ENVIRONMENTAL CRIMINAL CASES: THE DAWN OF A NEW ERA

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I. INTRODUCTION

In recent years, there has been a great deal of publicity concerning the current waste disposal crisis. Compounding the problem is the continuing illegal disposal of various hazardous substances by waste haulers and waste-generating corporations. Although such violations of environmental laws and regulations have routinely drawn monetary penalties in the past, authorities have come to believe that many of these violators increasingly accept such fines as part of their operating budgets. Often, the fines are less than the prohibitive costs of proper legal disposal. In order to deter this dangerous conduct, law enforcement officials at both the state and federal levels have begun to seek not only criminal indictments against individual corporate officials, but also larger monetary penalties from the polluting corporate entities themselves. This article addresses recent significant judicial decisions in federal and state courts relevant to the prosecution of corporations and corporate officials for violations of environmental criminal laws, sentencing developments, pending prosecutions, and recent legislative and executive action in the area of environmental criminal cases.

Over the past several years, the number of such indictments and the imposition of prison sentences for environmental crimes increased dramatically. Since the beginning of fiscal year 1983 the Department of Justice has recorded 703 indictments and 517 convictions were obtained.[1] A total of $56 million in federal fines has been assessed, and more than 316 years of jail time has been imposed.[2] Approximately thirty-three percent of these convictions and indictments were secured in the last two years and they returned more than two dollars in restitution and fines for every dollar spent on criminal enforcement.[3] In fiscal year 1990 alone,

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[1] *Justice Announces 1990 Record Year for Pursuing Environmental Violators*, 5 TOXICS L. REP. (BNA) 831 (Nov. 28, 1990).

[2] *Id.* According to Attorney General Richard Thornburgh, "More than half of the individuals convicted for environmental crimes [in 1990] were given prison sentences, and 84% of these are actually serving real jail time." *Id.*

[3] *Id.* While the Justice Department could not determine whether the increase in law enforcement decreased the volume of environmental crimes, Assistant Attorney

the Justice Department returned 134 indictments and convicted 95 percent of the defendants.[4]

II. RECENT JUDICIAL DECISIONS

Raising many unique problems in the field of criminal law, there continues to be a steady expansion of environmental criminal prosecutions against middle and upper-level management personnel for the illegal activities of their corporations. Recent cases have resulted in murder convictions against corporate officials, rejection of constitutional due process and equal protection challenges, and an expansion of the trend toward strict liability, as seen in *United States v. Park*.[5]

A. Corporate Activity Leading to Employee Deaths

A new era of corporate criminal liability was born in July of 1985 with the murder conviction of three corporate officials in *People v. O'Neil*,[6] the much publicized "Film Recovery" case. Although *O'Neil* did not involve a prosecution under an environmental statute, it has become a landmark decision in the area of corporate criminal liability due to the serious nature of the charges and the twenty-five year sentences imposed by the court.[7] *O'Neil* involved the death of a worker at Film Recovery Systems, Inc., a company that required its employees to work over vats of cyanide used to extract silver from X-ray film. The workers, many of whom could not speak English, were not informed that they were dealing with poisonous substances nor

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General Richard Stewart noted that there was no reason to believe that the increased number of convictions was due to an increased number of crimes. *Id.*

4 *Id.*

5 421 U.S. 658 (1975). In *Park*, the President of Acme Markets, Inc., was charged with a violation of the Federal Food, Drug, and Cosmetic Act. According to the indictment, food which had been shipped through interstate commerce was being sold through a Baltimore warehouse that was contaminated with rodents. *Id.* at 660. In finding that the Act did not "make criminal liability turn on 'awareness of some wrongdoing' or "conscious fraud,' " Chief Justice Burger posited "Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution." *Id.* at 672-73.

6 194 Ill. App. 3d 79, 550 N.E.2d 1090 (Ill. App. 1 Dist. 1990).

7 *Id.* at 88, 550 N.E.2d at 1092. The individual defendants were "officers and high managerial agents" of Film Recovery Systems, Inc. Each defendant was sentenced to 25 years and fined $25,000 for the murder convictions and also received concurrent sentences of 364 days for each of the fourteen counts of reckless conduct. *Id.* at 88, 550 N.E.2d at 1092-93.

were they provided with proper protective equipment. Because the court found that the same conduct was used to support charges with mutually exclusive mental states, the convictions were overturned and the case remanded for a new trial.[8]

The issue of whether a corporation can be tried for murder arises when corporate activities lead to death. In *Virginia v. Orkin Exterminating Co.*,[9] a state law manslaughter case was dismissed because under the common law theory of manslaughter a company was not considered a "person." The case stemmed from a misapplication of the pesticide Vikane which led to the death of a Virginia couple one week after their home was exterminated by Orkin employees. The two workers responsible for the application were charged with involuntary manslaughter but pled guilty to the lesser offense of unlawful use of pesticides and each received a suspended sentence of twelve months.[10]

In addition to the state criminal prosecution, a federal grand jury indicted Orkin on five counts of knowingly using a registered pesticide contrary to its labeling.[11] According to the district clerk's office, the company was convicted at trial and sentenced to two years probation, 2000 hours of community service, and a $500,000 fine, $150,000 of which was suspended. An appeal was taken from the conviction but subsequently dismissed by agreement among the parties.

B. Mental Culpability

The mental culpability required for conviction of an environmental crime was confronted by the United States Court of Appeals for the Eleventh Circuit in *United States v. Hayes International*

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[8] *Id.* at 97, 550 N.E.2d at 1098-1100. Despite the remand, the court found that sufficient evidence existed to support the convictions. The court found that the record supported the contentions that the air inside the plant made breathing difficult, caused nausea, vomiting and other illnesses, that ventilation was poor, that the employees were not informed of the dangers of cyanide and other gases, and that the defendants maintained direct control over these conditions. *Id.* at 96-97, 550 N.E.2d at 1102.

[9] 2 TOXICS L. REP. (BNA) 1300 (1988).

[10] *See* Virginia v. Robertson, 2 TOXICS L. REP. (BNA) 1300 (1988); Virginia v. Mullins, 2 TOXICS L. REP. (BNA) 1300 (1988).

[11] United States v. Orkin Exterminating Co., 2 TOXICS L. REP. (BNA) 1300 (April 21, 1988). The indictment charged the corporation with allowing the occupation of a fumigated site prior to the completion of the aeration operation; the removal of a warning sign before the aeration was completed; failure to follow pillow and mattress covering procedures, failure to use the warning agent, chloropicrin, before fumigation; and the failure to use approved, self-contained breathing devices during application. *Id.*

Corp.[12] *Hayes* focused on the degree of knowledge necessary for a conviction under the criminal penalties provision of the Resource Conservation and Recovery Act (RCRA).[13] In *Hayes*, the defendant corporation arranged for a private hauler to dispose of the waste the company was generating and the company was led to believe that the hauler was recycling the waste.[14]

Under the regulations effective at the time of the illegal disposal, the type of waste generated by the corporation required that a hauler with a valid permit dispose of the waste, unless it was being recycled.[15] The hauler used by Hayes did not have such a permit and did not recycle the waste. As a result, both the corporation and the officer who made the agreement were found guilty by a jury of violating RCRA. The district court, however, granted the defendants' motion for a judgment notwithstanding the verdict, because the corporate officer did not "know" that the hauler lacked a permit.[16]

The Eleventh Circuit reversed and remanded, holding that the Act was "not drafted in a manner which makes knowledge of legality an element of the offense."[17] Reading the statute in such a light, the court explained that it would not be a defense to claim that they did not know that the paint waste was a hazardous waste within the meaning of the regulations; nor would it be a defense to argue ignorance of the permit requirement."[18] The court,

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12 786 F.2d 1499 (11th Cir. 1986).

13 42 U.S.C. §§ 6901-6987 (1976). The question before the court concerned the degree of knowledge required for a conviction under the criminal penalties provision of the act, § 6928(d)(1) (Supp. III 1985). The provision provides, in pertinent part:

> Any person who (1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit . . . shall upon conviction, be subject to a fine of not more than $50,000 for each day, or imprisonment not to exceed five years . . . or both.

Id. at 6928(d)(1). It was undisputed that the hauler did not have the required permit. *Hayes*, 786 F.2d at 1501.

