The 1990 Amendments to the Federal Clean Air Act: Has Congress Built a Better Mousetrap

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By

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INTRODUCTION

ON November 15, 1990 President Bush signed into law the Clean Air Act Amendments of 1990 (1990 Amendments).[1] These Amendments enacted sweeping changes to the Clean Air Act (Act)[2] with the specific congressional intent of creating a strict federal regime to control the nation's air quality. The 1990 Amendments contain important provisions that change the law in six different areas: the attainment and maintenance of air quality standards;[3] permits and enforcement;[4] hazardous pollutants;[5] acid rain deposition control;[6] stratospheric ozone protection;[7] and motor vehicles and fuel.[8] This Article focuses primarily on the significant changes in the provisions dealing with permitting and enforcement.

For example, the Act required only construction permits for new major

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1. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C.A. §§ 7403-7671q (West Supp. 1991)).

2. 42 U.S.C. §§ 7401-7642 (1988). The Clean Air Act was last substantially amended in 1977. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

3. Clean Air Act Amendments of 1990, Pub. L. No. 101-549 §§ 101-111, 104 Stat. at 2399-471.

4. *Id.* §§ 501, 701-11, 104 Stat. at 2635-48, 2672-85.

5. *Id.* §§ 301-06, 104 Stat. at 2531-84.

6. *Id.* §§ 401-13, 104 Stat. at 2584-634.

7. *Id.* §§ 601-03, 104 Stat. at 2648-72.

8. Pub. L. No. 101-549 §§ 201-35, 104 Stat. at 2471-531.

sources[9] and for modifications[10] of existing major sources. The 1990 Amendments, in contrast, require such sources to obtain operating permits in addition to construction permits, including pre-existing major sources.[11] Moreover, the 1990 Amendments expand the types of facilities required to obtain either type of permit.[12] States that submit acceptable implementation plans to the United States Environmental Protection Agency (EPA) will administer the new operating permit program just as under the existing construction permit program.[13]

The 1990 Amendments define in great detail the minimum requirements for operating permits.[14] Such permits must contain: enforceable emissions limitations and standards,[15] compliance schedules,[16] inspection, entry, and monitoring requirements,[17] compliance certification and violation reporting procedures,[18] and other statutorily mandated conditions and measures.[19] The EPA will issue operating permits for a fixed term not to exceed five years, subject to review and renewal.[20]

The 1990 Amendments also create a wider range of enforcement options. For example, the EPA now has the authority to impose administrative fines,[21] whereas previously the EPA had to rely solely on civil or criminal litigation.[22] In addition, the 1990 Amendments expand the types of viola-

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9. The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

42 U.S.C.A. § 7412(a)(1) (West Supp. 1991).

10. The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

Id. § 7412(a)(5).

11. 42 U.S.C.A. § 7502(c)(5) (West Supp. 1991).

12. *Id.* § 7661(2).

13. *Id.* § 7661a(d)(1). Failure to submit an acceptable state implementation plan may result in sanctions or imposition of a federal implementation plan, designed by the EPA, in the state. *Id.* § 7661a(d)(2)-(3).

14. The 1990 Amendments also require the EPA to promulgate regulations that establish the minimum elements of an operating permit program. *See id.* § 7661a(b). The EPA has prepared regulations in response to this mandate. 56 Fed. Reg. 21,712 (1991) (to be codified at 40 C.F.R. pt. 70) (proposed May 10, 1991).

15. 42 U.S.C.A. § 7661(c)(a).

16. *Id.*

17. *Id.* § 7661(c)(c).

18. *Id.*

19. *Id.* §§ 7661c(a), 7661e.

20. 42 U.S.C.A. §§ 7661a-7661f.

21. *Id.* § 7413(d).

