resulted from the violation).

59. *Id.*

60. *See* CAL. HEALTH & SAFETY CODE § 25,117 (West Supp. 1990); 22 CAL. ADMIN. CODE tit. 22, §§ 66,680-99, 66,702-08 (1990).

stems from the acts or omissions of a single individual.[61] The relaxed standards for proof of *scienter* are evident in four recent court of appeals cases that address the *scienter* requirements under RCRA. A fifth case takes the contrary view, adopting a stricter standard.

In *United States v. Hoflin*,[62] the Ninth Circuit Court of Appeals considered whether a felony conviction for disposing of hazardous waste without a permit requires proof that the defendant had knowledge that a permit had not been obtained for the disposal, and that the waste was hazardous under RCRA.[63] The defendant was a public works director whose duties included maintenance of roads and the operation of a sewage treatment plant. Hoflin ordered his plant manager and employees to dispose of surplus paint by digging a hole on the grounds of the plant and burying the drums. Two years later, the plant manager reported the incident. The EPA recovered the drums, found leakage of paint into the soil, and determined that the paint contained hazardous wastes which, under RCRA, could only be disposed of at a permitted facility. No such permit had been obtained.[64]

On appeal, Hoflin claimed that he was not aware that the facility did not have a permit to dispose of the paint or that the paint was hazardous waste under RCRA. The Ninth Circuit affirmed his conviction, concluding that if "Congress intended knowledge of the lack of a permit to be an element . . . it easily could have said so."[65] The court concluded that under RCRA no evidence is needed to prove that the defendant knew that a permit was required, that no permit had been obtained, or that the waste was "hazardous" under the statute.[66] The statute requires only that

61. A corporation may be criminally liable for the acts and omissions of its employees, acting within the scope of their employment and intending at least in part to benefit the corporation; the employee's acts or omissions need not be approved by, or even known to, corporate management for the corporation to be charged with a crime. *See, e.g.*, United States v. Beusch, 596 F.2d 871 (9th Cir. 1979); *see also*, Harris & Cavanaugh, *Environmental Crimes and the Responsible Government Official*, 6 Nat. Resources & Env't 20-23 (Summer 1991). *But cf.* United States v. White, No. CR-90-228-AAM (E.D. Wash. Mar. 28, 1991) (corporate officer may not be held criminally liable solely for the environmental violations of his employees), *reported in Court Rejects Corporate Officer Liability in Criminal Prosecutions Under RCRA, FIFRA*, 21 Envt. Rep. (BNA) 2223-34 (Apr. 12, 1991).

62. 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990).

63. *Id.* at 1036-39.

64. *Id.* at 1035.

65. *Id.* at 1038.

66. *Id.* at 1037-39.

the "[d]efendant knew that the chemical wastes had the potential to be harmful to others or to the environment, or in other words, it was not an innocuous substance like water."[67]

In *United States v. Dee*,[68] the Fourth Circuit Court of Appeals reached a similar result. In *Dee*, defendants were civilian employees of the United States Army assigned to the Chemical Research, Development and Engineering Center at the Aberdeen Proving Ground in Maryland. All three had responsibility for operations and maintenance at the facility. On appeal of their convictions for illegally storing, treating and disposing of hazardous wastes under RCRA, the defendants contended, *inter alia*, that they did not "knowingly" commit the crimes inasmuch as they did not know that the chemicals they managed were hazardous wastes.[69] The defendants specifically claimed error in the trial court's jury instruction requiring a finding that "each defendant knew that the substances involved were chemicals," but expressly not requiring a finding that "the defendants knew that these chemicals were listed or identified by law as hazardous waste."[70]

The Court of Appeals affirmed, concluding that in a highly regulated industry, "anyone who is aware that he is in possession of [hazardous wastes] or dealing with them must be presumed to be aware of the regulation."[71] The court went on to conclude that, although the knowledge element of RCRA "does extend to knowledge of the general hazardous character of wastes," there is no requirement that a defendant know that the material is hazardous waste under RCRA.[72] The court found that it was error to instruct the jury that defendants had to know that the substances were chemicals without also requiring a finding that the defendants knew the hazardous nature of the chemicals, but this was harmless due to the "overwhelming evidence that defendants were aware that they were dealing with hazardous chemicals."[73]