14 *Id.* The defendant corporation produced two hazardous waste products relevant to the case: drainage from airplane fuel tanks and solvents used to clean paint guns. *Id.*

15 *Id.* Hazardous waste was not subject to regulation if it was "beneficially used or re-used [sic] or legitimately recycled or reclaimed." *Id.* (quoting 40 C.F.R. § 261.6(a)(1), *superseded* effective July 5, 1985, 50 Fed. Reg. 665).

16 *Id.* at 1500. The district court held that the government failed to present sufficient evidence to support the knowledge element. The court of appeals, noting that a district court order setting aside a jury verdict deserves no deferential value, conducted its own review of the evidence. *Id.*

17 *Id.* at 1503.

18 *Id.*

however, did find that knowledge of the permit status of the facility was required under the statute.[19] Thus, because the requirement of knowledge of the permit status was severely limited, the Eleventh Circuit in *Hayes* opened the door for additional prosecutions based on strict liability-type grounds.[20] The Eleventh Circuit appears to have created a presumption that those who generate and dispose of hazardous waste possess knowledge of all relevant regulatory provisions. *Hayes* also allowed the jurors to infer guilty knowledge from the defendant's deviation from prescribed procedures of which the defendant was presumed aware.[21]

The mental culpability of environmental offenders can have a dramatic impact on the severity of the fines imposed. *United States v. Protex Industries*[22] involved the first conviction of a corporation under the "knowing endangerment" provisions of

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[19] *Id.* at 1503-04. After noting that United States Supreme Court precedent offered conflicting views regarding "how far down the sentence 'knowingly' travels," *id.* at 1503, the Eleventh Circuit stated:

> In this case, the congressional purpose indicates knowledge of the permit status is required. The precise wrong Congress intended to combat through section 6928(d) was transportation to an unlicensed facility. Removing the knowing requirement from this element would criminalize innocent conduct; for example, if the defendant reasonably believed that the site had a permit, but in fact had been misled by the people at the site.

Id. at 1504 (citing Liparota v. United States, 471 U.S. 419 (1985)). Cf. United States v. Hoflin, 880 F.2d 1033, 1037-39 (9th Cir. 1989) (director of public works department can be convicted under RCRA without the government having established that he knew that the city did not obtain or possess a permit to dispose of hazardous waste).

[20] In reaching this conclusion, the court held "knowledge does not require certainty . . . . a defendant acts knowingly if he wilfully fails to determine the permit status of the facility." *Id.* at 1504 (citing Boyce Motor Lines v. United States, 342 U.S. 337 (1952)).

[21] *Id.* at 1504. The court specifically stated:

> The statute at issue here sets forth certain procedures transporters must follow to ensure that wastes are sent only to permit facilities. Transporters of waste presumably are aware of these procedures, and if a transporter does not follow the procedures, a juror may draw certain inferences, where there is no evidence that those who took the waste asserted that they were properly licensed, the jurors may draw additional inferences. Jurors may also consider the circumstances and terms of the transaction. It is common knowledge that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at an unusual price or under unusual circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permit facility.

Id.

[22] 874 F.2d 740 (10th Cir. 1989).

RCRA.[23] Protex Industries, Inc. was convicted of knowingly endangering three employees who worked in the company's drum recycling facility where drums which previously contained paints, solvents and pesticides were cleaned. Government experts at trial testified that two of the three employees suffered from psycho-organic syndrome as a result of their exposure to various workplace substances.[24] Protex was also found guilty of violating the Clean Water Act[25] and was fined $7.6 million. All but $440,000 of the fine was suspended on the condition that Protex pay for the cleanup of the property.[26]

In *United States v. Tumin*,[27] Albert S. Tumin became the first individual convicted under the "knowing endangerment" provision of RCRA.[28] Tumin was originally targeted as an illicit drug manufacturer when a chemical supplier, who had agreed to report suspicious chemical purchases, notified the federal Drug Enforcement Administration that Tumin purchased three drums containing 165 gallons of ethyl ether, commonly used in cocaine production.[29] Tumin eventually abandoned the drums in a residential area in Rockaway, New York. This led to Tumin's conviction for two violations of RCRA: knowing endangerment, and knowing transport of hazardous waste to an unlicensed facility. Under the knowing endangerment count, Tumin was convicted of possessing knowledge at the time he abandoned the ethyl ether that he was creating a substantial danger of death or seri-

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[23] *Id.* at 741. The "knowing endangerment" provision provides in pertinent part:

> Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than fifteen years, or both. A defendant that is an organization shall, upon conviction . . . be subject to a fine of not more than $1,000,000.

42 U.S.C. § 6928(e).

[24] *Protex*, 874 F.2d at 742. Specifically, the government experts testified that the employees suffered from psychoorganic syndrome, and a permanent increased risk of developing cancer. The evidence demonstrated that inadequate safety provisions failed to protect the employees from toxic chemicals. *Id.*

[25] 33 U.S.C. §§ 1251-1376 (1986).

[26] *Protex*, 874 F.2d at 741 n.1. *See also Cocaine Charge Fails to Materialize; Justice Gets Hazardous Waste Conviction*, 2 TOXICS L. REP. (BNA) 1399, 1400 (May 18, 1988).

[27] 2 TOXICS L. REP. (BNA) 1399 (April 13, 1988).

[28] *Id.* Conviction under the knowing endangerment provision is punishable by a fine of not more than $250,000 and up to fifteen years in prison.

[29] *Id.* According to the Department of Justice, while ethyl ether has legitimate purposes, it is both an essential element of cocaine production and an unusual item to be bought in large quantities. *Id.*

ous bodily injury.[30]

The first "convictions" under the knowing endangerment provisions[31] of the Clean Water Act were obtained in *United States v. Borowski*.[32] In *Borowski*, Borjohn Optical Technology, Inc. and its president were found guilty of illegally dumping nitric acid and nickel plating waste into a Massachusetts public sewer system. According to the Department of Justice, Borowski and Borjohn officers ordered employees, mainly illiterate Polish refugees, to use plastic buckets and dump contaminated water into the sewer system exposing the employees to dangerous levels of nitrogen dioxide, nickel, and nitric acid.[33] In what the United States Attorney's office termed the stiffest federal penalty issued for an environmental crime, Borowski was sentenced to twenty-six months in prison and a $400,000 fine, while the company was fined $50,000.[34]

C. *Criminal Discovery*

A California appeals court recently held that a corporate defendant in a criminal case may be forced to produce corporate records and information when requested by the prosecution. In *People v. Superior Court (Keuffel and Esser Co.)*,[35] a corporate defendant was charged with dumping excessive amounts of zinc into the local sewer system. The defendant company opposed a discovery motion by filing for a writ of prohibition in Superior Court. Although California prohibits discovery in criminal cases involving individuals,[36] *Keuffel and Esser Co.* was the first case to deal with the issue with regard to corporate defendants.

In ruling that a corporation is not protected by criminal discovery rules, the court, citing *Bellis v. United States*,[37] held that the

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[30] *Id.* According to the Department of Justice, when ethyl ether mixes with air it becomes highly explosive. Its flammable, volatile nature can cause it to be activated by any type of spark. The abandonment presents "a grave danger to human health and the environment." *Id.*

[31] 33 U.S.C. § 1319(c)(3) (Supp. 1987).

[32] 5 TOXICS L. REP. (BNA) 21 (May 23, 1990).

[33] *Id.*

[34] *Id.* According to an official of the Environmental Protection Agency, the stiff sentence "underscores the seriousness of these offenses. The government will not standby while companies knowingly put their employees at risk." *Id.*

[35] 181 Cal. App. 3d 785, 227 Cal. Rptr. 13 (Cal. App. 2 Dist. 1986), *review denied*, August 21, 1986, for order of Court of Appeals vacating writ of prohibition.

[36] *See* People v. Collie, 33 Cal. 3d 43, 48, 177 Cal. Rptr. 458, 460, 634 P.2d 534, 536 (1981).

