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James B. Doyle

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Doyle: "Who Will Watch the Watcher?": Using Independent Counsel to Compe

"WHO WILL WATCH THE WATCHER?": USING INDEPENDENT COUNSEL TO COMPEL FEDERAL FACILITIES TO COMPLY WITH FEDERAL ENVIRONMENTAL LAWS

The military is quite likely the largest generator of hazardous wastes in the United States and, rivaled only by the Soviet armed forces, the world. In recent years, the Pentagon generated between 400,000 and 500,000 tons of toxics annually, more than the top five U.S. chemical companies combined. Its contractors produced tens if not hundreds of thousands of tons more. And these figures do not even include the large amounts of toxics spewing from the Department of Energy's nuclear weapons complex.¹

I. INTRODUCTION

Although the federal government is the chief enforcer of federal environmental laws,² it is also one of the biggest violators of the environmental laws it is supposed to enforce.³ All federal facilities⁴ are required by law to abide by federal, state, and local environmental regulations.⁵ However, many

1. Michael Renner, *Assessing The Military's War On The Environment*, STATE OF THE WORLD 1991, at 143 (1991)(The Worldwatch Institute is an independent, nonprofit research organization created to analyze and to focus attention on global problems. Worldwatch is funded by private foundations and United Nations organizations. Worldwatch papers are written for a world wide audience of decision makers, scholars, and the general public.) Although the Soviet Union no longer exists, this point is still germane. The hazardous waste problems of what was formerly the Soviet Union have simply become the problems of the Commonwealth and the individual provinces.

2. 28 U.S.C. § 547 provides:

- [e]xcept as otherwise provided by law, each United States Attorney, within his district, shall--
- (1) prosecute for all offenses against the United States;
 - (2) *prosecute or defend*, for the government, all civil actions, suits or proceedings in which the United States is concerned;

28 U.S.C. § 547 (1)-(2) (1988).

3. See *infra* note 53 and accompanying text.

4. The federal government owns or operates over 20,000 facilities, ranging from huge military establishments, national parks, and systems of prisons and veterans hospitals to individual fish hatcheries, coast guard stations and research laboratories. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6285.

5. Executive Order 12,088 requires that federal facilities, must comply with the same federal, state, and local environmental standards, procedural requirements, and schedules for cleanups that apply to individual citizens and corporations. See *infra* note 10 and accompanying text.

federal facilities do not comply.⁶ Recognizing the poor compliance of federal facilities and the growing seriousness of the environmental problem, the Environmental Protection Agency (EPA) created the Office of Federal Facilities Enforcement (OFFE).⁷ Similarly, the Department of Justice (DOJ), which is responsible for judicial enforcement, elevated its Environmental Crimes Unit, within the Environment⁸ and Natural Resources Division, to the status of "Section."⁹ Yet, despite the creation of these offices and Presidential mandates that government "set the example,"¹⁰ each year more federal facilities are

6. In a 1986, report to Congress, the Government Accounting Office (GAO) reported that in 1984 the Department of Defense (DOD) generated over 530,000 tons of hazardous waste at 333 installations in the United States. Inspection Data for twelve of the DOD facilities compiled by state regulatory agencies indicated that there were seventy-two ongoing violations of the Resource Conservation and Recovery Act [hereinafter RCRA]. U.S. GENERAL ACCOUNTING OFFICE (GAO/NSIAD-86-60), HAZARDOUS WASTE: DOD'S EFFORTS TO IMPROVE MANAGEMENT OF GENERATION, STORAGE, AND DISPOSAL 28 (1986) [hereinafter HAZARDOUS WASTE REPORT]. In a separate report, it was reported that the number of sites on which problems have been spotted mushroomed from 3,526 on 529 military bases in 1986 to 14,401 on 1,579 installations in 1989. Ninety-six bases are polluted so badly that they are already listed on the Superfund National Priorities List (NPL). DEPARTMENT OF DEFENSE, DEFENSE ENVIRONMENTAL RESTORATION PROGRAM (1990).

7. At a recent conference on enforcement of environmental laws, James M. Strock, assistant administrator of EPA's Office of Enforcement, announced creation of the Office of Federal Facilities Enforcement (OFFE) and said that it will set priorities for the cleanup of federal facilities and ensure compliance. OFFE incorporates the hazardous waste compliance office of EPA's former Office of Federal Facilities. BNA, *DOJ, EPA Enforcement Officials Outline Plans To Bolster Against Corporate Polluters*, 20 ENV'T REP. 2012, 2013 (April 27, 1990) [hereinafter BNA Report].

8. Originally named the Land and Natural Resource Division, the name was changed to Environment and Natural Resources Division on Earth Day 1990, "to emphasize our [DOJ] commitment" to enforcement of environmental laws. Dick Thornburgh, *Our Blue Planet: A Law Enforcement Challenge* 13 (Jan. 8, 1991) (transcript available at Valparaiso University Law Review Office).

9. Before 1980, criminal enforcement by the EPA and the DOJ was considered "premature and impractical." In 1980, however, RCRA became the first environmental statute to include felony provisions. 42 U.S.C. § 6928(d), (e). And, in 1984, the felony sanctions were made more severe. In 1981, both the EPA and the DOJ began establishing the administrative framework to support criminal enforcement, and DOJ established a special Environmental Crimes Unit within the Lands and Natural Resources Division. In 1987, this office was elevated to "section," in order to direct more resources to deal with the surge of environmental enforcement actions. Rami S. Hanash, *The Legal Grounds For Prosecuting Federal Employees for Environmental Law Violations*, 1 FED. FACILITIES ENVTL. J. 17, 20 (1990).

10. In signing Executive Order No. 12,088, President Jimmy Carter noted:

I am pleased to sign this Executive Order, which will ensure that federal facilities and federal activities live up to the spirit and the letter of the Nation's environmental protection laws. The federal government itself should be the leader in that effort, and this Order will help establish that leadership. From now on, all federal facilities must comply with the same federal, state and local environmental standards, procedural requirements, and schedules for cleanups that apply to individual citizens and corporations.

Federal Compliance With Pollution Control Standards, II PUB. PAPERS 1769 (Oct. 13, 1978).

added to the Superfund Federal Agency Hazardous Waste Compliance Docket¹¹ and National Priorities List (NPL).¹²

Under federal law,¹³ federal facilities and employees are subject to the same administrative, civil, and criminal enforcement actions as non-federal facilities and employees.¹⁴ Predictably, however, federal facilities and employees rarely feel the bite of enforcement. At every turn the federal government, or its employees, has some defense or immunity to get itself out of trouble.¹⁵ As a result of this seeming shield of immunity, federal facilities and employees have not felt compelled to make environmental compliance a priority.¹⁶

11. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [hereinafter CERCLA], as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), requires that the EPA establish a Federal Agency Hazardous Waste Compliance Docket biannually which contains information regarding Federal facilities that manage hazardous waste or from which hazardous substances may be or have been released. 42 U.S.C. § 9620(c) (1988). The Docket serves three major functions: (1) to identify the universe of federal facilities that must be evaluated to determine whether they pose a risk to public health and the environment sufficient to warrant inclusion on the National Priorities List (NPL); (2) to compile and maintain the information submitted to the EPA on these facilities under the provisions listed in § 120(c) of CERCLA; and, (3) to provide a mechanism to make this information available to the public. *Federal Agency Hazardous Waste Compliance Docket* 55 Fed. Reg. 34,492 (1990). The Docket contained 1,170 sites in November of 1988. 53 Fed. Reg. 46,364 (1988). The number of sites increased to 1,268 in December of 1989. 54 Fed. Reg. 51,472 (1989). As of April 1990 the list contained 1,296 sites. 55 Fed. Reg. 34,492 (1990).

12. CERCLA requires that a National Priorities List (NPL) be kept and updated to include all facilities, federal and non-federal, and sites which appear to warrant remedial action. Criteria by which facilities and sites are evaluated to determine inclusion of the NPL are set forth in 40 C.F.R. § 300, App. B (1991). The standards are promulgated by the EPA with the purposes of the NPL in mind. In 1989, twenty-seven federal facilities were added to the NPL. 54 Fed. Reg. 48,184. In 1990, there were a total of ninety-six military bases alone listed on the NPL. Seth Shulman, *Toxic Travels: Inside the Military's Environmental Nightmare*, NUCLEAR TIMES (1990).

13. This Note uses RCRA as a reference point. However, because other Federal environmental statutes are substantially similar to RCRA in terms of enforcement and waivers of sovereign immunity, the analysis can be extended beyond the bounds of RCRA to other environmental laws - including CERCLA, the Clean Water Act (CWA), and the Clean Air Act (CAA).

14. Michael Donnelly & James G. Van Ness, *The Warrior and The Druid-The DOD and Environmental Law*, 33 FED. B. NEWS & J. 37, 38 (1986). ("The broad waivers of sovereign immunity found in the environmental statutes, coupled with the mandate presented by Executive Order 12,088, expose military activities and personnel to a wide array of enforcement tools." These enforcement tools include traditional administrative, civil, and criminal mechanisms. *Id.*)

15. Hanash, *supra* note 9, at 18. (Hanash observes: "[t]raditional enforcement mechanisms applied by regulators against private polluters are not legally amenable to use against Federal facilities. *Id.*")

16. One of the noted causes of the DOD's widespread non-compliance with RCRA is the "lack of command emphasis on effective hazardous waste management, the lack of cooperation by installation tenants, and the lack of installation commanders' involvement with hazardous waste management." HAZARDOUS WASTE REPORT, *supra* note 6, at 28.