22. *Id.* § 7413(b)-(c).

tions subject to criminal sanctions[23] and impose stiffer civil and criminal penalties for virtually all violations.[24] Furthermore, to aid the EPA in the identification of violators, the agency can require persons responsible for emission sources to monitor emission levels and affirmatively certify compliance (or non-compliance) with specific emission limitations.[25] The 1990 Amendments also contain a "bounty hunter" provision, allowing the EPA to pay rewards of up to $10,000 to individuals providing information that leads to the criminal conviction of a violator or to the imposition of civil penalties.[26]

The discussion that follows examines some of the new enforcement provisions under the 1990 Amendments and the possible problems associated with the implementation of those provisions. The Article highlights the continual struggle between the legitimate enforcement goals of the new regulatory regime enacted by the 1990 Amendments and the traditional due process rights of persons regulated by the Act.

A. The Consequences of Non-compliance

Under the 1990 Amendments, significantly stiffer penalties may be imposed against persons who fail to comply with the Act's provisions. The EPA (or a delegated state program) has three alternative approaches for enforcing the regulatory requirements of the Act. First, the EPA can assess administrative penalties of up to $25,000 per day, per violation, with a ceiling of $200,000 for a particular violation.[27] The EPA and the Department of Justice can raise this ceiling if they jointly determine that the $200,000 limit should be exceeded in a particular case.[28] In the administrative enforcement area, the EPA also may issue field citations with fines of up to $5,000 per day for minor violations including violations of record-keeping and reporting requirements.[29]

Second, the EPA has the authority to institute a civil judicial enforcement action against an alleged violator. In this court action, the EPA may seek a temporary or permanent injunction, or a civil penalty of up to $25,000 per day for each violation, or both.[30]

Finally, the EPA can petition the Department of Justice to initiate a criminal enforcement action.[31] The 1990 Amendments have significantly extended the possible criminal sanctions. For example, any person who negligently releases a hazardous air pollutant or extremely hazardous substance into the air and thereby places another person in imminent danger of death or serious bodily injury is subject to criminal liability, including incar-

23. *Id.* § 7413(c).
24. *Id.* § 7413(b)-(c).
25. 42 U.S.C.A. § 7414(a).
26. *Id.* § 7413(f).
27. *Id.* § 7413(d).
28. *Id.*
29. *Id.* § 7413(d)(3).
30. 42 U.S.C.A. § 7413(b).
31. *Id.* § 7413(a)(3)(D).

ceration.[32] More severe criminal sanctions apply in cases where a person knowingly releases such pollutants.[33] Furthermore, the 1990 Amendments expand the list of Clean Air Act violations that make a convicted person ineligible for federal contracts, grants, or loans and allow the EPA to extend the prohibition to other facilities owned or operated by the convicted person.[34]

1. Criminal Liability Under the 1990 Amendments to the Clean Air Act

a. The General Provisions

When the Clean Air Act first became law, criminal prosecution for even the most egregious environmental offenses was relatively rare.[35] The regulatory enforcement climate, however, has changed drastically over the last twenty-one years since the original passage of the Clean Air Act and the public pressure to expand liability for environmental offenses has increased accordingly. To deal with such violations, the federal government has created a distinct unit of the Department of Justice to investigate and prosecute environmental violators.[36] Congress also has amended most major environmental statutes to incorporate stringent criminal penalties for those parties acting in violation of the statutory mandates[37] and the new Federal Sentencing Guidelines applicable to individual defendants impose significant prison terms on parties convicted of environmental crimes.[38] These increased pen-