[37] 417 U.S. 85, 100-01 (1974). The *Bellis* Court held that no privilege against self-incrimination "can be claimed by the custodian of corporate records, regard-

fifth amendment right against self-incrimination does not extend beyond individuals.[38] Although this privilege was first denied to corporate bodies in 1906 in the landmark Supreme Court decision of *Hale v. Henkel*,[39] the continued exposure of corporations to civil discovery rules in criminal prosecutions could present serious constitutional concerns in light of the present trend toward holding corporate officials personally responsible for environmental crimes. The future, therefore, will call for new and more aggressive tactics on the part of defense attorneys in the face of the court's willingness to uphold prosecution discovery requests.[40]

D. Choosing Penalty Provisions

In *Commonwealth v. Parker White Metal, Inc.*,[41] the defendants, who were charged with illegal disposal of hazardous waste, argued that their equal protection and due process rights were violated by allowing the prosecutor to choose between different penalty provisions for the same unlawful conduct.[42] In denying

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less of how small the corporation may be." *Id.* at 100 (citations omitted). *See also* People *ex rel* Clancy v. Superior Court, 39 Cal. 3d 740, 745, 218 Cal. Rptr. 24, 705 P.2d 347 (1985). Justice Marshall expressly limited the holding by noting "[t]his might be a different case if it involved a small family partnership or . . . if there were some other pre-existing relationship of confidentiality among the parties."

38 *Keuffel and Esser*, 227 Cal. Rptr. at 15, 182 Cal. App. 3d at 788.

39 201 U.S. 43 (1906). Writing for the majority in *Henkel*, Justice Brown posited:

> While an individual may lawfully refuse to answer incriminating questions unless protected by immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

Id. at 75.

40 In at least one case where the government used reports filed with the state by a commercial incinerator of hazardous waste to trigger a criminal investigation into the company's operating procedure for completing manifests, the defense went on a pre-indictment discovery mission by tapping into the state agency which maintains the hazardous waste manifests. The defense was able to stop the investigation by showing the Attorney General that other similarly situated New Jersey companies had completed manifests using the non-hazardous code for what was arguably hazardous waste. Thus, instead of waiting for a grand jury presentation and subpoena for corporate files, the defense attorney was able to gather information, present it to the Attorney General, and solve the problem without jeopardizing the value of the corporation's publicly traded stock. The state thereafter forwarded a letter to the corporation which acknowledged that it was dropping all criminal charges. *See State Investigation into Shipping Practices Dropped After Examination of Manifest Files*, 2 TOXICS L. REP. (BNA) 370 (Aug. 26, 1987).

41 512 Pa. 74, 515 A.2d 1358 (1986).

42 *Id.* at 79, 515 A.2d at 1360. The defendants argued that the Solid Waste Management Act created arbitrary classifications and vested unbridled discretion in the prosecutor, thereby violating their federal and state constitutional rights. *Id. See*

the equal protection claim, the court found that:

> [T]here is no equal protection infirmity in an act merely because it allows the prosecutor or enforcing agency to choose between two different penalty provisions for similar unlawful conduct and that the mere *possibility* that a prosecutor *might* selectively enforce the provisions of an act for improper motives does not invalidate that act.[43]

The court also denied the defendants' due process argument, finding that the statute was not overly vague, despite the fact that the defendants were exposed to possible civil, criminal, and equitable penalties.[44]

E. Non-Preemption of State Prosecution by OSHA

Several state courts have held that the federal Occupational Safety and Health Act of 1970 (OSHA)[45] does not preempt the criminal prosecution of corporations and their officers under state assault, battery, reckless conduct or reckless endangerment laws. For example, the Illinois Supreme Court in *People v. Chicago Magnet Wire Co.*,[46] a case involving the exposure of 42 workers to "poisonous and stupefying" substances, held that OSHA did not prevent Illinois from prosecuting the defendants under state aggravated battery and reckless conduct statutes.[47] In overturning

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Solid Waste Management Act of July 7, 1980, P.L. 380, No. 97 §§ 103-1003, 35 P.S. § 6018.101 to 6018.1003 (Purdon Supp. 1986). Specifically, the defendants charged that sections 606(a) and 606(b) of 36 PA. STAT. § 6018 imposed "different degrees of punishments for identical statutory violations." *Id.* at 82-83, 515 A.2d at 1362 (quoting Brief for Appellees at 9-10). The court found that section 606 established a wide range of penalties ranging from summary offenses (carrying prison terms of no more than thirty days and fines of $100-$1000) to first degree felonies (with prison sentences of two to twenty years and fines up to $50,000 a day per violation). *Id.* at 85, 515 A.2d at 1363.

[43] *Id.* at 86-87, 515 A.2d at 1364 (emphasis in original).

[44] *Id.* at 94, 515 A.2d at 1368. In finding it "obvious" that sections 606(a) and (b) did not violate the defendants' due process rights, the court posited that:

> Appellees were *fully* informed by the terms of the Act of exactly what conduct was proscribed as well as the full range of civil, criminal and equitable remedies and penalties to which they might be subjected for violating a substantive provision of the Act. It is of no constitutional significance that appellees were not advised in advance as to which of the two applicable penalty ranges the prosecutor or agency would choose to prosecute them under for these violations (alleged) of the Act, for a defendant has no right to a particular sentence within the range authorized by the statute.

Id. at 94, 515 A.2d at 1368 (citations omitted) (emphasis in original).

[45] 29 U.S.C. § 651, (1982).

[46] 126 Ill.2d 356, 534 N.E.2d 962 (Ill. 1989), *cert. den.*, 110 S. Ct. 52 (1990).

[47] *Id.* at 364, 534 N.E.2d at 965.

a dismissal of the indictment, the court posited that state criminal laws are a forceful and valuable supplement to OSHA which insure that egregious conduct is sufficiently punished and that workers receive adequate protection.[48]

Similarly, in *People v. Pymn Thermometer Corp.*,[49] the New York Court of Appeals upheld the criminal convictions of Park Glass Machinery, Pymn Thermometer, William Pymn, the President of both corporations, and Edward Pymn, Jr., the Vice President and plant manager, for assault and reckless endangerment of workers exposed to mercury.[50] The defendants argued that allowing state intervention in the workplace health and safety without an OSHA-approved plan contravened congressional intent that OSHA oversee state regulatory action and that, therefore, OSHA impliedly preempted the state criminal action. In rejecting this argument, the high court of New York held that OSHA does not pre-empt state prosecution of employers for criminal activity in the workplace.[51] Writing for the court, Chief Judge Wachtler reasoned that the comprehensiveness of OSHA did not presume that Congress intended to occupy the field.[52]

F. Knowledge Inferred From One's Presence in Business

The gravity with which environmental criminal prosecutions are viewed is evident in *Minnesota v. McAlister*.[53] The Minnesota Court of Appeals held that the trial court erred in accepting the defendants' pleas to lesser included offenses. The trial court had ruled that the state hazardous waste statute,[54] under which the

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48 *Id.* at 373, 534 N.E.2d at 969.

49 76 N.Y.2d 511, 561 N.Y.S.2d 687, 563 N.E.2d 1 (1990). *See also* New York v. Pymn Thermometer Corp., 5 TOXICS L. REP. (BNA) 680, 680-81 (Oct. 24, 1990) (discussing generally People v. Pymn Thermometer Corp.).

50 *Pymn*, 96 N.Y.2d at 515, 561 N.Y.S. at 688, 563 N.E.2d at 2. *See also Pymn Thermometer*, 5 TOXICS L. REP. (BNA) at 680-81.

51 *See Employer Appeals Criminal Convictions, Argues OSH Act Pre-empts State Prosecution*, 4 TOXICS L. REP. (BNA) 1233 (April 4, 1990) (discussing generally New York v. Pymn Thermometer Corp.).

52 *Pymn*, 76 N.Y.2d at 522, 561 N.Y.S.2d at 692, 563 N.E.2d at 6. *See also* Pymn Thermometer Corp., 5 TOXICS L. REP. at 681. In commenting on the decision, New York Attorney General Robert Abrams stated that "the highest Court in our state has delivered a significant victory for worker safety and the right of the State to prosecute 'intolerable and morally repugnant' behavior by employers." *Id.*

53 399 N.W.2d 685 (Minn. App. 1987).