In 1989, however, the United States Attorney in Maryland successfully prosecuted three federal civilian employees for criminal violations of federal environmental laws.¹⁷ In affirming the district court's dismissal of the employees' defenses of governmental immunity, the Fourth Circuit Court of Appeals found that the employees had acted outside their official capacities.¹⁸ By not recognizing the immunity of these federal employees, the court suggested that "responsible federal employees" may be held criminally liable for violations of federal environmental laws at their facilities despite their status as government employees.¹⁹ Although criminal enforcement against "responsible federal employees" offers much potential for compelling compliance at federal facilities, it has not yet been used effectively to accomplish this goal.²⁰

Despite the seriousness of the environmental problem at federal facilities, and the President²¹ and Attorney General's tough enforcement position,²² the DOJ is not bringing criminal cases against federal employees.²³ Several factors

17. *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991). [hereinafter the *Aberdeen* case] (Three federal employees were convicted of RCRA and Clean Water Act violations.) See *infra* note 133 and accompanying text for full discussion of case.

18. *Id.* at 744.

19. The Assistant Attorney General in charge of the Land and Natural Resources Division told attorneys to expect more prosecutions similar to those at Aberdeen Proving Ground in Maryland. He also warned that the same principles would apply to the federal sector as to the private sector, including prosecution of military officers in charge of a polluting facility. BNA, *supra* note 7, at 2012. See also notes 143-48 and accompanying text, detailing the court's unwillingness to recognize traditional immunities.

20. There are a total of only four cases in which criminal penalties have been imposed on federal employees for violation of federal environmental laws. In *United States v. Pond*, No. S-90-0420 (D. Md. 1991), the defendant was convicted under the Clean Water Act for violating permit requirements and for making false statements. In *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989), the defendant was convicted under CERCLA for failing to report hazardous waste spills. And, in *United States v. Lewis*, No. 3-88-50 (S.D. Ohio 1988), the defendant was convicted of violations of the Atomic Energy Act for unlawful possession of Americium 241, a radioactive by-product material. DEPARTMENT OF JUSTICE, ENVIRONMENTAL CRIMES SECTION, ENVIRONMENTAL DIVISION, *Government Employees Prosecuted* (March 12, 1991). See *infra* note 133 and accompanying text for an examination of the *Aberdeen* case.

21. President Bush has called himself the environmental President. In a speech to Congress in 1989, Mr. Bush said:

I am directing the Attorney General and the Administrator of the Environmental Protection Agency to use every tool at their disposal to speed and toughen the enforcement of our laws against toxic waste dumpers. I want faster cleanups and tougher enforcement of penalties against polluters.

Text of President Bush's Speech to Congress, WASH. POST, Feb. 10, 1989, at A20, col. 3.

22. The former Attorney General publicly announced his "commitment" to enforcement of environmental laws. Thornburgh, *supra* note 8, at 3.

23. *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991), is so far the only major RCRA case in which federal employees have been successfully prosecuted for environmental crimes. Although there are ongoing investigations at other federal sites, such as the Rocky Flats nuclear weapons facility in Colorado, and the Hanford Nuclear facility in

may account for the lack of enforcement by the DOJ -- including lack of funding, prosecutorial discretion, limited personnel,²⁴ or the existence of a conflict of interest in the DOJ investigating and prosecuting other federal employees.²⁵ But, regardless of why cases are not being prosecuted, the environmental problem still exists and needs a solution. Use of independent counsel²⁶ to investigate and prosecute cases against federal employees may be an effective solution to this serious environmental problem.²⁷

The independent, court appointed counsel operates outside the DOJ and is not constrained by the Executive Branch or DOJ policy²⁸ when making most²⁹ investigatory and prosecutorial decisions. The use of independent

Washington state, there have been only three other successful prosecutions. Hanash, *supra* note 9, at 19. See also *supra* note 20.

24. One author has observed that, "[i]n general, decision making [as to what cases to investigate and prosecute] is not based on studied policy analysis. Rather it involves vast discretion, varying priorities, and uneven resources with substantial uncertainty as to which choices will be made in any given circumstance." Gene S. Anderson, *Criminal Prosecution: Who Gets Indicted and Why*, 1 FED. FACILITIES ENV'T J. 37, 38 (1990).

25. See *infra* note 173 and accompanying text, setting out the Imputed Disqualification Rule of the MODEL RULES OF PROFESSIONAL CONDUCT and suggesting its application to the DOJ.

26. Chapter 40 of the Ethics In Government Act of 1978, requires that when conflicts of interest exist in the Department of Justice (DOJ) investigating and prosecuting cases against other government officials, an independent prosecutor should be appointed. 28 U.S.C. §§ 591-99 (1988). See also *infra* note 170 and accompanying text, noting that the independent counsel statute is aimed at achieving a high level of integrity in the federal government.

27. This Note argues that a conflict of interest exists where even a lower ranking federal employee is investigated by a United States Attorney, a Presidential appointee, who works under the Attorney General. In light of the seriousness of the environmental problem posed by non-complying federal facilities, independent counsel should be used to investigate and prosecute individual federal employees for environmental crimes. Use of independent counsel would avoid any conflict of interest and allow for more effective enforcement of environmental laws. See *infra* notes 210-15 and accompanying text for analysis of the use of independent counsel to prosecute lower level executive appointees.

28. The independent counsel statute provides:

(a) Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and *independent authority* to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of Title 18.

28 U.S.C. § 594(a) (1988) (emphasis added).

29. The 1982 amendments to 28 U.S.C. §§ 591-99 require the Attorney General to "follow the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws" in determining whether "reasonable grounds" exist requiring use of an independent counsel. Congress concluded:

[r]equiring appointment of a special prosecutor to investigate alleged violations in instances where a clear Departmental policy not to prosecute exists is inconsistent with

counsel therefore, avoids DOJ internal constraints and conflicts of interest which may arise where the government is required to investigate and prosecute its own employees. Consequently, where traditional administrative, civil, and criminal enforcement mechanisms have failed,³⁰ actual or threatened criminal enforcement against "responsible federal employees" by independent counsel may work to compel compliance at federal facilities.

This Note examines first the scope and seriousness of the environmental problem at federal facilities which is the result of violations of the Resource Conservation and Recovery Act (RCRA).³¹ Second, the note examines how traditional legal remedies at the federal level³² -- including administrative, civil, and criminal enforcement -- have been ineffective at compelling federal employees and facilities to comply with RCRA requirements. Third, the note examines criminal enforcement by the DOJ against "responsible federal employees"³³ as a potential enforcement mechanism and assesses its effectiveness. Fourth, the note outlines the policy and relevant provisions of the independent counsel statute. And finally, the note suggests the use of independent counsel in cases involving criminal prosecution of federal employees for violations of environmental laws as an alternative to traditional enforcement mechanisms.

II. NATURE AND SCOPE OF THE ENVIRONMENTAL PROBLEM AT FEDERAL FACILITIES

Perhaps the biggest problem associated with assessing the true nature and

the Act's goal of establishing a standard administration of justice for officials and non-officials. Instead it creates unfairness by imposing a stricter application of criminal law on public officials.

S. REP. NO. 496, 97th Cong., 2d Sess. 15, reprinted in 1982 U.S.C.C.A.N. 3537, 3551-52.

30. Hanash, *supra* note 9, at 18 and accompanying text, noting that "[t]raditional enforcement mechanisms . . . are not legally amenable to use against federal facilities."

31. 42 U.S.C. §§ 6901-91 (1988). See also Donnelly & Van Ness, *supra* note 14, at 38-40 for analysis of similar provisions of the Clean Air Act and Clean Water Act.

32. Although there are also remedies at the state and local levels and citizen suit provisions available for use against federal polluters, the analysis in this note is limited to enforcement of federal environmental laws at the federal level. Considering the President and Attorney General's tough enforcement position, this note presupposes that enforcement should be emphasized at the federal level first. The government should get its own house in order before it goes after other polluters. For an examination of enforcement of environmental laws at the state level, see generally Richard H. Allan, *Criminal Sanctions Under Federal and State Environmental Statutes*, 14 *ECOLOGICAL Q.* 117 (1987); See also Nancy E. Milstein, Note, *How Well Can States Enforce Their Environmental Laws When The Polluter Is The United States Government*, 18 *RUTGERS L.J.* 123 (1986).

33. See *infra* note 122 and accompanying text, discussing extension of the "responsible corporate officer" theory to "responsible federal employees."

scope of the environmental problem at federal facilities is the lack of information detailing non-compliance with environmental laws. Commentators from the World Watch Institute recently observed: "[D]ata that would permit a truly comprehensive picture of the military's resource use and its health and environmental effects are by and large unavailable. Shielded by the mantle of 'national security,' the armed forces and military contractors have either been exempt from environmental regulations or ignored them."³⁴ National security is indeed an important interest to protect; however, as the late President Dwight D. Eisenhower observed, it makes no sense to "destroy from within what you are trying to defend from without."³⁵ Despite the lack of hard data detailing the exact scope of the problem at the federal level, evidence from local sources³⁶ and professional researchers³⁷ help to reveal at least the tip of the iceberg of environmental problems that exist at federal facilities.