32. *Id.* § 7413(c)(4).
33. *Id.* § 7413(c)(5).
34. *Id.* § 7606(a).
35. *See* Frederick W. Addison, III & Elizabeth E. Mack, *Creating an Environmental Ethic In Corporate America: The Big Stick of Jail Time*, 44 SW. L.J. 1427 (1991); Note, *Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1335 (1979).
36. The Environmental Crimes Unit (ECU) was organized at the Department of Justice in 1982 with the specific purpose of investigating and prosecuting parties committing environmental offenses. *See* Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379 (1986). In his 1991 keynote address at the Department of Justice Environmental Law Enforcement Conference, Attorney General Richard Thornburgh noted that since the establishment of the ECU in 1982, federal prosecutors have returned a total of 761 indictments that resulted in 549 convictions. Richard Thornburgh, Our Blue Planet: A Law Enforcement Challenge, Keynote Address at the 1991 Department of Justice Environmental Law Conference, New Orleans, La. (Jan. 8, 1991) These convictions resulted in the assessment of $57 million in penalties, restitutions, and forfeitures and the imposition of 348 years of jail time. *Id.* at 5. The conviction rate in federal criminal prosecutions for environmental offenses has reached a staggering 95% under this prosecutorial scheme, with 55% of those convicted receiving a prison sentence. *Id.*; *see* Mary E. Kris & Gail L. Vannelli, *Today's Criminal Environmental Enforcement Program - Why You May Be Vulnerable and Why You Should Guard Against Prosecution Through An Environmental Audit*, COLUM. J. ENVTL. L. (forthcoming 1991).
37. *See, e.g.*, Clean Air Act Amendments of 1990, 42 U.S.C.A. § 7413(c) (West Supp. 1991) (requiring sentences ranging from not more than 1 year to 15 years imprisonment for the most egregious Clean Air Act violations); Clean Water Act, 33 U.S.C. § 1319(c)(3) (1988) (prescribing a 15-year sentence and/or $250,000 fine for individuals or $1,000,000 fine for corporations knowingly endangering other parties under the Clean Water Act); Clean Water Act, 33 U.S.C. § 1319(c)(2) (imposing up to three years imprisonment and/or a $250,000 fine for parties knowingly discharging waste in violation of the Clean Water Act).
38. *United States Sentencing Comm'n*, FEDERAL SENTENCING GUIDELINES MANUAL § 2Q1.1-2Q2.1 (1991) [hereinafter FEDERAL SENTENCING GUIDELINES MANUAL]. Further-

alties are an expression of a strong public policy refusing to tolerate the actions of persons who seek to impose an unwarranted environmental burden on society.[39]

The criminalization of environmental statutes is nowhere better displayed than in the 1990 Amendments to the Clean Air Act. The 1990 Amendments institute a major reform in the criminal penalties applicable to violations of the Act, increase the length of prison terms that can be imposed for violations of the Act's provisions, and even incorporate criminal penalties for certain paperwork violations.[40] The most severe criminal sanctions, however, are reserved, understandably, for parties committing knowing violations of the Act that endanger the life and health of other individuals.[41]

Under the 1990 Amendments, a person may be imprisoned for up to two years, fined,[42] or both, if that individual engages in any of the following conduct: knowingly makes a false material statement, representation, or certification in, or omits information from, or knowingly alters, conceals, or fails to file or maintain any required notice, application, record, report, plan, or other document that the person is required to file or maintain;[43] fails to notify or report as required by the Act;[44] or falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method the Act requires maintained or followed.[45] The penalties may be doubled if the offender has previously been convicted of another offense under this section.[46] Previous to the 1990 Amendments, any person convicted of the same offense could be imprisoned for a period of not more than six months, or fined $10,000, or both.[47] The 1990 Amendments also impose a possible prison

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more, the Federal Sentencing Guidelines have extinguished the right to parole to ensure that the sentence imposed is the sentence an offender will serve. *See* Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come. . .and It Is Hard Time*, 20 Envtl. L. Rep. (Envtl. L. Inst.) at 10,100 (March 1990); *see also* Kris & Vannelli, *supra* note 36, at 7-8. The Sentencing Guidelines also place severe limitations on the availability of probation for individual defendants, which had been the norm for those convicted of environmental offenses. FEDERAL SENTENCING GUIDELINES MANUAL, *supra*, § 5B1.1 (probation only authorized if minimum term of imprisonment under sentencing table ranges from zero to six months).