54 MINN. STAT. § 115.071(2)(b)(1987). The subdivision provided, in pertinent part:

> Any person who knowingly, or with reason to know, disposes of hazardous waste in a manner contrary to any provision [of the hazardous

defendants were charged, was unconstitutionally vague.[55] Similar to the Eleventh Circuit opinion in *United States v. Hayes International Corp.*[56] the Minnesota court held that the trier of fact could infer knowledge on the part of those engaged in the business. In addition, the court held that the state did not have to prove that the substances listed under the statute were hazardous, but merely that the substances were listed in the statute.[57]

G. *Broad Construction of Criminal Statutes*

The New York Appellate Division exemplified the recent trend toward broadly construing the criminal provisions of environmental statutes in *People v. J.R. Cooperage.*[58] The appellate division reviewed the record below to determine if the record contained sufficient evidence to support the jury's finding that the defendants were guilty of attempting to cause commercial waste haulers to dispose of or possess hazardous waste without authorization.[59] The court, in affirming the verdict, rejected the strict construction of the statute urged by the defendants. In supporting a more liberal construction, the court looked to the legislative purpose, which called for violations of the state hazardous waste laws to be deterred to the maximum practicable ex-

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waste code] or any standard or rule adopted in accordance with those chapters relating to disposal, is guilty of a felony.

Id.

A separate subdivision defined "hazardous waste" as:

[A]ny refuse, sludge, or other waste material or combination or refuse, sludge or other waste material in solid, semi-solid, liquid, or contained gaseous form which because of its quantity, concentration, physical, 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 life or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. Categories of hazardous waste include, but are not limited to: explosives, flammables, oxidizers, poisons, irritants, and corrosives. Hazardous waste does not include source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended.

MINN. STAT. § 116.06(13)(1987).

55 *McAlister*, 399 N.W.2d at 689-90. The court did require the state to show "that the substances disposed of exhibit the requisite properties to be included on the [hazardous waste] list. *Id.* (citation omitted).

56 786 F.2d 1499, 1501 (11th Cir. 1986).

57 *McAlister*, 399 N.W.2d at 690.

58 128 A.D.2d 7, 515 N.Y.S.2d 262 (A.D.2d 1987), *aff'd*, 72 N.Y.2d 579, 535 N.Y.S.2d 353, 531 N.E.2d 1285 (1988).

59 128 A.D.2d at 9-10, 515 N.Y.S.2d at 263.

tent and redressed in relation to their gravity.[60]

In light of these recent decisions, it is clear that criminal enforcement of environmental laws is on the upswing across the United States. It is likely that this trend will continue as long as prosecutors or enforcement agencies find that such action generates deterrence.

III. Sentencing Developments

Apart from the various substantive issues that have been confronted in recent environmental criminal prosecutions of corporations and corporate officers, a wide variety of sentences have been issued in a number of cases. Although the range of available penalties is usually fixed by statute, several courts have created innovative sentencing programs that include newspaper advertisements and the donation of funds to public education on the subject of environmental crime. In addition to these novel penalties, the courts have shown increased willingness to issue jail sentences, however short, in an effort to increase the deterrent effect of environmental enforcement measures.

One approach employed recently by United States District Judge Jack Tanner was to have the Chief Executive Officer of Pennwalt Corporation, which was pleading guilty to charges of polluting a Tacoma, Washington waterway, appear before the court to enter the plea. Judge Tanner was reported to have said that his reason for requiring the Chief Executive Officer to enter the plea personally was to send a message to companies and their officers that they will be held accountable for environmental disasters.[61]

A. Individual Responsibility

While the deterrent effect created by the criminal prosecution of middle and upper level management personnel may ultimately be greater than that generated by monetary fines, there also exists a danger that such corporate officials could irreparably damage their professional reputations and lose their means of livelihood for simply following company policy. It may be easy to justify punishing a corporate official who personally directs the illegal disposal of hazardous waste, but it is more difficult to prosecute a person in a position of responsibility whose only

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60 *Id.* at 11-12, 515 N.Y.S.2d at 265 (citation omitted).

61 *CEO Enters Guilty Plea for Pennwalt Pollution*, The Star Ledger, August 10, 1989, at 48, col. 3.

choice is to pollute or to become unemployed. At the present time, it appears that the courts feel secure with the value of increased deterrence generated by criminal prosecutions, although the great majority of successful cases have occurred where the personal responsibility of the individual defendants has been fairly easy to establish.

In a recent "midnight dumping" prosecution, a New Jersey jury convicted a West Virginia man, the president of the now defunct Graves Resources Management, Inc. (which had been licensed by New Jersey to collect and transport hazardous waste), on charges of knowing abandonment, illegal disposal, and illegal storage of hazardous waste.[62] That case marked the first time the FBI issued an interstate fugitive warrant for the apprehension of an individual wanted for violations of state environmental laws.[63] The defendant, Albert F. Ingram, was sentenced to ten years in prison for violating New Jersey's version of the RCRA statute.[64] According to state prosecutor Ed Neafsey, this was the harshest penalty ever imposed for an environmental crime in New Jersey.

Ingram was charged with dumping the hazardous waste at various locations in southern New Jersey during 1982-83 and was arraigned on a ten-count indictment in 1984 after fighting extradition from West Virginia, where he faced similar charges. The trial was originally scheduled for January 1987; however, the defendant failed to appear and a bench warrant was issued. The bench warrant led the New Jersey Attorney General's Office to seek the aid of the FBI in returning Ingram to New Jersey. The invocation of FBI jurisdiction, through the employment of an interstate flight warrant used to reach fugitives wanted for violent

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62 State v. Ingram, 226 N.J. Super. 680, 686, 545 A.2d 268, 271 (Law Div. 1988) (two counts of indictment dismissed due to lack of territorial jurisdiction). *See* 3 TOXICS L. REP. (BNA) 1400 (March 23, 1988).

63 The Star Ledger, March 11, 1988, at 18, col.1.

64 N.J. STAT. ANN. §§ 13:1E-1 to 13:1E-48. The prosecution was initiated pursuant to N.J. STAT. ANN. § 2C:17-2(d)(1) (1978) which proscribes the causing or risking of widespread damage or injury. by:

> (d) A person who knowingly or recklessly fails to take reasonable measures to prevent or mitigate widespread damage commits a crime of the fourth degree if: (1) [h]e knows that he is under an official, contractual or other legal duty to take such measures. . . .

N.J. STAT. ANN. § 2C:17-2(d)(1) (1978). The New Jersey Criminal Code was subsequently amended in 1985 to provide specifically for environmental polluters. *See* N.J. STAT. ANN. § 2C:17-2(2) (1985).

New Jersey state prosecutor Edward Neafsey considered the ten year sentence the harshest penalty ever imposed for an environmental crime in the state.

crimes, is further evidence of the new hard line that the government is pursuing in dealing with environmental crimes.

Middle management corporate officials have also been singled out for prosecution. For example, in *United States v. International Nutronics, Inc.*,[65] Eugene O'Sullivan, the former Vice President and Radiation Safety Officer at the International Nutronics plant in Dover, New Jersey, was sentenced to two years probation for his involvement with a spill of radiation-contaminated water. Convicted of nine criminal counts, O'Sullivan faced up to thirty-five years in jail and a $35,000 fine. At the time of sentencing, Assistant United States Attorney Jacqueline Wolff admitted that O'Sullivan "will no longer be able to get employment in this field, which is all that he knows."[66] It appears that prosecutors fully realize any criminal conviction, regardless of the resulting sentence, is sufficient to destroy the career of the convicted official.

Environmental prosecutions, however, are not limited to upper or middle level management. In *United States v. Carr*,[67] the defendant, a civilian maintenance supervisor for the United States Army who directed work crews to improperly dispose of waste cans of paint, was found guilty of failure to report the hazardous release to the appropriate Federal authorities.[68] The Second Circuit found that the legislature intended the reporting requirements of CERCLA to reach persons of relatively low rank if those persons were positioned to prevent, detect and abate the release of hazardous substances.[69]

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65 1 TOXICS L. REP. (BNA) 850 (December 4, 1986).

66 *Id.* at 851.

67 880 F.2d 1550 (2d Cir. 1989).

68 *Id.* at 1550-51. Carr was convicted under § 103 of the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9603 (1982 & Supp. IV 1986). Under § 103, any person "in charge of a facility" which releases a proscribed amount of a hazardous substance is guilty of a crime if he fails to report the release to the designated federal agency. *Id.* at 1550 (quoting 42 U.S.C. § 9603). The district court judge issued a jury instruction that the defendant could be considered "in charge" of the facility if he maintained any degree of supervisory control. *Id.* at 1551.