In July of 1989, there were already one-hundred and fifteen federal sites on the Superfund National Priorities List (NPL),³⁸ and fifty-two additional government installations were being considered for inclusion on the list.³⁹ A member of the EPA's federal facilities compliance task force has estimated that the NPL will eventually include as many as one-thousand federal sites.⁴⁰ And, as of April 13, 1990, the Federal Agency Hazardous Waste Compliance Docket,⁴¹ a list of federal facilities being considered for inclusion on the NPL, contained 1,296 facilities.⁴²

It was also reported in July of 1989, that according to a San Diego County Hazardous Waste Management Study, the Navy was the largest single generator

34. Renner, *supra* note 1, at 133.

35. *Id.* at 132.

36. Many states conduct their own environmental audits and compile their own data in monitoring compliance of federal and non-federal facilities within their borders in order to effectively enforce their own environmental laws. See *infra* notes 43-47 and accompanying text, for analysis of the problems of the San Diego, California area.

37. The Worldwatch institute is a professional research organization which compiles data from national and international sources. Although, as noted, there is not much direct evidence of non-compliance at federal facilities, the Worldwatch team has compiled a lot of indirect evidence to help define the nature and scope of the problem. Renner, *supra* note 1.

38. Eric Malnic, *Camp Pendleton Among Sites Proposed for Superfund List*, L.A. TIMES, July 14, 1989, at Part I-3.

39. *Id.*

40. Philip Shabecoff, *Military is Accused of Ignoring Rules On Hazardous Waste*, N.Y. TIMES, June 14, 1988, at C-4.

41. See *supra* note 11, for a description of the Federal Agency Hazardous Waste Compliance Docket.

42. See *supra* note 11.

of hazardous wastes in San Diego County.⁴³ The Navy reportedly produced twenty-five percent of the 93,000 tons of toxics produced annually in the county.⁴⁴ At one of the polluting facilities, the Coronado Naval Amphibious Base, there were five hazardous waste sites "on which an estimated 120,000 gallons of waste oils and solvents were disposed of, along with 3,000 gallons of waste lubrication oils, paints, and thinners."⁴⁵ Unexploded ammunition was also suspected of being located on the base.⁴⁶ The report also noted that the potential build-up of explosive gases presented a threat to human health and the environment.⁴⁷

Build-up of the hazardous waste materials identified on California and other installations has, as of now, had unknown effects on the health of past, present, and future generations. But, according to one study by the National Cancer Institute,⁴⁸ 14,500 civilian employees at Hill Air Force Base in Utah⁴⁹ exposed to carbon tetrachloride, trichloroethylene(TCE), and other solvents during the mid-fifties suffered a higher death rate from bone⁵⁰ and lymphoid cancers⁵¹ than other civilians in their age group.⁵² Although the information about San Diego County details the federal facility compliance problems of only one area, one thing is clear: if this is only the tip of the iceberg, what lurks beneath the water line is a monstrous environmental problem in need of a solution.⁵³ Unfortunately, there is no effective legal mechanism to compel

43. Michael Richmond, *Navy Faces Costly Toxic-Waste Cleanup at 7 Bases*, SAN DIEGO TRIB., July 13, 1989, at B-1, col. 1.

44. *Id.*

45. *Id.* at B-5.

46. *Id.*

47. *Id.*

48. *Cancer Deaths High Among Aircraft Workers*, FED. TIMES, November 23, 1987 at 13 (reporting the results of a National Cancer Institute Study).

49. Renner, *supra* note 1, at 142 (Hill Air Force Base is a site of heavy on-base groundwater contamination).

50. Multiple myelomas, the most common type of bone cancer, are characterized by persistent, unexplained skeletal pain (especially in the back or thorax) renal failure, or recurrent bacterial infections, especially pneumonia. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1005 (Berkow & Fletcher eds., 15th ed. 1987) [hereinafter THE MERCK MANUAL].

51. Non-Hodgkins Lymphoma, a cancer of the lymphoid cells, usually disseminates throughout the body causing pressure and symptoms on various organs, including the tonsils, and is ultimately terminal. *Id.* at 918.

52. Renner, *supra* note 1, at 143. ("[i]t is suspected that human exposure through drinking, skin absorption, or inhalation may cause cancer, birth defects, and chromosome damage or may seriously impair the function of a person's liver, kidneys, blood, and central nervous system.")

53. San Diego County is only illustrative. The government owns or operates 20,000 facilities across the country, and 1,579 had environmental problems as of 1989. Additionally, 7000 former military installations were being investigated for potential environmental problems. Renner, *supra* note 1, at 143.

compliance and clean-up.⁵⁴

III. USE OF TRADITIONAL ENFORCEMENT UNDER RCRA TO COMPEL COMPLIANCE AT FEDERAL FACILITIES

A. *The Resource Conservation and Recovery Act and Traditional Enforcement*

The Resource Conservation and Recovery Act⁵⁵ was enacted in 1976 to promote the protection of health and the environment and to conserve valuable material and energy resources.⁵⁶ This purpose is achieved by setting up a "cradle to grave" system for identifying and tracking hazardous waste from the time of identification to the time of safe disposal.⁵⁷ The Resource Conservation And Recovery Act empowers the EPA to establish criteria based on ignitability, corrosotivity, reactivity, and toxicity⁵⁸ to identify hazardous wastes. Based on these factors, EPA generates a list of hazardous wastes⁵⁹ for the reference of potential hazardous waste producers.⁶⁰

54. Hanash, *supra* note 9, at 18, and accompanying text (author observes that no effective remedy exists for use against federal facilities).

55. 42 U.S.C. §§ 6901-91, was enacted to address the "last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. REP. NO. 1491, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241. RCRA is designed primarily as a preventive measure to deter irresponsible management of hazardous and non-hazardous wastes, although, "it does not address the problems of hazardous waste encountered at inactive or abandoned sites or those resulting from spills that require emergency response." CERCLA, 42 U.S.C. §§ 9601-75 (1988), was set up to deal with clean-up of abandoned sites. UNITED STATES OFFICE OF SOLID WASTE, RCRA ORIENTATION MANUAL I-2 (1990) [hereinafter RCRA ORIENTATION MANUAL].

56. RCRA ORIENTATION MANUAL (I-1) to (I-2) (1990).

57. *Id.* at I-4.

58. 42 U.S.C. § 6921(a) (1988) provides:

(a) Criteria for Identification or Listing

[T]he administrator shall . . . develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to the provisions of this subtitle, taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics. Such criteria shall be revised from time to time as may be appropriate.

42 U.S.C. § 6921(a) (1988). *See also* 40 C.F.R. §§ 261.20-.24 (1990), for a recent list of criteria promulgated by the EPA.

59. *See* 40 C.F.R. §§ 261.30-.33 (1990) for a recent list of those wastes classified as "hazardous" by the EPA.

60. Because RCRA is designed primarily to promote responsible management of hazardous wastes and deter illegal practices in transportation, storage, and disposal, the identification and listing of criteria and hazardous wastes give notice to potential hazardous waste producers and the general public. 42 U.S.C. § 6907(b) (1988).

RCRA also sets up a permit system⁶¹ under which a generator of hazardous waste must operate. The generator of the hazardous waste must secure a permit from the EPA.⁶² Once a waste has been identified as a hazardous waste and a permit has been secured, a written manifest⁶³ must accompany the waste at all stages of transportation, storage, and disposal.⁶⁴

Like other regulatory statutes, enforcement under RCRA may take several forms. Depending on the nature and severity of the problem,⁶⁵ administrative,⁶⁶ civil,⁶⁷ or criminal⁶⁸ action may be taken to compel compliance with the statute. When administrative enforcement is used, the EPA issues and enforces administrative orders.⁶⁹ When civil or criminal enforcement is used, the EPA refers cases to the DOJ for judicial action.⁷⁰

B. Enforcement Against Federal Facilities

1. Administrative Enforcement

RCRA authorizes the EPA to issue compliance orders to any "person"⁷¹ who violates RCRA regulatory requirements.⁷² The statute also gives the EPA

61. A permit is "an authorization, license, or equivalent control document issued by the EPA or an authorized state to implement the regulatory requirements of Subtitle C, Parts 264 and 265 for treatment, storage, or disposal facilities" [hereinafter TSD's]. UNITED STATES OFFICE OF SOLID WASTE, RCRA ORIENTATION MANUAL, Glossary-7 (1986).

62. 42 U.S.C. § 6925 (1988).

63. A "manifest" is "shipping document, EPA form 8700-22, used for identifying the quantity, composition, origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of treatment, storage, or disposal." *Id.* at Glossary-5.

64. The Administrator of the EPA has established requirements to ensure, "[t]hat all hazardous waste generated is designated for treatment, storage, or disposal in and arrives at treatment, storage, or disposal facilities (other than facilities on the premises where the waste is generated) for which a permit has been issued." 42 U.S.C. § 6922(a)(5) (1988). *See also* 40 C.F.R. §§ 262-63 (1990).

65. RCRA ORIENTATION MANUAL, *supra* note 55, at III-91.

66. *See infra* note 72 and accompanying text.

67. *See infra* note 100 and accompanying text.

68. Hanash, *supra* note 9, and accompanying text.

69. RCRA ORIENTATION MANUAL, *supra* note 55, at III-91.

70. *Id.* at (III-94) to (III-96). *See also infra* note 167 and accompanying text.

71. The term "person" is defined as "an individual, trust, firm, joint stock company, corporation (including a *government corporation*), partnership, association, State, municipality, commission, political subdivision of a state, or any interstate body." 42 U.S.C. § 6903(15) (1988) (emphasis added).