39. A perfect example of this new approach is evident in a statement made by Richard B. Stewart, Assistant Attorney General for the Environmental and Natural Resources Division of the Department of Justice, when he said: "Those who would seek to illegally profit from the environmental consciousness of our citizens are warned - the risk you create for the environment will be matched by the risk you face of jail." *Justice Department Files Criminal Charges Against Pollution Testing Firm and Its President*, BUS. WIRE, Aug. 28, 1990.

40. *See supra* note 31-34 and accompanying text.

41. 42 U.S.C.A. § 7413(c)(5)(A) (West Supp. 1991).

42. The fines that may be assessed for such violations are determined in accordance with Title 18 of the United States Code. *See* 18 U.S.C. §§ 3571-3574 (1988).

43. 42 U.S.C.A. § 7413(c)(2)(A).

44. *Id.* § 7413(c)(2)(B).

45. *Id.* § 7413(c)(2)(C).

46. *Id.* § 7413(c)(2).

47. 42 U.S.C. § 7413(c)(2) (1988). Under the old scheme, such offenders usually received probation as the result of a criminal prosecution for these types of offenses. The increased criminal penalties incorporated by the 1990 Amendments have foreclosed the availability of probation for offenders under these provisions because of the new restrictions placed upon that program by the Federal Sentencing Guidelines. Under the Federal Sentencing Guidelines, probation is authorized only if the minimum term of imprisonment under the sentencing table

term of not more than one year for a person who knowingly fails to pay a fee owed to the federal government under the Act.[48] Prior to the enactment of the 1990 Amendments, such a violation was not subject to a criminal penalty.

Congress also increased criminal penalties for other violations. The 1990 Amendments provide a prison term of not more than five years and/or a fine for persons knowingly violating any provision of: an implementation plan,[49] the new source performance standards,[50] the section relating to solid waste combustion,[51] the section relating to preconstruction requirements,[52] the section relating to emergency orders,[53] the sections relating to permits,[54] or any requirement or prohibition in the sections relating to stratospheric ozone control,[55] including a requirement of any rule, order, waiver, or permit promulgated or approved under those sections. The prior version of the Act punished similar activities by imposing a jail term of not more than one year and a fine of not more than $25,000 per day for first time offenders (with both penalties doubled upon a second conviction).[56] Under the new criminal penalties incorporated by the 1990 Amendments, criminal sanctions are imposed even where the violators do not possess the conventional *mens rea* requirement for criminal liability. A person who *negligently* releases a defined hazardous pollutant[57] or extremely hazardous substances[58] into the ambient air and thereby places another person in imminent danger of death or serious bodily injury is now punishable, if convicted, by up to one year imprisonment and/or a fine.[59]

Persons who knowingly release defined hazardous substances into the ambient air and place others in imminent danger of death or serious bodily injury are to be punished by imprisonment for not more than fifteen years and/or a fine.[60] If the "person" convicted of the knowing violation is an organization, a fine of up to $1,000,000 for each violation may be imposed.[61] To establish such violations, the law does not require an actual, knowing participation in or authorization of the alleged offenses by those charged.

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ranges from zero to six months. FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 38, § 5B1.1.

48. 42 U.S.C.A. § 7413(c)(3) (West Supp. 1991).
49. *Id.* § 7413(c)(1).
50. *Id.* § 7411(e).
51. *Id.* § 7429.
52. *Id.* § 7477.
53. 42 U.S.C.A. § 7603.
54. *Id.* §§ 7661-7661a.
55. *Id.* §§ 7671-7671q.
56. 42 U.S.C. § 7413(c)(1) (1988).
57. 42 U.S.C.A. § 7413(c)(4) (West Supp. 1991); *see id.* § 7412 (defining "hazardous pollutant").
58. *Id.* § 7413(c)(4); *see id.* § 11002(a)(2) (directing the Administrator to publish a list of extremely hazardous substances).
59. *Id.* § 7413(c)(4). The fine is assessed under Title 18 of the United States Code. *See* 18 U.S.C. §§ 3571, 3574 (1988).
60. 42 U.S.C.A. § 7413(c)(5)(A).
61. *Id.* Such fines are assessed under Title 18 of the United States Code. *See* 18 U.S.C. §§ 3571, 3574.