69 *Id.* at 1554. Relying on the statutory interpretation imposed by the Fifth Circuit in United States v. Mobil Oil Corp., 464 F.2d 1124 (5th Cir. 1982), the Second Circuit held that operators of the offending facility have the opportunity to timely discover releases, control the activities that cause the pollution, and maintain the capacity to abate and prevent the damage to the environment. The court found that a more restrictive statutory interpretation "would only 'frustrate congressional purpose by exempting from the operation of the [statute] a large class of persons who are uniquely qualified to assume the burden imposed by it.'" *Id.* (quoting *Mobil Oil*, 464 F.2d at 1127).

B. Gross Violations

The willingness of courts to punish severely those who grossly violate environmental laws was exemplified in the state prosecution of *Pennsylvania v. Fiore*.[70] Fiore was convicted of 53 criminal counts resulting from the illegal dumping of 1.2 million gallons of toxic leachate into a local river and was sentenced to six to twelve years in prison and a $200,000 fine.[71] *Fiore* involved extensive intentional criminal activity,[72] and the severity of the sentence indicated a recognition that environmental pollution is a crime of the most serious nature.

In *United States v. Wells*,[73] the owner of Wells Metal Finishing Inc. and his company were found guilty of nineteen counts of discharging industrial waste water containing illegally high concentrations of cyanide and zinc into the public sewer system.[74] While the company, which had declared bankruptcy, did not receive a sentence, Wells, the president and owner, was sentenced to a $60,000 fine and fifteen months in a federal penitentiary.[75]

C. Corporate Probation

While it is possible for a corporate official to receive probation as part of a criminal sentence, the United States Court of Appeals for the First Circuit in *United States v. Interstate Cigar Co., Inc.*,[76] ruled that a sentence of probation for a corporate entity itself is excessive punishment. Although *Interstate Cigar* did not involve an environmental crime, but rather a charge of mail fraud, it has been considered the leading case on corporate probation. Finding that the maximum penalty under federal law[77] for mail fraud was either a $1000 fine or imprisonment of not

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70 Pa. Ct. Com. Pls. Allegheny County, No. 850-8740 (April 10, 1987).

71 *Id.*

72 Fiore was subsequently charged with conspiracy to commit the murder of a State Department of Environmental Resources official.

73 4 TOXICS L. REP. (BNA) 1219 (March 22, 1990).

74 The illegal dumpings, which spanned a two-year period between February 1987 and February 1989, were found to be in violation of the Clean Water Act. *Id.* According to EPA officials, the waste discharge, averaging 14,400 gallons a day, contained cyanide and zinc levels 20 times more than the permissible Federal limits. *Id.*

75 *Id.* In calling Wells' illegal discharges "serious violations" of the Clean Water Act, EPA Regional Administrator Julie Belaga emphasized "[w]e cannot and will not allow any company or individual to get away with such irresponsible actions." *Id.* The EPA called Wells sentence "the longest jail term ever handed down for an environmental crime." *Id.*

76 801 F.2d 555 (1st Cir. 1986).

77 18 U.S.C. § 1341 (1982).

more than five years, or both, the First Circuit ruled that because the corporate entity could not serve a jail sentence, it could also not be put on probation.[78] The maximum penalty facing the company was, therefore, a $1,000 fine.

The recurring modern trend, however, has been to disregard the persuasive authority of *Interstate Cigar* and allow corporate probation. In *United States v. Collins*,[79] an Alabama district court sentenced Welco Plating, Inc. to five years probation and ordered it to pay for the cleanup costs associated with the contaminated areas.[80] Welco was convicted of violations of the RCRA, CERCLA, and the Clean Water Act stemming from the illegal disposal of liquid electroplating wastes between 1978 and 1987.[81] In *United States v. Central Transport Inc.*,[82] the court sentenced the corporate defendant to pay one million dollars in fines for illegally discharging hazardous waste directly into the Charlotte, North Carolina sewer system. The fine was later suspended in lieu of a two year probation during which the Company was required to implement a plan to clean up both the polluted lagoons and the contaminated ground water.[83] The decisions in *Collins* and *Central Transport Inc.* exemplify the trend away from *Interstate Cigar* by allowing for corporate probation.

D. Innovative Sentencing

Although the meting-out of prison sentences and the imposition of stiff fines in environmental prosecutions generate a deterrent effect, several state courts have gone further and required that the corporation and/or the convicted corporate official take affirmative steps to publicize the gravity of the environmental

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78 The court chose to read the statute literally noting that "we do not think it desirable to endorse imaginative new ways of expanding sentencing power". *Interstate Cigar*, 801 F.2d at 556-57. The court was persuaded by Federal law which allowed probation as a substitute for other punishments, a survey of federal sentences which used corporate probation only in lieu of other statutory penalties, scholarly authorities which advocated or implied the use of corporate probation only as a substitute for statutory fines or imprisonment, and the recent amendment of federal statutory laws not yet in effect. *Id.*

79 2 TOXICS L. REP. (BNA) 1342 (April 25, 1988).

80 EPA officials estimated the total cost to be more than $1.3 million. *Id.*

81 *Id.* Both the owner and the company were charged with the illegal transportation and dumping of hazardous waste into several Jackson County, Alabama rivers and creeks. In addition to the corporate punishment, the owner was personally sentenced to eighteen months in jail, five years probation, a $200,000 fine, and community service in excess of three hundred hours. *Id.*

82 4 TOXICS L. REP. (BNA) 1362 (March 5, 1990).

83 *Id.* at 1363.

crime. *Wisconsin v. Doyle*[84] and *Wisconsin v. Doyle Handymark Corp.*[85] involved the prosecution of a painting company and its president for hazardous waste crimes. The president was fined $10,000 and sentenced to ten days in jail for his involvement while the corporation was fined $90,000 and ordered to run quarter-page announcements in local Wisconsin newspapers encouraging compliance with environmental laws while admitting its own disregard of the same laws. A Pennsylvania court pursued a similar course in *Pennsylvania v. Suburban Publisher Inc.*[86] when it allowed a corporation to enter the local Accelerated Rehabilitative Disposition Program after it agreed to pay for both the waste cleanup and the education of the printing industry regarding compliance with waste disposal laws. Most recently, in *United States v. Central Transport, Inc.*[87] a North Carolina federal court ordered a defendant to place an advertisement in the local newspaper apologizing for its non-compliance with federal law and the pollution of the local sewer system.[88]

Another example of innovative sentencing involved federal bid-rigging charges for garbage collection services by one of New Jersey's largest sanitation companies. Judge Alfred J. Lechner of the United States District Court of New Jersey sentenced two owners of Atlantic Disposal to community service one day a week for five years, picking up garbage at New Jersey military bases. The judge stressed the importance of tailoring the punishment to the crime.[89] Even though this case did not involve illegal hazardous waste disposal, it may, nonetheless, serve as precedent in environmental criminal prosecutions because it involved the closely related business of sanitation services.

E. Stiff Penalties Despite Guilty Pleas

Even where corporate officials have pleaded guilty to charges brought against them, some courts have chosen to impose stiff sentences. Two of the longest sentences to date were imposed against two Georgia executives who pleaded guilty to RCRA violations in *United States v. Harwel.*[90] The former president of a waste treatment company received three years in prison

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84 Wisc. Cir. Ct., Juneau County, No. 86-CF-52 (September 3, 1987).
85 Wisc. Cir. Ct. Juneau County, No. 86-CF-53 (September 3, 1987).
86 Luzerne County Court, Pennsylvania, No. 780-1987 (April 9, 1987).
87 4 TOXICS L. REP. (BNA) 1362 (March 5, 1990).
88 *Id.* at 1363. *See supra* notes 76-77 and accompanying text.
89 The Star Ledger, March 20, 1988, at 1.
90 N. Dist. of Georgia, No. 85-28R (January 5, 1987).

while another defendant, the former chief of operations and one-time employee of the Georgia Environmental Protection Division of the Department of Natural Resources, received an eighteen month sentence. These men had not only directed the illegal disposal of toxic waste, but also falsified information provided to state and federal authorities. Similarly, in *United States v. Unichem International, Inc.*,[91] the defendant corporation pleaded guilty to three felony charges under RCRA and agreed to pay a fine of $1.25 million, the largest ever imposed for RCRA criminal violations.[92]

F. Sentencing Guidelines

The United States Sentencing Commission *Guidelines Manual* contains seven guidelines that deal specifically with environmental criminal offenses.[93] The vast majority of environmental crimes are categorically sentenced under two guidelines: § 2Q1.2 — "Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification;" and § 2Q1.3 — "Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification." Because of the inability to provide appropriate sentences for both individual and corporate environmental crime violators, attacks have been made calling for reform of the sentencing guidelines.[94]

Presently pending in the comment stage are proposed amendments to the United States Sentencing Commission *Guidelines Manual*, "Chapter Eight — Sentencing of Organizations."[95] These proposed organizational guidelines, the first to cover corporate sentencing, contain a comprehensive remedial scheme ranging from the imposition of criminal fines[96] and probation[97] to community service.[98] The only proposed section dealing di-

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91 5 TOXICS L. REP. (BNA) 104 (May 31, 1990).