72. 42 U.S.C. § 6928(a) provides:

(a) [w]henever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of [RCRA], the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both.

42 U.S.C. § 6928(a).

the authority to impose penalties of up to \$25,000 per day for violations of compliance orders.⁷³ The statute defines the term "person" to include any "individual" or "government corporation."⁷⁴ Although it appears that Congress intended to include federal facilities as potential defendants, the term "government corporation" has been interpreted by the courts to not include federal agencies, or federal facilities, as potential defendants.⁷⁵ And, even if the EPA could overcome this barrier of statutory interpretation, the DOJ cites an additional reason why the EPA cannot enforce administrative orders against federal facilities.

In April of 1987, officials from the DOJ testified before the House Oversight and Investigation Sub-Committee on Energy and Commerce, that the EPA may not issue administrative orders under RCRA to address federal facility compliance violations.⁷⁶ F. Henry Habicht II, former Assistant Attorney General for the DOJ Environment and Natural Resources Division, cited the "unitary executive"⁷⁷ theory as support for the position taken by the DOJ.⁷⁸ The "unitary executive" theory is a constitutionally based argument that the President should resolve disputes within the executive branch of the government. Authority for this position comes from the Supreme Court's decision in *Myers*

73. 42 U.S.C. § 6928(c) provides:

(c) If a violator fails to take corrective action within the time specified in the compliance order, the Administrator may assess a civil penalty of not more than \$25,000 for each day of continued non-compliance with the order and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the state).

42 U.S.C. § 6928(c) (1988).

74. See *supra* note 71 ("government corporation" is included in the definition of "person").

75. The term "federal agency" is not included in RCRA's definition of "person." See *supra* note 71. In the Clean Water Act (CWA), however, the definition of person includes "any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." The Clean Water Act also clearly and unambiguously subjects all "officers, agents, or employees" of a federal agency to all Clean Water Act sanctions. Thus, under RCRA, where Congress did not so unambiguously include the government agency or individual within the coverage of the statute, the federal facility may not be a proper subject of regulation. See Michael A. Brown et al., *The Liability of The Employee of a Federal Agency Charged With Criminal Environmental Violations: Do The Rules of Fair Play Apply To The Football?* 35 FED. B. NEWS & J. 441, 442-43 (1988).

76. *Justice Department Nixes EPA Plan to Issue Administrative Orders at Federal Facilities*, 18 ENV'T REP. (BNA) 7 (1987).

77. The "unitary executive" theory is a constitutionally based theory which argues that under the United States Constitution, "the Executive power [is] vested in the President," and therefore the President must resolve internal disputes in the Executive Branch. U.S. CONST. art. II, §1, cl. 1. See also *infra* note 79.

78. *Federal Facility Compliance With Environmental Laws: Hearings Before The Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. Appendix B (1987) (statement of F. Henry Habicht II, former Assistant Attorney General, Land and Natural Resources Division, Department of Justice).

v. *United States*.⁷⁹ According to the "unitary executive" theory, whenever the EPA finds a federal facility out of compliance, it cannot itself compel the facility to come into compliance with RCRA using its traditional enforcement authority.⁸⁰ Because both parties are part of the Executive Branch, the President must solve the conflict.⁸¹

In order to fulfill his duty of solving inter-agency conflicts over environmental compliance, President Carter issued Executive Order 12088,⁸² "Federal Compliance With Pollution Control Standards." The President also issued Executive Order 12146,⁸³ "Management of Federal Legal Resources," which sets up a general dispute resolution process to be followed when inter-agency conflicts arise. Executive Order 12088, requires the head of each Executive agency to ensure that his agency is in compliance with applicable environmental regulations.⁸⁴ The order requires the EPA to monitor compliance and negotiate solutions with other agency heads.⁸⁵ In signing Executive Order 12088, President Carter noted that the federal government would be expected to set the example of compliance with environmental laws.⁸⁶ In reality the government has been the model of noncompliance.⁸⁷

In an effort to give teeth to Executive Order 12088, and effectively monitor

79. In *Myers v. United States*, 272 U.S. 52 (1926), a postmaster was removed from office by the Postmaster General, whose removal was sanctioned by the President, before the end of his four year term. The appellant's administratrix, Ms. Myers, sued for contract damages under The Act of July 1876, § 6, cl. 179, 19 Stat. 80, which provided that "postmasters shall hold office for four years, unless sooner removed or suspended according to law, and provided that they may be removed by the President by and with the advice and consent of the Senate." Mr. Myers was removed before the expiration of his term and the matter was not submitted for consent of the Senate. *Myers*, 272 U.S. at 56. The Court, however, found the statute unconstitutional in requiring the President to seek review from the Senate in removing lower ranking federal employees from office. *Id.* at 107. Based on *Myers*, the DOJ argues that any dealings with enforcement or discipline within the Executive Branch must be carried out by the President.

80. See *supra* note 73 and accompanying text, explaining the parameters of the EPA's traditional authority under RCRA to issue Compliance Orders which can contain penalties of up to \$25,000 per day for each day of non-compliance and can suspend or revoke facilities' permits. *But cf.* note 77 and accompanying text which argues that the "unitary executive" theory only allows the President to enforce penalties. One federal agency cannot enforce penalties against another federal agency.

81. See *supra* note 79 and authority cited therein.

82. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (1978), reprinted in 1978 U.S.C.C.A.N. 9763.

83. Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (1979), reprinted in 1979 U.S.C.C.A.N. 3320.

84. Exec. Order No. 12,088, *supra* note 82, at § 1-101.

85. *Id.* at § 1-603.

86. See *supra* note 10.

87. See *supra* note 1 and accompanying text; see also HAZARDOUS WASTE REPORT, *supra* note 6, at 33-54.

federal facilities, the EPA established the Federal Facilities Compliance Program (FFCP).⁸⁸ Because the EPA cannot issue and enforce compliance orders at federal facilities, the FFCP sets up the alternative route the EPA must take in attempting to bring federal facilities into compliance.⁸⁹ Under the FFCP, the EPA determines first which facilities are out of compliance under the applicable statute.⁹⁰ The EPA then issues Corrective Action orders,⁹¹ as it normally would against non-federal violators.⁹² If the facility fails to obey the Corrective Action orders, instead of using traditional enforcement procedures, EPA must negotiate⁹³ with agency heads to come to a Federal Facility Compliance Agreement.⁹⁴ Finally, should the negotiations fail, the EPA, and the other government agency involved in the conflict, submit the dispute to the Director of the Office of Management and Budget (OMB).⁹⁵ The director of OMB seeks the technical expertise of the EPA in resolving the dispute.⁹⁶ An official from the Federal Facilities Compliance Office of the EPA admitted that the Federal Facility Compliance Strategy works slow at best to resolve interagency disputes and at compelling compliance with environmental laws when compared with traditional administrative and judicial enforcement.⁹⁷

2. Civil and Criminal Judicial Enforcement Against Federal Facilities

Traditionally, when administrative enforcement has failed to compel compliance at non-federal facilities, judicial remedies are sought against the non-complying entity.⁹⁸ As with other sections of RCRA, the provisions for judicial enforcement apply equally to federal facilities.⁹⁹ RCRA gives the EPA the power to "commence a civil action in United States district court . . . for

88. ENVIRONMENTAL PROTECTION AGENCY, FEDERAL FACILITIES COMPLIANCE STRATEGY (Nov. 8, 1988). See also Donnelly & Van Ness, *supra* note 14, at 38 for a concise summary of the Federal Facilities Compliance Program [hereinafter FFCP].

89. Hanash, *supra* note 9, at 65-67 and accompanying text.

90. The FFCP is used in lieu of traditional administrative and judicial enforcement mechanisms under the other major environmental statutes – including the CAA and CWA – as well as RCRA, as the Executive Branch alternative approach to solving environmental compliance problems at federal facilities. FFCP, *supra* note 88, at I-2.

91. See RCRA ORIENTATION MANUAL, *supra* note 55, at III-91.

92. See *supra* note 72 and accompanying text.

93. Exec. Order No. 12,088, requires the EPA and federal agencies to work together to find solutions to environmental problems on federal facilities. See *supra* note 82, at § 1-602.

94. FFCP, *supra* note 88, at VI-8 defining the components of a "Federal Facilities Compliance Agreement."

95. Exec. Order 12,088, *supra* note 82, at §1-602.

96. *Id.* at §1-603.

97. Telephone interview with Allyn Stern, staff attorney in the Federal Facilities Compliance Office (Jan. 10, 1991).

98. RCRA ORIENTATION MANUAL, *supra* note 55, at (III-93) - (III-96).

99. See *supra* note 10 and accompanying text.

appropriate relief” against a person, including an individual employee or federal facility, which violates any RCRA regulatory provision.¹⁰⁰ Appropriate relief consists of civil penalties of up to \$25,000 per day, and/or a temporary or permanent injunction.¹⁰¹ The “knowing endangerment” provision¹⁰² of RCRA provides for criminal penalties of up to one million dollars against corporations which violate that section.¹⁰³

Federal facilities are in reality, also immune from traditional judicial enforcement. The DOJ points to the *Marbury v. Madison*¹⁰⁴ decision to justify the immunity of federal facilities from judicial enforcement. The DOJ argues that any case it would bring against a federal facility would be

100. 42 U.S.C. § 6928(a) provides:

(a) [W]henever on the basis of any information, the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, [T]he Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

42 U.S.C. § 6928(a) (1988).

101. 42 U.S.C. § 6928 provides in part:

(g) Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

(h) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment, [t]he Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

42 U.S.C. § 6928 (g) - (h) (1988).

102. 42 U.S.C. § 6928(e) provides:

[a]ny person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . [w]ho 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.