The Eleventh Circuit reached a similar result in *United States v. Hayes International Corp.*.[74] The defendants in *Hayes* were acquit-

67. *Id.* at 1039.
68. 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).
69. *Id.* at 745.
70. *Id.*
71. *Id.*, quoting United States v. Int'l. Minerals and Chemical Corp., 402 U.S. 558, 565 (1971).
72. *Id.*
73. *Id.* at 745-746.
74. 786 F.2d 1499 (11th Cir. 1986).

ted, notwithstanding the verdict, of knowingly transporting hazardous waste to a facility without a proper permit.[75] The Court of Appeals reversed and remanded, with instructions to enter judgment in accordance with the verdicts of guilty.[76] The court acknowledged that, from the wording of RCRA, it is unclear "how far down the sentence [of RCRA Section 6928(d)] 'knowingly' travels."[77] Despite this ambiguity, the court concluded that "knowingly" requires that the defendant knew the waste was being treated, stored or disposed of, but not that the defendant knew that the waste was hazardous or that a permit was required under RCRA.[78]

In the most recent published opinion of a United States court of appeals on proof of intent under RCRA, the Fifth Circuit upheld the conviction and 41-month prison sentence of an individual defendant, James Sellers, on sixteen counts of illegally disposing of drums containing methylethylketone without a permit.[79] The drums were discovered in a rural area of Mississippi, beside a creek, and one drum was found to be leaking.[80] On appeal, Sellers contended *inter alia* that the court's instruction that the jury must find that "the Defendant knew what the wastes were . . . that is, paint and paint solvent waste" was in error.[81] Sellers had requested that the jury be instructed that it must find "that the Defendant knew or reasonably should have known that the substance was waste and that the waste could be harmful to persons or the environment if . . . improperly disposed of."[82]

The Court of Appeals found that Seller's requested instruction was incorrect as framed, since RCRA does not require that the defendant know that the waste would be harmful "if improperly disposed of."[83] Therefore, the Court concluded, Sellers' conviction should be upheld unless the district court's instruction was "plain error."[84] The Court concluded it was not. While acknowledging that other courts have required that the defendant know

75. *Id.* at 1500-01.
76. *Id.* at 1507.
77. *Id.* at 1503.
78. *Id.*
79. United States v. Sellers, 926 F.2d 410, 412 (5th Cir. 1991).
80. *Id.*
81. *Id.* at 414-16.
82. *Id.* at 415.
83. *Id.* at 417.
84. *Id.*

that the waste was hazardous or potentially harmful to persons or the environment, the Fifth Circuit found:

> It is clear that paint and paint solvent waste, by its very nature, is potentially dangerous to the environment and to persons. Thus, it should come as no surprise to Sellers that the disposal of that waste is regulated. The evidence presented at trial established that Sellers knew that the waste he was disposing included M.E.K., a paint solvent, and that this substance was extremely flammable. There can be no doubt that Sellers knew that the substance he was disposing of was potentially dangerous to humans and the environment. . . ."[85]

Therefore, the Court concluded, it was not plain error for the district court to have failed to instruct the jury that they must arrive at this finding.[86]

Only the Third Circuit has reached a contrary result. In *United States v. Johnson & Towers, Inc.*[87] the court reviewed the same provision of RCRA as in *Hayes*. The case involved a criminal prosecution of the corporation and two of its employees under RCRA and the Clean Water Act for draining solvents into a trench that led to a creek.[88] Reversing the district court's dismissal of the indictment, the Court of Appeals took the opportunity to clarify the "knowledge" requirement of RCRA. Unlike the court in *Hayes*, the Third Circuit concluded that "knowingly" modifies every element of the offense.[89] "At a minimum," the court reasoned, "the word 'knowingly' which introduces subsection (A), must also encompass knowledge that the waste material is hazardous," and that a permit is required.[90] The Court of Appeals remanded the case directing that the jury be instructed, "*inter alia*, that in order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit."[91]