92 *Id.* Unichem International, Inc. was charged with transporting, storing, and disposing of the toxic substances carbon disulfide, acetone, and ethylbenzene in violation of the federal RCRA laws. The company also faced the possibility of being placed on corporate probation pending the outcome of an environmental audit of its facilities. *Id.* at 104-05.

93 United States Sentencing Commission, *Guidelines Manual* §§ 2Q1.1-2Q2.1 (November 1989).

94 *See* Sharp & Shen, *The (Mis)Application of Sentencing Guidelines to Environmental Crimes*, 5 TOXICS L. REP. (BNA) 189 (July 11, 1990) (summarizing the criticisms and proposed reforms).

95 55 Fed. Reg. 46,600, 46,601 (proposed Nov. 5, 1990).

96 *Id.* at 46,603-09, §§ 8C1.1-8C5.18.

97 *Id.* at 46,609-10, §§ 8D1.1-8D1.4.

98 *Id.* at 46,602, § 8B1.3.

rectly with environmental crimes specifically allows for an upward departure when "the offense presented a threat to the environment of a kind, or to a degree, not adequately taken into account by the applicable offense guideline."[99] Public comment on the proposed guidelines ended on January 10, 1991, and the proposed guidelines must have been submitted for Congressional approval by May 1, 1991. If Congress does not reject the Sentencing Commission proposals within 180 days of receiving them, "Chapter Eight" will become law. Both prosecutors and defense attorneys alike await this final decision by Congress with great anticipation because of its effect on the future of corporate criminal environmental prosecutions.

IV. PROSECUTIONS UNDER SELECTED STATUTES

A. Federal Water Pollution Control Act (Clean Water Act)[100]

In *United States v. Woeck,*[101] a former president, two officers, and a superintendent of the Maine Power and Equipment Company were charged with dumping toxic wastes into local Washington State lakes and rivers in violation of the Clean Water Act.[102] The company and the three officers pleaded guilty to lesser charges on twenty-six counts. The individuals all faced maximum fines of $100,000 each and up to one year in prison while the company was potentially liable for a $300,000 fine.[103] In *United States v. Cumberland Wood and Chair Corp.*[104] a Kentucky furniture company, a plant manager, and the corporate president were charged with multiple criminal violations of the Clean Water Act, exposing them to potential fines of up to four million dollars and maximum individual prison sentences of three years on each count.[105]

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99 *Id.* at 46,608, § 8C5.4.

100 33 U.S.C. § 1251 (1981).

101 1 Toxics L. Rep. 787 (December 1, 1986).

102 *Id.* at 788. The 115-count indictment against the corporation and the four individuals included charges that the defendants routinely submerged dry docks, covered with toxic wastes, into the Duwamish River and Lake Union in Washington. Most of the waste was generated by paint overspray, sandblasting, and old paint caused during ship repair. *Id.*

103 *Id.* The government dismissed all charges against the superintendent because he was not an officer of the corporation. *Id.* According to the offices of Federal Magistrate Judge Philip Sweigert, the three individual defendants were each placed on three years probation and sentenced to five days in jail and three hundred hours of community service.

104 5 TOXICS L. REP. (BNA) 595 (September 19, 1990).

105 *Id.* The indictment, which did not state the specific type of waste, alleged that

B. *Safe Drinking Water Act*[106]

In the first criminal conviction obtained for a knowing and wilful violation of the Clean Water Act, a Michigan oil company and its vice president, Edmund O. Woods, were charged with tampering with four underground wells in an effort to prevent the EPA from detecting violations. In *United States v. Jay Woods Oil Co.*,[107] the EPA discovered the violations while conducting a routine inspection to determine if the underground injection wells were leaking pollutants into the groundwater.[108] The company was fined $4000 and Woods was sentenced to three months in jail and nine months probation.

C. *Resource Conservation and Recovery Act of 1976 (RCRA)*[109]

In *United States v. Leigh Industries Inc.*,[110] a corporation and its president were sentenced in the U.S. District Court for the District of Colorado on charges of failing to notify the EPA following a release of hazardous substances and dumping hazardous waste without a permit. The company and the president pleaded guilty to violations of RCRA by knowingly disposing of toxics and corrosives. The president was sentenced to two years probation, fined $10,000, and ordered to give three lectures to professional organizations on the implications of disobeying hazardous waste laws.[111] In *United States v. Sellers*,[112] the first sentence handed down in Mississippi for polluting the environment, the defendant was sentenced to forty-one months in prison without parole and three years probation for RCRA violations.[113] Most recently, in

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the company illegally discharged industrial refuse into Lake Cumberland in violation of the Clean Water Act. *Id.*

106 42 U.S.C. § 201; 201; 300f to j-10

107 18 ENV'T REP. (BNA) 502 (Feb. 13, 1987).

108 *Id.* The company injected saltwater into the ground in order to bring the oil to the surface. *Id.*

109 42 U.S.C. § 6901-6987 (1976).

110 No. 87-CR116 (D. Colo. Aug. 14, 1987).

111 *Id.*

112 4 TOXICS L. REP. (BNA) 1278 (March 14, 1990).

113 The indictment charged that Sellers dumped 16 drums, each containing 55 gallons of mineral spirits and methyl ethyl ketone mixed with paint, into the Camp Breach Creek in a rural area of Mississippi. Sellers allegedly picked up the waste from the New Jersey-owned Trident Marine Company in Violet, Louisiana.

State officials also determined that Sellers was in violation of state hazardous waste laws but chose not to prosecute due to the federal violations. In addition to the prison sentence and probation, Sellers was also required to pay a $800 fine and the clean up costs around the dump site.

United States v. Pure Gro Co.,[114] a federal grand jury indicted Pure Gro Co. in what the EPA called the first RCRA knowing endangerment charge for the illegal disposal of pesticides.[115]

D. Ocean Dumping Act[116]

In the first criminal case brought under the Ocean Dumping Act, a federal grand jury indicted a Houston area chemical company, its Norwegian parent, and nineteen individuals on charges of dumping toxic chemicals in to the Gulf of Mexico. In *United States v. Odjell Westfal-Larsen (USA), Inc.*,[117] a thirty-seven count indictment charged the defendants with shipping toxic chemicals with the intent to dump the material into ocean waters. The company denied the allegations and cited highly technical interpretations and conflicting overlapping state and federal regulations as the basis of the indictment. A directed verdict for the defendants on the Ocean Dumping Act violations was ordered by the trial court. The verdict is currently on appeal, however, and as of this writing, the Fifth Circuit has not rendered its decision.