42 U.S.C. § 6928(e) (1988).

103. 42 U.S.C. § 6928(e) provides:

[A] defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.

42 U.S.C. § 6928(e) (1988).

104. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), involved a suit brought by a Justice of the Peace appointee who was denied his commission as a result of Thomas Jefferson's defeat of John Adams in the Presidential election of 1800. When Jefferson took office he refused to deliver the signed and sealed commission to Marbury. When Jefferson directed his Secretary of State, James Madison, not to deliver the commission, Marbury sought an injunction requiring delivery of the commission. Thus, the dispute came down to whether the Judiciary could step in and resolve a dispute between the President and an Executive appointee. Mr. Chief Justice Marshall, in an historic opinion, declined to issue the injunction opining that Article III, of the Constitution of the United States requires actual adversity between parties. *Id.* at 168-71. Because both parties here were of the Executive Branch, and thus there was no real party in interest, the case was considered “nonjusticiable.”

nonjusticiable.¹⁰⁵ Because the real party in interest on both sides of the "v" would be the United States,¹⁰⁶ any judicial ruling would be only an "advisory opinion."¹⁰⁷

Responding to the serious environmental problem posed by non-complying federal facilities, Representative Al Swift (D-Washington) introduced legislation in 1987 proposing that the EPA be given power to itself civilly enforce environmental laws against federal facilities through civil suits.¹⁰⁸ The legislation, however, died in committee.¹⁰⁹ Similar legislation, was introduced¹¹⁰ January 3, 1991.¹¹¹ Interestingly, none of this legislation directly addressed the Constitutional nonjusticiability problem.¹¹²

Succinctly stated, then, the nature of the problem with direct enforcement¹¹³ against federal facilities stems from two separate enforcement obstacles. First, the EPA may not use administrative enforcement because of the "unitary executive theory."¹¹⁴ Second, the DOJ refuses to take civil or criminal judicial action because, it argues, that any case it brings will be nonjusticiable.¹¹⁵ Thus, where the federal facility is the target, the Federal Facilities Compliance Program is the only direct method by which the EPA can

105. *Id.*

106. *Id.* (Both *Marbury* and the President were actually in reality the United States, and thus there was no real party in interest, because the United States could not be bound against itself by a court decision. Likewise, where the Department of Justice, an executive branch department, sues the Department of Defense, another executive branch department, the real party in interest on both sides of the controversy is the government, and therefore, pursuant to *Marbury*, the case is nonjusticiable.)

107. *Id.* An "advisory opinion" is defined as "an interpretation of the law without binding effect." BLACKS LAW DICTIONARY (6th ed. 1990). The Supreme Court is required by the Constitution to decide only true "cases and controversies." U.S. CONST. art. III, § 2.

108. H.R. 3782, 100th Cong., 1st Sess. (1987) (The legislation proposed to create a special environmental counsel within the EPA. "The Special Environmental counsel [would be] an independent instrumentality of the United States within the Environmental Protection Agency, similar to an independent counsel. In the performance of his functions, the Special Environmental Counsel [would] not be responsible to, or subject to the supervision or direction of any officer, employee, or agent of the United States.")

109. Cong. Index (CCH), 35,074 (1987).

110. H.R. 67, 102nd Cong., 1st Sess. (1991).

111. Westlaw Billcast (Mar. 12, 1991)(Billcast estimates that H.R. 67 has only a four percent chance of getting out of the House Committee on Public Works And Transportation, and a two percent chance of getting out of the same Senate Committee.)

112. H.R. 3782, 100th Cong., 1st Sess. (1987).

113. For the purposes of this note, "direct enforcement" refers to administrative or judicial actions which target the facility itself. "Indirect enforcement" refers to judicial action taken against a federal employee which may be used to "indirectly" compel federal facilities to comply with environmental laws.

114. See *supra* notes 77-79 and accompanying text.

115. See *supra* notes 104-07 and accompanying text.

compel federal facilities to comply with federal environmental laws.¹¹⁶ Because the Federal Facilities Compliance Program is slow and ineffective at compelling compliance,¹¹⁷ "indirect enforcement"¹¹⁸ has been used to compel compliance at federal facilities. By extending the "responsible corporate officer"¹¹⁹ theory to "responsible federal employees,"¹²⁰ the EPA has had some degree of success in regulating federal facilities.¹²¹

3. Civil Suits Against "Responsible Federal Employees"

In *United States v. Northeastern Pharmaceutical & Chemical Co., (NEPACCO II)*¹²² the Eighth Circuit found an individual corporate officer guilty under RCRA for "contributing to the disposal of hazardous substances that present an imminent and substantial endangerment to public health."¹²³ Although the defendant was not involved in the actual improper disposal of the hazardous waste, the court found him guilty as a "responsible corporate officer."¹²⁴ *Northeastern Pharmaceutical* illustrates how RCRA's civil penalty provisions may be applied against a corporate officer in his individual capacity. The "responsible federal employee" is subject to the same civil penalties as any non-federal employee.¹²⁵ But civil enforcement against "responsible federal employees" has had only limited success in dealing with the compliance

116. See *supra* note 88 and accompanying text.

117. See *supra* note 97 and accompanying text, noting the relative ineffectiveness of this approach to enforcement of federal environmental laws at federal facilities.

118. See *supra* note 113.

119. See *infra* note 122 and accompanying text.

120. 42 U.S.C. § 6903(15) (1988). The term "person" includes "individuals," "corporations," and "government corporation." By analogy, the "responsible federal employee" is included as a "responsible corporate officer." See also Donnelly & Van Ness, *supra* note 14, at § 40.

121. See *supra* note 20 and accompanying text.

122. 810 F.2d 726 (8th Cir. 1986) (A "responsible" corporate officer is a high level executive who, although she did not participate in the actual illegal conduct, may be held liable if she had knowledge of the conduct or personally directed the activity of lower ranking employees.) The "responsible" corporate officer theory was extended to federal employees in the context of a criminal prosecution in *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

123. *NEPACCO II*, 810 F.2d at 749 (defendants were held liable for violating § 6973(a) of RCRA). 42 U.S.C. § 6973, authorizes the Administrator of the EPA to bring suit on behalf of the United States against any person:

[w]ho has contributed or who is contributing to the [h]andling, storage, treatment, transportation, or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, [o]f any solid waste or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6973 (1988).

124. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 745-46 (8th Cir. 1986).

125. See *supra* note 19 and accompanying text.

problem.¹²⁶

A 1988 article reported that although RCRA does not immunize a federal employee from civil suit, "[t]he qualified immunity government officials generally enjoy for discretionary functions performed in good faith is no less available to fend off a RCRA suit simply because it was not explicitly mentioned in the statute."¹²⁷ In *Harlow v. Fitzgerald*, the court found that a federal employee need only show the "objective reasonableness" of his conduct to escape liability.¹²⁸ Because a general qualified immunity for federal employees has been recognized by the courts in civil suits, effective use of the civil enforcement mechanism has been precluded. However, because federal employees' actions are not always "objectively reasonable," civil suits against responsible federal employees can be at least somewhat effective.¹²⁹

4. Criminal Suits Against Federal Employees

In 1980, RCRA became one of the first environmental statutes to include felony provisions.¹³⁰ Unlike administrative and judicial enforcement against federal facilities under RCRA, courts have not recognized any special theory or immunity available exclusively to a federal employee where the DOJ has decided to bring a criminal action against a federal employee in his individual capacity.¹³¹ The seminal case in which criminal sanctions were successfully imposed on federal employees for violations of federal environmental laws was *United States v. Dee*,¹³² also known as the *Aberdeen* case.¹³³

126. Under federal common law, government officials are shielded from liability for civil penalties as long as their conduct does not violate "clearly established" statutory standards or constitutional rights of which a reasonably competent public official should have known. More succinctly, the official's conduct need only be "objectively reasonable" to qualify him to exercise his governmental immunity. *Id.* at 818-19. This qualified immunity has precluded successful use of civil judicial remedies against federal employees.

127. Donnelly & Van Ness, *supra* note 14, at 40.

128. 457 U.S. at 818.

129. *Id.*

130. 42 U.S.C. § 6928(d)(e). See also *supra* note 9.

131. *United States v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990). (The court dismissed the defendants claims of sovereign immunity finding that the defendants had acted as individuals and outside their official capacities.)

132. 912 F.2d 741 (4th Cir. 1990).

133. The defendants were three government employees who worked at the Aberdeen Proving grounds. The facility is used to store various chemical agents used for research and development by the United States Army Toxic and Hazardous Materials Agency. Major Lawrence E. Rouse, *The Disposition of The Current Stockpile of Chemical Munitions And Agents*, 121 MIL. L. REV. 17, 25 (1988). The employees were convicted of violating RCRA criminal provisions for illegal storage and disposal of hazardous wastes.