Although there is arguably a split of authority in the courts of appeals, the clear majority of the Circuit Courts that have addressed this issue have concluded that proof of *scienter* under RCRA requires only that the defendant "knew" that the dis-

85. *Id.*
86. *Id.*
87. 741 F.2d 662 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).
88. *Id.* at 663-64.
89. *Id.* at 668.
90. *Id.*
91. *Id.* at 669.

charge, disposal, storage, treatment or other activity described by the statute had occurred and that the waste had the potential to be harmful to persons or to the environment.[92] There is *no* requirement of proof that the defendant knew: (1) that the material was "hazardous waste" under RCRA, a "pollutant" under the Clean Water Act, or otherwise a regulated material; (2) the permit requirements of applicable environmental statutes; (3) whether the facility had a permit; or (4) any other proscription or requirement of the statute at issue.

Although the Supreme Court has not yet considered the question with respect to environmental crimes,[93] constitutional due process challenges to the diminished "intent" requirement are unlikely to be successful since public health and welfare crimes are *malum prohibitum* and require no proof of intentional conduct.[94] The California HWCL criminal provisions[95] have been upheld by California courts against constitutional due process challenges. In *People v. Martin*,[96] the Second District Court of Appeal concluded that HWCL, as a public welfare statute, required no proof of intent whatsoever.[97]

92. *See, e.g.*, United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3635 (U.S. March 18, 1991) (No. 90-877); United States v. Greer, 850 F.2d 1447, 1450-53 (11th Cir. 1988), *reh'g denied*, 860 F.2d 1092 (11th Cir. 1988) (en banc).

93. The Court denied certiorari in the most recent reported case on the subject. United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3635 (U.S. March 18, 1991) (No. 90-877).

94. *See* United States v. Park, 421 U.S. 658, 672 (1975); United States v. Dotterweich, 320 U.S. 277, 280-81 (1943). *But cf.* Liparota v. United States, 471 U.S. 419, 424 n.7 (1985) (noting the inherent ambiguity of the "knowledge" requirement in criminal enforcement of complex regulatory statutes) (quoting W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 27 (1972)); Fike, *A Mens Rea Analysis for the Criminal Provisions of the Resource Conservation Act*, 6 STAN. ENVTL. L.J. 174, 195 (1986-87) (concluding that the legislative history, language, and judicial interpretations of RCRA indicate Congress' intent to define a [constitutionally permissible] general intent offense). *See also* Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses - A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 467-69 (1981); Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses — Another View*, 35 VAND. L. REV. 1337, 1343-45 (1982).

95. CAL. HEALTH & SAFETY CODE § 25,189.5 (West Supp. 1990) (providing liability where the defendant knew or should have known that its conduct was in violation of the statute).

96. 211 Cal. App. 3d 699, 259 Cal. Rptr. 770 (1989).

97. *Id.* at 713, 259 Cal. Rptr. at 780.

C. *Prosecutorial Discretion*

1. Role of the Media

The uncertainty of whether an environmental violation will be prosecuted criminally is compounded further by the potential for overzealous prosecution in cases involving large corporations, community activism, or public media attention. Too often, the determination seems based more on the media attention given a particular environmental accident than on the conduct of the company involved.[98]

Although the prosecutor's options are more limited once criminal charges have been brought in a high profile case, decisions are still fraught with uncertainty. Any decision to dismiss charges or to accept a plea in exchange for a less than maximum penalty will generally have to be justified at the highest levels within the agency as well as to the public and the media. Moreover, even when a plea agreement is reached that is satisfactory to the agency, a court may decide to reject the settlement.[99]

2. Enforcement Policy Guidelines

The determination of whether an environmental violation will be criminally prosecuted is complicated still further by the lack of policy guidelines. To date, the Justice Department has failed to publish formal guidelines or approval procedures to assist prosecutors in determining which environmental violations should be enforced criminally.[100] Instead, on July 1, 1991, in response to criticism that the Justice Department's enforcement policies provided a disincentive to voluntary reporting and auditing,[101] the

98. *See, e.g., supra* note 11.