E. State Hazardous Waste Statutes

In the 1987 case of *California v. Lorentz and Lorentz Barrel and Drum Co.*,[118] a state criminal complaint charged a drum recycling company and its owner with ten violations of the California Hazardous Waste Control Act. Pleading guilty to all ten illegal storage and handling of hazardous waste charges, the owner was sentenced to five years imprisonment with a three year suspended sentence, fined one million dollars, and ordered to pay up to $100,000 in restitution to residents living in the area surrounding the factory. The state court also fined the corporation one million dollars.[119]

In *Harmon v. Commonwealth*[120] the former operator of United Hospital Services, a New Jersey hospital waste disposal company, was fined $3000 and sentenced to three consecutive six to twelve month prison terms for illegally dumping in Bucks County, Pennsylvania "red bag" waste containers obtained from New York hospitals. The bankrupt disposal company was fined $125,000

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114 5 TOXICS L. REP. (BNA) 595 (Sept. 19, 1990).
115 *Id.*
116 33 U.S.C. § 1401 (1972).
117 No. H220 (S.D. Texas Sept. 3, 1987).
118 No. C86-39578, Santa Clara County (Cal. Mun. Ct. July 22, 1987).
119 *Id.*
120 119 Pa. Commw. 1, 546 A.2d 726 (1988).

for six violations of the Pennsylvania Solid Waste Management Act. The corporation was under contract with several New York hospitals to transport and dispose the waste to legal incinerators. The bags, containing syringes, test tubes, and specimen jars, were found at a former dump site in Nockamixon Township, Pennsylvania. A cleanup was undertaken by the Pennsylvania Department of Environmental Resources and the cost was borne by the New York hospitals who contracted with United Hospital Services.[121]

The state of Washington obtained the first conviction under the Washington Model Toxics Control Act in *Washington v. Gordon*.[122] In *Gordon*, the defendant illegally dumped hydrochloric acid, lead acetate, acrylonitrile, sodium hydroxide, and sodium cyanide near the Pacific Ocean coastline.[123] After pleading guilty to the illegal disposal charge, the defendant was sentenced to thirty days in jail and ordered $10,000 in waste cleanup costs.[124]

F. Racketeer Influenced, Corrupt Organizations Act (RICO)[125]

The April 26, 1988 federal grand jury indictment of MacDonald & Watson Waste Oil Co. marked the first time a racketeering charge was brought in a federal hazardous waste prosecution. In addition to the RICO counts,[126] the company and its officers were also charged with the illegal transportation, disposal, and failure to report the release of hazardous sub-

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121 See Pennsylvania v. Harmon, 2 TOXICS L. REP. (BNA) 515 (Sept. 9, 1987). On appeal, Harmon argued the penalties imposed by the trial court resulted in a misapplication of the sentencing guidelines. Noting that "[d]ifferent and more severe penalty provisions prevail where hazardous waste . . . is concerned," the appellate court disagreed. *Harmon*, 119 Pa. Commw. at 14-15, 546 A.2d at 733, 737. The court sanctioned the trial judge's use of aggravating factors, such as the defendant's continued collection of hospital waste despite the lack of a proper disposal method, failure to appreciate the gravity of the offense, and the hazard to the community and public health, as within legitimate judicial discretion. *Id.* at 13-14.

122 5 TOXICS L. REP. (BNA) 412 (August 13, 1990).

123 *Id.* The chemicals dumped by the defendant are commonly combined to make the illegal drug methamphetamine. *Id.*

124 *Id.*

125 18 U.S.C. § 1961 (1978).

126 The indictment charged that both the company and its president conducted a series of mail fraud violations and obstructed justice in violation of Federal RICO laws. United States v. MacDonald & Watson Waste Oil Co., 2 TOXICS L. REP. (BNA) 1342 (April 26, 1988). Four employees and two other companies were also charged with mail fraud violations for allegedly assuring customers that MacDonald & Watson, despite lacking a state permit, was able to legally dispose of contaminated soils. *Id.*

stances.[127] Prior to trial, certain counts of the indictment, including the RICO violation, were severed. MacDonald & Watson was convicted on several hazardous waste charges and fined $175,000, a portion of which was suspended on the condition that the money be paid to Rhode Island to facilitate clean-up of the damages caused by the company.

The president of MacDonald & Watson was convicted on two counts of transporting hazardous waste. A sentence of eighteen months imprisonment was imposed on the first count while the sentence on the second count was suspended. Additionally, the president was ordered to pay a $50,000 fine, and was also barred from participating in the waste business during the period of his suspended sentence.[128]

A subsequent indictment and conviction under RICO came down on June 8, 1990 in *United States v. Paccione.*[129] Angelo Paccione and Anthony Vulpis, together with the carting and recycling companies they controlled, were convicted of illegally dumping asbestos and other waste in a massive illegal landfill which they owned and controlled. The defendants were each given twelve year prison sentences and ordered to pay twenty-two million dollars as forfeited profits.[130] It was the stiffest sentence ever imposed for an environmental crime in New York.

V. PENDING PROSECUTIONS

New Jersey appears to be at the forefront in prosecuting environmental criminals. A prime example is the indictment of the

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127 The company was charged with three violations of RCRA and one violation of CERCLA. *See* United States v. MacDonald & Watson Waste Oil Co., 4 TOXICS L. REP. 957 (Dec. 22, 1989). The charges stemmed from the illegal transport of toluene-contaminated soil from the Boston-based Master Chemical Co. to the Naragansett Improvement Co., located in Providence, Rhode Island. Naragansett, an asphalt manufacturer, did not have a license to store or handle hazardous materials and used the contaminated soil to either make asphalt to ship the soil to an unpermitted site. *Id.* Naragansett was convicted of RCRA violations for treating, disposing and storing the hazardous waste without a permit and was fined $50,000. *Id.* at 958.

128 Both the company and the individual defendants are presently appealing the convictions. The RICO count in the indictment was dismissed after trial as part of a plea agreement in which the corporate entity, MacDonald and Watson, pleaded guilty to mail fraud and surrendered its license to deal in hazardous wastes (no source for this information).

129 5 TOXICS L. REP. (BNA) 346 (June 8, 1990).

130 Egan, *Mob Looks at Recycling and Sees Green*, N.Y. TIMES, Nov. 28, 1990, at B1, col. 1.

Ciba-Geigy Corp.[131] Although the thirty-five count indictment against four middle-management officials of the company's Toms River manufacturing plant was dismissed in July 1987 because of improprieties in the grand jury process, that dismissal was reversed by a New Jersey appellate court in January 1988.[132] The New Jersey Supreme Court granted certification to review the Appellate Division opinion, but the appeal has since been dismissed by agreement among the parties. The dismissal of the appeal came after a second indictment was returned against Ciba-Geigy and two corporate officers.[133]

The second indictment charged Ciba-Geigy in twenty-four counts, among other charges, with the unlawful abandonment of toxic pollutants and hazardous wastes; illegal disposal of hazardous wastes; making false statements to the New Jersey Department of Environmental Protection; and conspiring with officers of the company and a subsidiary corporation to do the above.[134] If convicted on all counts, Ciba-Geigy faces the possible loss of its corporate charter, in addition to potentially millions of dollars in fines. Trial is set for early 1991.

Recently, a federal indictment of Exxon Corporation for its role in the massive Port of Valdez, Alaska oil spill was release.[135] The five count indictment charged Exxon with negligently causing the release of more than ten million gallons of crude oil into Prince William Sound in violation of the Clean Water Act;[136] discharging and depositing the oil in Prince William Sound without a permit in violation of the Refuse Act;[137] killing migratory birds

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131 State v Ciba-Geigy Corp., 222 N.J. Super. 343, 536 A.2d 1299 (App. Div. 1988), *cert. denied*, 111 N.J. 574, 546 A.2d 502 (1988).

132 *Id.* at 350, 356.

133 State v. Ciba Corp., SG5-195-87-4.

134 *Id.*

135 Indictment No. A90-015 CR, District of Alaska, February 27, 1990.

136 33 U.S.C. § 1311(a), 1319 (c)(1) (1948).

Section 1311(a) provides, with specific exceptions, that "the discharge of any pollutant by any person shall be unlawful." *Id.*

Section 1319(c)(1) provides:

> The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by an owner or operator of such point source satisfactory to the Administrator that such modified requirements will represent the maximum use of technology within the economic capability of the owner or operator.

Id.

137 33 U.S.C. §§ 407, 411.

without a permit in violation of the Migratory Bird Treaty Act;[138] willfully and knowingly failing to ensure that the tanker was constantly manned by competent persons in violation of the Ports and Waterways Safety Act;[139] and violations of the Dangerous Cargo Act[140] for employing persons that Exxon knew were physically and mentally incapable of performing the duties assigned to them. In addition to criminal penalties, Exxon may still be held liable for restitution and civil penalties.[141]

Although no individual officers of Exxon were named in the indictment, this prosecution clearly indicates the federal government's willingness to proceed against corporations causing environmental catastrophes. The pursuit of criminal sanctions in addition to civil remedies, given the current climate, seems likely to increase.