Dee made it clear just how much potential individual criminal prosecution of "responsible federal employees" may have for compelling compliance by individual federal employees¹³⁴ and federal facilities.¹³⁵ As commentators observed in 1988, "Of the enforcement options available under various environmental statutes, military agencies least appreciate the potential risk posed by criminal prosecution."¹³⁶

In the *Aberdeen* case, three federal civilian employees of the Department of the Army were convicted of violations of RCRA's criminal provisions¹³⁷ for the illegal storage and disposal of hazardous wastes at Aberdeen Proving Ground in Maryland.¹³⁸ The *Aberdeen* case marked the first time that criminal penalties were imposed against federal employees, in their capacity as individuals, for knowing¹³⁹ violations of federal environmental laws. Responding to criminal allegations, the defendants raised the traditional defense of government immunity¹⁴⁰ which generally protects government employees from liability.¹⁴¹

In dismissing the defendants' defenses of governmental immunity, the judge observed that there was "simply no merit"¹⁴² to the defendants' claims. Because the defendants were indicted, tried, and convicted as individuals,¹⁴³ the judge noted that they were not, in any sense, agents of the government for purposes of their case.¹⁴⁴ By trying the defendants as individuals without immunity, the court suggested that whenever federal employees knowingly fail to comply with environmental regulations, they act at their own peril and will stand alone before justice.¹⁴⁵ Because the defendants were found to have acted

134. Daniel Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 ENV'T REP. 10,065 (March 1985). The author observes that "[c]ompared to the possibility of civil fines or injunctions, the threat of criminal punishment most quickly seizes the attention of members of the regulated community [who] wish to eschew the stigma of criminal conduct at almost all costs." *Id.* at 10,067.

135. See *infra* note 154 and accompanying text.

136. Donnelly & Van Ness, *supra* note 14, at 40.

137. 42 U.S.C. § 6928(d) (1988) (RCRA criminal penalties).

138. See *supra* note 133.

139. See *infra* note 151 and accompanying text.

140. *United States v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990).

141. *Butz v. Economou*, 438 U.S. 478, 504-05 (1978) (holding that federal officials acting in their official capacity may invoke governmental immunity where their actions are "objectively reasonable.")

142. *United States v. Dee*, 741 F.2d at 744.

143. *Id.*

144. *Id.*

145. *Anderson*, *supra* note 24, at 42 (The author notes that unlike corporate employees who may hide behind the corporate entity when prosecuted for violating environmental laws, federal employee have no such entity to hide behind to protect them from liability.)

in their individual capacities, the DOJ refused to provide counsel for them.¹⁴⁶ The Department noted that its interest in the lawsuit was in the prosecution of the case only.¹⁴⁷ Thus, the defendants had to provide for their own counsel, a costly undertaking in itself, in addition to the criminal penalties imposed by the court.¹⁴⁸

The defendants also argued that they did not have the requisite "knowledge"¹⁴⁹ to be found guilty of the crimes for which they were convicted under RCRA. The court reasoned, however, "ignorance of the law is no excuse."¹⁵⁰ The court found that the defendants need only have known the general hazardous character of the wastes¹⁵¹ with which they were dealing, and not that regulations existed listing and identifying these particular chemical wastes as RCRA hazardous wastes.¹⁵² Further, the court found that the government need not prove that the defendants knew violation of RCRA was a crime.¹⁵³ But prosecution of individual employees for actions taken while outside their official capacities would seemingly not compel compliance at federal facilities generally.

Perhaps most interesting about the *Aberdeen* case is that in a press release accompanying the indictment, the United States Attorney referred to the Department of The Army's, "institutional avoidance of the requirements of environmental laws."¹⁵⁴ The indictments and convictions were, however, as

146. Major John J. Bartus, *Federal Employee Personal Liability Under Environmental Law: New Ways for The Federal Employee to Get In Trouble*, 31 A.F. L. REV. 45, 52 (1989), (explaining the government's policy in regards to environmental crimes committed by its employees).

147. *Id.*

148. DEPARTMENT OF JUSTICE, *supra* note 20, at 1 (Each of the three Aberdeen defendants was sentenced to three years of probation and one-thousand hours of community service. Today, under the Federal Sentencing Guidelines, they would be required to serve a mandatory prison term of fifteen months each.)

149. *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990). See generally Robert A. Milne, Note, *The Mens Rea Requirements of The Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFFALO L. REV. 307 (1989); and Christopher Harris et al., *Criminal Liability For Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations And Their Executives*, 23 WAKE FOREST L. REV. 203 (1988) (discussing the *mens rea* requirements of the federal environmental statutes).

150. *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990).

151. *Id.* See also *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502-03 (11th Cir. 1986).

152. *Dee*, 912 F.2d at 745.

153. *Id.*

154. Brown, *supra* note 75, at 442 (The authors point out that the charges in the *Aberdeen* indictment reflected the absolute disregard by the United States Army of federal and state laws governing hazardous waste. These statements suggest that the real target was the Army, not just the individual federal employees.) (emphasis added).

previously noted, against the defendants in their individual capacities.¹⁵⁵ Although the United States Attorney's statement does not appear, in the first instance, to be legally correct, the statement suggests that the EPA and DOJ view criminal prosecution of "responsible federal employees" as a way to indirectly regulate federal facilities.¹⁵⁶ If used effectively in this manner, the actual or threatened¹⁵⁷ use of criminal enforcement against federal employees may work well to indirectly compel compliance at federal facilities.

There are many other facilities like the one at Aberdeen which store hazardous chemicals and materials.¹⁵⁸ In fact, these other facilities pose greater risks to health and the environment than did the Aberdeen facility.¹⁵⁹ When considered along with all the sites listed on the Superfund National Priorities List¹⁶⁰ and the 1,296 sites listed on the Federal Facilities Compliance Docket,¹⁶¹ it is evident that federal facility non-compliance with environmental regulations is a serious problem in need of a solution. Administrative enforcement by the EPA, as well as civil and criminal judicial enforcement, has been ineffective in compelling environmental compliance at federal facilities. Moreover, civil suits against "responsible federal employees" are only marginally effective where courts recognize the qualified immunity of federal employees.

Consequently, criminal enforcement of federal environmental laws against "responsible federal employees," promises to be the most effective means of compelling federal facilities to comply with federal environmental

155. See *supra* notes 142-45 and accompanying text.

156. See *supra* note 113.

157. See *supra* note 134 and accompanying text.

158. Renner, *supra* note 1, at 142. Other contaminated federal sites include the Rocky Mountain Arsenal, Colorado, which has been described as "the largest of all seriously contaminated sites, and called 'the most contaminated square mile of earth' by the Army Corps of Engineers." The list also includes Picatinny Arsenal, New Jersey, where levels of trichloroethylene, a known carcinogen, is 5,000 times more concentrated in the groundwater than current EPA standards allow; Otis Air Force Base, Massachusetts; McClellan Air Force Base, California; and McChord Air Force Base, Washington.

159. Pine Bluff Arsenal in Arkansas is located about thirty miles from the City of Little Rock and holds twelve percent of the DOD's stockpile of chemical munitions and agents. Similarly, Pueblo Depot Activity in Colorado is located near the city of Pueblo which has a population of 100,000 people. It holds almost ten percent of the existing stockpile. Tooele Army Depot in Utah is thirty miles from Salt Lake City and holds forty-three percent of the stockpile of chemical munitions or agents. Rouse, *supra* note 133, at 22-23.

160. See *supra* note 12 and accompanying text.

161. See *supra* note 11 and accompanying text.

regulations.¹⁶² Individual federal employees are in charge of federal facilities and those listed on the National Priorities List.¹⁶³ If no other enforcement mechanism will work, then either actual or threatened criminal prosecution of "responsible federal employees" may encourage compliance at federal facilities.

5. Problems With Criminal Enforcement Against Federal Employees

Although immunity¹⁶⁴ and *mens rea*¹⁶⁵ do not loom as barriers to use of criminal enforcement against federal employees, other problems create enforcement obstacles.¹⁶⁶ Traditionally the DOJ has acted as the enforcement mechanism of the federal government.¹⁶⁷ In criminal actions, the government is usually on the prosecution side of the case, enforcing federal laws against criminal violators.¹⁶⁸ Occasionally, however, an individual inside the executive branch violates federal criminal law.¹⁶⁹ In these cases, in order to

162. A recent study reported:

Criminal enforcement is viewed as the most effective tool for achieving deterrence. Most of the people interviewed think that the RCRA criminal enforcement program is more effective than EPA's criminal enforcement programs for other media. This high regard for the criminal enforcement program was a common perception among industry, environmental groups, and government agencies. An examination of the accomplishments of the criminal enforcement program supports these widely held perceptions.

ENVIRONMENTAL PROTECTION AGENCY, *THE NATION'S HAZARDOUS WASTE MANAGEMENT PROGRAM AT A CROSSROADS: THE RCRA IMPLEMENTATION STUDY 61-62* (1990); *see also* Hedges, *Enviro-Cops On The Prowl For Polluters*, U.S. News & World Report, Oct. 9, 1989, at 23.

163. In most cases federal installations, are run by military officials and other federal civilian employee.

164. *United States v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990).

165. *See supra* note 149 and accompanying text.

166. *See infra* notes 173-74 and accompanying text, discussing the conflict of interest and lack of enforcement.

167. 28 U.S.C. § 516 provides: "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice under the direction of the Attorney General." *Id.*

168. *See supra* note 2 and accompanying text.