99. *See* Wall St. J., April 25, 1991, at A3, col. 2 (reporting the federal district court's rejection of Exxon's plea agreement with the Justice Department, providing for a $100 million criminal fine as part of settlement payments totaling $1.1 billion for the 1989 Valdez oil spill, as "not adequate"); *see also*, United States v. Pennwalt, 20 Env't Rep. Cas. (BNA) 703 (W.D. Wash. August 9, 1989) (district court refuses to accept corporation's plea to criminal charges under the Clean Water Act until corporation's chairman personally enters the plea on behalf of the corporation).

100. In fact, the Justice Department Manual provides U.S. Attorneys with virtually unbridled authority to "prosecute cases under [federal environmental statutes] which are not developed or referred to them from a federal agency." U.S. DEPARTMENT OF JUSTICE MANUAL § 5-11.306 (Oct. 1, 1988). This procedure stands in stark contrast to the formal guidelines and approval procedures adopted by the Justice Department with respect to criminal enforcement of other regulatory statutes, such as antitrust violations. *See id.* at § 7-5.400-420.

101. *See* note 108 *infra*.

Justice Department published "Factors in Decisions on Criminal Enforcement for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator."[102]

The introduction to the Justice Department's "Factors" makes it clear that the purpose of this publication is to encourage "self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community" and to "give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and to ensure that such discretion is exercised consistently nationwide."[103] To those ends, the factors to be considered include whether a violator has (1) made voluntary disclosure; (2) cooperated in giving all relevant information concerning the violation; (3) taken preventative measures and adopted compliance programs to prevent future noncompliance; (4) pervasive noncompliance; (5) undertaken internal disciplinary actions against individual employee violators; and (6) taken sufficient action in remedying any ongoing noncompliance.[104]

Although these criteria are facially valid and provide some guidance, many are structured to be self-cancelling and provide no limitation on prosecutorial discretion or guidance to the regulated community. For example, the discussion of voluntary compliance makes clear that "[a] disclosure is not considered to be 'voluntary' if that disclosure is already specifically required by law, regulation or permit."[105] Few environmental violations are not required by statute, regulation or permit to be disclosed.[106] Therefore, this factor provides little guidance to prosecutors or comfort to the regulated community that disclosure of a violation, no matter how timely and complete, will in fact be considered "voluntary."

As a result of these and other caveats in the Justice Department's factors, the regulated community is still without guidance

102. *See* 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 VIOLATORS, 1 (July 1, 1991) [hereinafter FACTORS IN DECISION].

103. *Id.*

104. *Id.* at 3-6.

105. *Id.* at 3.

106. *See*, pp. 314-18, *supra*.

on whether a violation, however accidental, may lead to a criminal prosecution of the company and its managers.

Justice Department officials have stated informally that additional criteria are employed when making criminal enforcement decisions, and that they tend to focus on two general categories of violations for criminal enforcement: "1) activities totally outside the regulatory system (the "midnight dumper"); and 2) activities subverting the regulatory system by acts of concealment or fraud (knowing circumvention of legal requirements in order to save money in compliance costs)."[107] The true breadth of the second category is revealed by the parenthetical attached to it. Fomer Assistant Attorney General Richard Stewart has offered a further explanation that it includes targeting "responsible corporations that are largely complying, but are short-cutting, the requirements of the law."[108] Mr. Stewart has also explained that the factors considered in determining whether to pursue criminal enforcement of this category of defendants include their prior enforcement or compliance history; their prior criminal record, if any; the adequacy of civil remedies; the need to deter future similar violations; the degree of harm; and the degree of criminal culpability.[109] Yet, the Justice Department failed to include guidelines to this effect when it published its Factors in Decisions, and consequently, these factors are not widely known to prosecutors or industry.

There is no reason to delay providing more definitive guidance documents to prosecutors and the regulated community concerning the types of violations that will be handled criminally. The Justice Department has developed formal guidelines and approval procedures for determining whether to proceed criminally with respect to other regulatory violations. For example, in federal antitrust cases, U.S. Attorneys seeking to bring criminal indictments must submit prosecutive memoranda summarizing the facts and legal issues underlying the alleged violation, for review and approval by the Antitrust Division.[110] Moreover, prosecutors need

107. *See* Stewart, *supra* note 1, at 39.