VI. Recent Legislation

The range of environmental statutes under which criminal indictments are being brought continues to expand. On November 1, 1988, President Ronald Reagan signed into law H.R. 3515,

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138 16 U.S.C. §§ 703, 707(a) (1918). Section 703 provides, in pertinent part:

> [I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird, any part, nest, or egg of any such bird or any part, nest, or egg thereof, included in the terms of the conventions [between the United States and Great Britain (39 Stat. 1702 (1916)); United States and United Mexican States; and United States and Japan.].

16 U.S.C. § 703. Section 707(a) provides:

> Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both.

16 U.S.C. § 707(a).

139 33 U.S.C. § 1232(b)(1) (1978). The section provides:

> Any person who willfully and knowingly violates this chapter or any regulation issued hereunder shall be fined not more than $50,000 for each violation or imprisoned for not more than five years, or both.

Id.

140 46 U.S.C. § 3718(b) (Supp. 1983). Section 3718(b) provides:

> A person willfully and knowingly violating this chapter or a regulation prescribed under this chapter shall be fined not more than $50,000, imprisoned for not more than 5 years, or both.

Id.

141 *See Exxon Indicted by Federal Grand Jury: Impact On Natural Resource Claims Debated*, 4 Toxics L. Rep. (BNA) 1115 (March 7, 1990) (discussing generally United States v. Exxon).

the Medical Waste Tracking Act.[142] That bill incorporated an earlier bill, H.R. 4756, reported to the Judiciary Committee, which codified current practice and authorized EPA officials to carry firearms and make arrests.[143]

On the state level, New Jersey recently enacted legislation providing criminal penalties for violation of the state Air Pollution Control Act.[144] That bill provides that a purposeful or knowing violation of the Act is a crime of the third degree, and a reckless violation is punishable as a crime of the fourth degree.[145]

VII. Recent Executive Action

A. *Federal Level*

The recently enacted Federal Sentencing Guidelines provide a "base offense level" of twenty-four for knowingly endangering another through the mishandling of toxic or hazardous substances.[146] For malfeasance regarding recordkeeping or reporting of hazardous waste releases or discharges, a base offense level of eight is assessed.[147] Under the current guidelines, an organization may be sentenced either to a term of probation or a

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142 42 U.S.C. § 4992 (Supp. 1988). The two-year experimentation program expressly included New Jersey, Connecticut, New York and all states contiguous to the Great Lakes. States were also allowed to petition the government to become part of the demonstration program. *Id.* at 4992(a). The states expressly named were allowed to opt-out of the program if the governor notified the government that the state had already implemented a more stringent medical waste tracking system than the Federal model. *Id.* at 4992(b)(2).

143 H.R. 3515, 100th Cong., 2d Sess., 134 Cong. Rec. 9531, 9537 (Oct. 4, 1988).

144 N.J. Stat. Ann. §§ 26:2C-1 to 26:2C-36 (1990). *See also* H.R. 3641, Environmental Crimes Act of 1989, which would impose new sanctions on those causing environmental catastrophes. The proposed bill received mixed reviews from witnesses testifying at a House Judiciary Subcommittee Meeting on Criminal Justice hearing on December 12, 1989. *HR 3641 Receives Mixed Reviews at Hearing on Environmental Crimes Act*, 4 Toxics L. Rep. (BNA) 851 (Dec. 20, 1989).

145 N.J. Stat. Ann. § 26-2C-19(f). The section states:

> Any person who:
> (1) purposely or knowingly violates the provisions of P.L. 1954, c.212 (c.26:2C-1 et seq.), or any code, rule, regulation, administrative order, or court order promulgated or issued pursuant thereto, is guilty of a crime of the third degree; (2) recklessly violates the provisions of P.L. 1954, c.212 (c. 26:2C-1 et seq.), or any code, rule, regulation, administrative order, or court order promulgated or issued pursuant thereto, is guilty of a crime of the fourth degree.

Id.

146 United States Sentencing Commission, *Guidelines Manual*, § 2Q1.1 (November 1989).

147 *Id.* at § 2Q1.2. The Application Notes indicate a downward departure may be warranted where negligent, as opposed to knowing, conduct is involved. *Id.*

fine.[148] At present, the United States Sentencing Commission is reviewing general corporate criminal liability in an attempt to properly conform punishment with the corporation's criminal culpability.[149]

The United States government is also recruiting citizens to assist in detecting criminal violations of CERCLA. On May 5, 1988 in an apparent attempt to broaden its information gathering techniques and increase the number of environmental crime actions, the EPA announced that citizens can receive monetary rewards for providing information that leads to the arrest and successful conviction of any person violating CERCLA. The EPA can award a citizen up to $10,000 per conviction pursuant to the rule.[150]

In New Jersey, the United States Attorney's office appointed an "environmental crime coordinator" specifically to oversee the prosecution of environmental criminals. The appointment was designed to secure the conviction and imprisonment of environmental law violators who traditionally received fines rather than criminal penalties. The areas specifically targeted for investigation were illegal ocean dumping, midnight dumping, and nuclear regulatory violations.[151]

B. State Level — New Jersey

On January 25, 1990, New Jersey Governor James Florio fulfilled a campaign promise by appointing the state's first "environmental prosecutor."[152] To emphasize the state's commitment to pursuing polluters, Governor Florio held a press conference

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148 *Id.* at Appendix B § 3551(c).

149 *See supra* notes 88-92 and accompanying text.

150 *See EPA Issues Rule to Reward Citizens Who Give Information on CERCLA Violations*, 19 Env't Rep. (BNA) 45 (May 6, 1988). The voluntary procedure permits individuals who learn of potential criminal violations to maintain their confidentiality, disclose the information, and apply for an award. The administrative rule allows rewards where the information discloses notice failure or destruction or concealment of required records. *Id.* The rule expressly prohibits co-defendants, EPA officials, and law enforcement officers from claiming the rewards. *Id.*

151 Rudolph, *A Clean Jersey: US Targets Environmental Crimes*, The Star Ledger, March 21, 1988, at 1, col. 1. Noting that many firms look upon civil penalties for environmental crimes as "the cost of doing business," Jacqueline Wolff, the appointed coordinator, emphasized that "[e]nvironmental crime shouldn't be treated as anything less than any other type of crime." *Id.* at 10, col. 1.

152 Frank, *Pollution Fighter Named by Florio*, The Star Ledger, Jan. 25, 1990, at 1, col. 1. The executive order instilled in the environmental prosecutor broad powers to coordinate the enforcement of state environmental laws, act as liaison to other jurisdictions, and designate the most important civil actions and prosecutions. *Id.*

announcing the appointment after inspecting the site of a recent Exxon Corporation spill in Linden, New Jersey. An Executive Order signed by Governor Florio requires all state agencies possessing environmental enforcement responsibility to cooperate and support the new prosecutor, thereby creating an "umbrella" under which most, if not all of the environmental prosecutions in New Jersey would be brought.[153]

New Jersey is also following the lead of the federal government by instituting a program that rewards citizens who blow the whistle on illegal dumpers and others who despoil New Jersey's environment. Any tip leading to a civil or criminal fine will result in a reward of the greater of 10 percent of the penalties collected or $250.[154]

VIII. CONCLUSION

With the increase in prosecution of environmental crime on both the federal and state level, corporate officials in companies that generate, transport, or dispose of toxic waste must be on notice that fines are rapidly being replaced by jail sentences or probation for illegal disposal of toxic waste. Whether these measures will actually deter illegal dumping is still a question; however, corporate officials whose companies engage in illegal dumping are facing the frightening prospect of criminal liability for the actions of their subordinates and the policies of their corporations.

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153 *Id.*

154 Johnson, *Jersey to Offer Bounties for Tips on Polluters*, The Star Ledger, Sept. 20, 1990, at 26, col. 1. According to Florio, the bounties were placed in various statutes for years but never used. The new state initiative to encourage reporting allowed individuals with information concerning the illegal dumping of garbage, toxic chemicals, or low-level radioactive or medical waste to report directly to the state or local county prosecutor. *Id.*