169. Congress noted that there have been several occasions in our Nation's history when high-level government officials were investigated for alleged criminal wrongdoings. Specifically, during the Grant administration a special prosecutor was appointed to investigate an alleged "whiskey ring," in which the President's personal secretary and close friend was a part. In the 1920s, controversy stirred when high level Executive Branch officials were suspected of illegal and corrupt leasing of government oil reserves. This controversy was known as the "Teapot Dome" scandal. And, during the Truman administration, a special prosecutor was appointed to investigate alleged wrongdoings among officials of the Internal Revenue Service. More recent examples of situations in which an independent counsel has been used are Watergate and the Iran-Contra Affair. S. REP. NO. 170, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4218 [hereinafter *Ethics in Government Report*] *See also In re Olson*, 818 F.2d 34, 39-43 (D.C. Cir. 1987) (The Special Division of the District of Columbia Court of Appeals for Appointing Independent Counsels, does a concise review of the history of the independent prosecutor in the United States.) Although

avoid a conflict of interest or an appearance of impropriety,¹⁷⁰ independent counsel is appointed from outside the government to investigate and potentially prosecute the case.¹⁷¹ Although the independent counsel statute was originally introduced after Watergate to deal with corruption at higher levels of government,¹⁷² because there exists a conflict of interest at any level when a federal employee is the accused,¹⁷³ independent counsel could be used in these cases to avoid the conflict of interest, and appearance of impropriety, and more effectively enforce criminal environmental laws against "responsible federal employees."¹⁷⁴

independent prosecutors were used before 1978, the independent prosecutor statute was not itself enacted until 1978 in response to Watergate. See *infra* note 181 and accompanying text.

170. The Ethics in Government Report provides:

The purpose of this legislation [Independent Counsel Statute, 28 U.S.C. §§ 591-599] is to preserve and promote the accountability and integrity of public officials and of the institutions of the Federal government, and to invigorate the Constitutional separation of powers between the three branches of government.

Supra note 169, at 4217.

171. 28 U.S.C. §§ 591-599 (1988).

172. Ethics in Government Report, *supra* note 169, at 4218-19.

173. The MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10(a) (Proposed Final Draft 1981), provided:

Imputed Disqualification: General Rule

(a) When lawyers are associated in a firm, none of them shall undertake or continue representation when a lawyer practicing alone would be prohibited from doing so under the provisions regarding conflict of interest;

The term "law firm" was defined, in the statute's comment section, to include "lawyers employed in the legal department of a government agency." Under 28 U.S.C. § 591(b), the Attorney General and Administrator of the EPA were included in that group of persons to which the independent counsel statute was expressly applicable and presumed a conflict of interest. See also 5 U.S.C. § 5312 (1988). Arguably, under Rule 1.10 of the MODEL RULES OF PROFESSIONAL RESPONSIBILITY, the conflict of interest between the Attorney General and the Administrator of the EPA can be imputed to employees working under them.

174. Because only four cases have thus far been successfully prosecuted against federal employees for criminal violations of federal environmental laws; and, because the environmental problem posed by federal facilities is massive, where traditional remedies have failed to compel compliance, use of independent counsel may aid in more effective enforcement and avoid the political conflict of interest and the bureaucratic structure altogether. See *supra* note 20 and accompanying text.

IV. THE INDEPENDENT, COURT-APPOINTED, PROSECUTOR¹⁷⁵A. *History of the Independent Prosecutor*

The Independent Prosecutor statute was a response to Watergate¹⁷⁶ and other previous internal government problems involving the illegal activities of high ranking government officials.¹⁷⁷ The DOJ has traditionally been charged with enforcing the laws of the United States.¹⁷⁸ But the DOJ may itself sometimes have a conflict of interest in fairly and justly enforcing those laws.¹⁷⁹ After Watergate, and similar occurrences throughout history,¹⁸⁰ congress decided to create a permanent mechanism which could be used to deal with cases in which a conflict of interest had been identified. Although such a mechanism had not previously been codified by congress for permanent use, after Watergate the time was ripe for creation of just such a mechanism. The Watergate scandal shocked the conscience of America. Public trust and confidence in the President, and the government in general, was shaken. The President, and other top executive officials, had breached the public trust, and

175. The name was changed from *Independent Prosecutor* to *Independent Counsel* in the 1982 Amendments because of the negative association of the term *Prosecutor* with the Watergate scandal. Ethics In Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 [hereinafter 1982 Amendments].

176. In response to allegations of illegal activity among high ranking executive officials Attorney General Elliot Richardson created the office of Watergate Special Prosecutor within the DOJ. The office of Special Prosecutor was created to investigate top officials and bring charges against those who had engaged in illegal activities. Archibald Cox was selected to serve as the special prosecutor and charged with conducting the Watergate investigation. As part of his investigation, Mr. Cox requested tapes and documents in the possession of President Richard Nixon. Instead of producing the tapes and documents, President Nixon ordered Mr. Cox to desist. When Mr. Cox refused, the President ordered Attorney General Richardson to fire Mr. Cox. Mr. Richardson refused to fire Cox and instead resigned, as did Deputy Attorney General, William D. Ruckelshaus.

Finally, Solicitor General Robert H. Bork carried out the president's order and fired Mr. Cox. The President then abolished the office of Watergate Special Prosecutor. Following public outcry and resulting congressional action, the office was re-established and Mr. Cox's former assistant, Leon Jaworski, was named the new Watergate special prosecutor. The President was finally compelled to produce the requested tapes and documents, and eventually resigned his office. Several other top executive officials also pled guilty to criminal charges. The series of firings and resignations that resulted from the Watergate investigation became known as the "Saturday Night Massacre." Carl Levin & Elise J. Bean, *The Independent Counsel Statute: A Matter Of Public Confidence And Constitutional Balance*, 16 HOFSTRA L. REV. 11, 11-14 (1987).

177. See *supra* note 169.

178. See *supra* note 2 and accompanying text.

179. See *infra* note 191 and accompanying text.

180. Ethics in Government Report, *supra* note 169.

a new watchman was needed to watch the watcher.¹⁸¹

B. *The Independent-Prosecutor Statute*

In the wake of Watergate, congress enacted the Independent Prosecutor Statute of Title VI of the Ethics in Government Act of 1978.¹⁸² The statute was the result of over five years of congressional debate, comment from the American Bar Association, and decisions by the courts.¹⁸³ The constitutional issues are still hotly debated. Most of the debate centers around the constitutionality of allowing the judiciary to appoint independent counsel where enforcement of the laws of the United States has been constitutionally assigned to the executive branch.¹⁸⁴ Critics argue that "separation of powers" does not allow for the judiciary to take part in executive enforcement of the laws.¹⁸⁵ Supporters of the statute, however, argue that the framers did not intend the "separation of powers" to be so strictly defined.¹⁸⁶ Despite critics contentions, the law was enacted in 1978 with a five year sunset provision.¹⁸⁷ The statute was repassed in 1982,¹⁸⁸ and 1987¹⁸⁹ by an overwhelming majority, and is up for reauthorization again in 1992. Although the constitutional debate has continued, many agree that the statute has accomplished its goal of placing a check on the executive, and has helped to rebuild the public trust and confidence

181. See *The Federalist* No. 51 (James Madison):

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, *but experience has taught mankind the necessity for auxiliary precautions.* (emphasis added)

182. 28 U.S.C. §§ 591-599 (1988).

183. Ethics in Government Report, *supra* note 169, at 4219.

184. Constance O'Keefe and Peter Safirstein, Note, *Fallen Angels, Separation of Powers, and The Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in The Special Prosecutor Provisions of the Ethics In Government Act*, 49 BROOKLYN L. REV. 113, 126 n.62 (1982) (examining the Constitutionality of allowing the judiciary to supervise and remove the special prosecutor).

185. *Watergate Reorganization and Reform Act of 1975: Hearings on S.495 and S.2036 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. Part 2, 47, 54-55 (1975 & 1976). See also *Special Prosecutor: Hearings Before The Senate Comm. on The Judiciary*, 93rd Cong., 1st Sess., 451 (1973) (testimony of then acting Attorney General Robert H. Bork).

186. Donald J. Simon, *A Constitutional Rationale for The Independent Counsel Law*, 25 AM. CRIM. L. REV. 229 (1987) (A comprehensive overview of the case law, history, and argument supporting the Constitutionality of the independent counsel statute).

187. 28 U.S.C. § 599 (1988).

188. 1982 Amendments, *supra* note 175.

189. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987). [hereinafter 1987 Amendments]

that was lost as a result of Watergate.¹⁹⁰

C. Use of Independent Counsel

Under the independent counsel statute, once an allegation has been made and substantiated against an executive official included in the coverage provisions of the statute,¹⁹¹ the Attorney General conducts a preliminary investigation to determine whether enough evidence exists to warrant further investigation and possible prosecution by independent counsel.¹⁹² When sufficient evidence exists warranting further investigation, the Attorney General submits the case to a special judicial panel.¹⁹³ The judicial panel appoints independent counsel and defines the jurisdiction of the independent counsel appointee.¹⁹⁴ Once the court has appointed independent counsel and defined jurisdiction, its job is, for the most part, completed.¹⁹⁵ From this point the appointee takes charge and works independently guided primarily by the statute.¹⁹⁶ Importantly, unlike other executive appointees, the independent counsel may be removed from office only for "good cause."¹⁹⁷

190. Irvin B. Nathan & David P. Gersch, *Strengthening The Independent Counsel Law Requires Judicial Review of The Attorney General's Decisions*, 25 AM. CRIM. L. REV. 199, 203 (1987); see also Simon Lazarus & Jane E. Larson, *The Constitutionality of The Independent Counsel Statute*, 25 AM. CRIM. L. REV. 187, 198 (1987).