108. Richard B. Stewart, Remarks at the COLUM. J. ENVTL. L. Symposium, "Crimes Against the Environment: Current Policies and Future Trends in Environmental Criminal Enforcement" (March 8, 1991) [hereinafter Remarks of Richard B. Stewart]. (Mr. Stewart is a former Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice).

109. *Id.*

110. U.S. DEPARTMENT OF JUSTICE MANUAL § 7-5.420 (Oct. 1, 1988).

not fear that the guidelines will be used as a shield against criminal prosecution. The law is clear that Justice Department policy guidelines cannot be raised as a defense to criminal prosecutions arguably falling outside them.[111] Instead, the Justice Department recognized this in publishing its Factors in Decisions, and expressly asserted that they are non-binding on prosecutors.[112]

The factors suggested by former Assistant Attorney General Stewart should be adopted and augmented[113] as guidelines for determining whether to proceed with criminal enforcement. This will not only provide needed guidance to the regulated community but will give prosecutors means to justify their position to the public and the media in a particular case.

III. Measures for Reducing the Risk of Criminal Prosecution

Despite present uncertainties of environmental enforcement, there are measures that companies can and should undertake to reduce the risk of violations, minimize the possibility that the government will pursue criminal enforcement, if an enforcement action is brought, and enhance opportunities for a more favorable disposition of an enforcement action.[114] The key is to establish a record of "good faith," through effective environmental management and training, and to coordinate this effort with public and government relations programs. The Clean Water Act specifically authorizes consideration of good faith efforts at compliance, among other factors, in determining civil enforcement decisions and penalties.[115] Justice Department officials have informally stated that "good faith" may also be considered in determining whether to proceed civilly or criminally in enforcement of envi-

111. *See* United States v. Snell, 592 F.2d 1083, 1087 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979).

112. Factors in Decisions *supra* note 102, at 14-15.

113. In addition to the factors suggested by former Assistant Attorney General Stewart, *see supra* notes 108-09 and accompanying text, the guidelines should include a general limitation on prosecution of corporations based on acts of individual employees which are unauthorized and inconsistent with company policy.

114. Measures for avoiding liability are addressed in articles by other participants in the Symposium, also published in this issue of the Colum. J. Envtl. L.

115. 33 U.S.C. § 1319(d) (1988).

ronmental laws, as well as in determining the government's position on the appropriate nature or amount of penalties.[116]

Developing and maintaining a record of "good faith" requires a commitment of resources. Adopting formal training programs for managers and employees responsible for compliance is an important step in this process, and in promoting compliance. Good faith also requires adoption of document retention policies for ensuring compliance with all recordkeeping and reporting requirements of environmental statutes. Periodic environmental audits of all facilities, by outside consultants or an in-house team of engineers and industrial hygienists, are also essential to determine potential problem areas, provided management is committed to implementing procedures and repairing or upgrading equipment identified as in need of correction. The Justice Department has stated that violations identified as a result of audits will not be subject to criminal penalties if they are reported and corrected promptly and in good faith. Guidelines on this narrow issue have been promised by former Assistant Attorney General Stewart.[117]

Finally, effective environmental management requires coordination of public and government relations programs with environmental compliance and worker safety efforts, to ensure that the company's commitment of resources and good faith efforts are known to the regulators, the community, and the nation.

CONCLUSION

With or without more definitive guidelines, the use of criminal enforcement as a means of regulating compliance with environmental laws is here to stay. Compliance with complex regulations and stringent standards will cost American businesses and consumers increasing sums of money. But noncompliance costs far more in terms of its direct impact on the bottom line, the prospect of severe penalties for the company and its management, and in indirect costs from adverse public and government relations. A commitment to environmental compliance is simply a matter of good business. A commitment to informing prosecutors and the

116. Walker Smith, Remarks at Executive Enterprise Conference, "California Water Compliance 1991" (Nov. 15-16, 1990). (Ms. Smith is the Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice).

117. Remarks of Richard B. Stewart, *supra* note 108-09.

regulated community of the "rules of the game" is simply a matter of good government.