191. The Independent Counsel statute, 28 U.S.C. § 591(b)(1)-(3) (1988) provides:

[Persons covered by the statute include:]

- (1) the President and Vice President;
- (2) any individual serving in a position listed in section 5312 of title 5; [and],
- (3) any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule under section 5313 of title 5;

28 U.S.C. § 591(c)(1)-(2) (1988) provides:

[The Attorney General may conduct a preliminary investigation with respect to persons not listed in subsection (b) if]:

- (1) the Attorney General receives information sufficient to constitute grounds to investigate whether any person other than a person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction; and
- (2) the Attorney General determines that an investigation or prosecution of the person, with respect to the information received, by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest.

192. 28 U.S.C. § 592(a) (1988).

193. *Id.*

194. *Id.*

195. *Id.* (At the request of the Attorney General, the court may expand the jurisdiction of the independent counsel).

196. 28 U.S.C. § 594 (1988).

197. *Id.* at § 596(a)(1).

D. Persons Subject to the Independent Counsel Statute

The independent counsel statute specifically includes as potential subjects of investigation and prosecution, the President, Vice-President, other cabinet and top executive appointees, and specific executive level II, III, and IV officials.¹⁹⁸ Of the more than forty times¹⁹⁹ the statute has been used, high level officials have generally been the target of investigation.²⁰⁰ A separate section of the statute, however, extends coverage to any other executive branch official who may have violated federal criminal law.²⁰¹ Under this section, whenever a lower level executive branch official is suspected, the investigation and prosecution of whom would result in a "personal, financial, or political conflict of interest,"²⁰² independent counsel may be used to investigate and prosecute the case. Presumably, this section which covers lower level government officials authorizes investigation and prosecution of any lower ranking executive appointee, military or civilian, where a personal, financial, or political conflict of interest can be identified.²⁰³

When Congress reauthorized the independent counsel statute in 1982, it limited the statute's coverage, but at the same time gave the Attorney General more discretion in deciding when to invoke the statute.²⁰⁴ Congress concluded that under the express coverage provisions, coverage was too extensive and investigation by the DOJ of many of the persons subject to the statute would not present a significant enough conflict of interest.²⁰⁵ The statute was, therefore, amended to reduce the number of Executive branch officials expressly covered from one-hundred and twenty to seventy.²⁰⁶

Although in the 1982 amendments Congress reduced the number of persons covered under the express provisions, it also extended more power to the Attorney General to use the independent counsel process to investigate persons not expressly covered by the statute.²⁰⁷ Congress specifically extended coverage of the statute to some private citizens, and to any other "officials not

198. See *supra* note 191.

199. Stephen Breyer, *Foreword*, 25 AM. CRIM. L. REV. 167, 168 (1987).

200. Nathan & Gersch, *supra* note 190, at 203, n.22.

201. 28 U.S.C. § 591(c)(1)-(2) (1988). See *supra* note 191.

202. *Id.*

203. Although the statute has not yet been used to prosecute other than high level officials who are or have been close to the President, 28 U.S.C. § 591(c) clearly authorizes use of independent counsel in cases involving lower ranking federal employees. See *supra* note 191 and accompanying text.

204. 1982 Amendments, *supra* note 175, at 3545.

205. *Id.* at 3542.

206. *Id.* at 3543.

207. *Id.* at 3545.

covered under subsection 591(b)."²⁰⁸ The language of the 1982 amendment suggests that lower level federal employees are covered by the statute.²⁰⁹

E. Application to Lower Level Executive Appointees

Two elements must exist to trigger the use of independent counsel in cases involving lower level federal employees. First, there must be a "personal, financial, or political" conflict of interest in the DOJ investigating and prosecuting the case.²¹⁰ The only case thus far in which an independent counsel was appointed for use against a lower ranking federal employee, was the case involving Oliver North and the sale of arms to Iran.²¹¹ Robert Walsh was appointed Special Prosecutor by Attorney General Edwin Meese, III, in 1986 because, the Attorney General noted, he had a "personal, financial, or political" conflict of interest,²¹² in investigating and prosecuting Lieutenant Colonel Oliver North. The court did not explain what is required to create such a conflict of interest.

Second, the 1982 amendments require the attorney general to consider prosecutorial policies of the DOJ when deciding whether to refer the case to the independent prosecutor.²¹³ The factors which the attorney general must consider include: the availability of non-criminal alternatives; the federal interest in prosecution; the deterrent effect of the prosecution; the nature and seriousness of the offense; and the subject's culpability and past record.²¹⁴ Congress included this provision because cases were being brought against federal employees which would not have been brought against non-federal employees if the DOJ were investigating and prosecuting the case.²¹⁵

V. USE OF INDEPENDENT COUNSEL TO PROSECUTE "RESPONSIBLE FEDERAL EMPLOYEES" FOR ENVIRONMENTAL CRIMES

In applying the aforementioned factors to cases involving "responsible

208. *Id.*

209. When considered along with the coverage of §591(c) (the 1982 Amendments) the two appear to extend coverage of the statute to other persons not listed in subsection 591(b) subject only to the discretion of the Attorney General.

210. 28 U.S.C. § 591(c).

211. *In re Oliver North*, Division No. 86-6 (D.C. Cir. 1986). See also *Application of The Attorney General Pursuant to 28 U.S.C. §592(c)(1) For The Appointment of an Independent Counsel Regarding Iranian Arms Shipments and Diversion of Funds*, No. 86-6, filed December 4, 1986 [hereinafter *Application of Attorney General*].

212. *Application of Attorney General*, *supra* note 211.

213. 1982 Amendments, *supra* note 175, at 3550.

214. *Id.*

215. *Id.*

federal employees” who have committed environmental crimes, a compelling case can be made for use of the independent prosecutor.²¹⁶ There is an inherent conflict of interest whenever a federal employee is asked to investigate and criminally prosecute another federal employee.²¹⁷ Considering the seriousness of the environmental problem posed by federal facilities,²¹⁸ the broad discretion allowed the Attorney General,²¹⁹ and the failure of federal facilities to comply with environmental laws,²²⁰ independent counsel is potentially an effective alternative to ineffective traditional enforcement mechanisms to compel compliance at federal facilities.

By making the relevant DOJ inquiries, it should be clear to the Attorney General that an independent counsel could and should be appointed to investigate and prosecute federal employees for environmental crimes. First, as has previously been noted, available non-criminal alternatives have been ineffective at compelling compliance.²²¹ Second, the President and Attorney General have unambiguously expressed the federal government’s interest in prosecuting environmental crimes.²²² Third, in terms of deterrence, one commentator recently observed: “As compared to the possibility of civil fines or injunctions, the threat of criminal punishment most quickly seizes the attention of members of the regulated community who wish to eschew the stigma of criminal conduct at almost all costs.”²²³ Responsible federal employees would be compelled to make environmental compliance a priority, and the threat of criminal prosecution would deter future offenses. Fourth, although the complete nature and seriousness of the environmental problem at federal facilities is not completely known,²²⁴ it is clear that the problem is serious and becoming even more serious.²²⁵ Finally, federal employees are at least as culpable as other environmental polluters. The felony provisions of RCRA have been in effect

216. Although national security is involved, the Court that appoints the independent prosecutor can take this into account. The court should appoint a person with, or ensure the appointee gets, the appropriate security clearance. The independent prosecutor should also be required to consider national security in carrying out his or her duties.

217. See *supra* note 170 and accompanying text, for description of the goals of the Ethics In Government Act.

218. See *supra* note 1 and accompanying text.

219. 1982 Amendments, *supra* note 175, at 3545.

220. See *supra* notes 11-12 and accompanying text.

221. See *supra* note 15 and accompanying text.

222. See *supra* notes 21-22 and accompanying text.

223. Hanash, *supra* note 9 and accompanying text.

224. Renner, note 1 at 133.

225. See *supra* note 1 and accompanying text. See also *supra* notes 11-12 and accompanying text.

since 1984. Federal employees have been on notice for over seven years.²²⁶

VI. CONCLUSION

The environmental problem that exists as a result of noncompliance at federal facilities is real and serious. Traditional enforcement mechanisms have thus far failed to compel federal facilities and employees to comply with federal environmental laws. Although use of criminal enforcement against "responsible federal employees" promises to be an effective method of compelling compliance at federal facilities, it has not yet been used effectively.

The appointment of independent counsel could be used as an effective alternative to failed traditional enforcement mechanisms to compel federal facilities and employees to comply with federal environmental laws. Because the Attorney General has been given broad discretion to use independent counsel whenever he identifies a conflict of interest, the statute need not be limited to use in only those cases involving high level executive branch officials. There is some inherent conflict of interest whenever one executive branch appointee is asked to investigate and prosecute another executive appointee. Moreover, where the President and Attorney General have publicly declared their intention to crack down on environmental crime, use of independent counsel may be an effective means of regulating federal employees and facilities which heretofore have been exempt from enforcement of federal environmental laws.

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226. One author has observed that criminal cases will likely increase because "the regulated community had been given ample time to become familiar with its new environmental obligations." The felony provisions were enacted in 1980 and strengthened in 1984. Thus, the regulated community has had more than ten years to take notice and comply with RCRA requirements. Hanash, *supra* note 9, at 20.