Any "person" who commits an alleged violation, including corporate officers merely acting in a supervisory capacity are subject to criminal liability.[62] The introduction of circumstantial evidence, including proof that the defendant took affirmative steps to be shielded from relevant information concerning the charged violations may establish proof of the requisite intent.[63]

b. Criminal Liability and the Responsible Corporate Officer

The criminal provisions of the 1990 Amendments apply to any person who commits an enumerated offense.[64] The definition of person was amended in 1990 to include "any responsible corporate officer."[65] Congress clearly intended criminal sanctions to be levied against corporate officials who are responsible for overseeing the actions of environmental personnel.[66] The Department of Justice has adopted this scheme by promoting the identification, prosecution, and conviction of the "highest-ranking, truly responsible corporate officials."[67]

The seminal case establishing liability for corporate officers under the "responsible corporate officer" doctrine was *United States v. Dotterweich*.[68] In *Dotterweich* the United States Supreme Court affirmed the convictions of a pharmaceutical corporation and its president for violations of the Federal Food, Drug, and Cosmetic Act.[69] The corporate president's conviction was affirmed even though he did not participate in the activities leading to the charged violations nor did he have any knowledge of the unlawful conduct.[70] The Court determined in *Dotterweich* that Congress did not intend for corporate officials to be immune from criminal liability when their corporation was charged with a criminal offense.[71] The Court determined that liability should extend to all corporate officials who have some "responsibility" for the unlawful actions.

> [A] corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful [conduct] depends on the evidence produced at the trial. . . . The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws. . . . Hardship

62. 42 U.S.C.A. § 7413(c)(6). *See* Addison & Mack, *supra* note 35, at 1432.

63. 42 U.S.C.A. § 7413(c)(5)(B).

64. The term person was defined originally under the Act as "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e) (1988).

65. 42 U.S.C.A. § 7413(c)(6) (West Supp. 1991).

66. Addison & Mack, *supra* note 35, at 1432.

67. F. Henry Habicht, II, *The Federal Perspective on Environment Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.), at 10,480 (Dec. 1987); *see also* Kris & Vannelli, *supra* note 36, at 17-18.

68. 320 U.S. 277 (1943).

69. *Id.* at 278 (the defendants were convicted for introducing or delivering for introduction into interstate commerce adulterated or misbranded drugs under 21 U.S.C. § 331(a)).

70. *Id.*

71. *Id.* at 281-85. The Court reasoned that "the only way in which a corporation can act is through the individuals who act on its behalf." *Id.*

> there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting.[72]

The Court discussed the principles enumerated in *Dotterweich* more recently in *United States v. Park*.[73] In *Park* the Court set forth the applicable standards for determining if a responsible corporate officer is criminally liable for the alleged statutory violation.[74] The Court held in *Park* that a corporate officer or other person was criminally liable if that person, by reason of his position in the corporation, had the responsibility and authority either to initially prevent or promptly correct the unlawful act, and that the party failed to meet its duty.[75]

The First Circuit, in *United States v. MacDonald & Watson Waste Oil Co.*,[76] recently applied the standards established in *Park* to limit the applicability of the responsible corporate officer doctrine under statutes containing a *scienter* requirement. The court held that knowledge could not be inferred to find a corporate officer culpable solely due to that officer's position in a corporation.[77] Consequently, courts may require prosecutors to establish a corporate official's knowledge of the illegal activities through direct or circumstantial evidence to prove liability under statutes containing a *mens rea* requirement, depending on the specific language of the statute involved.

Courts are applying the responsible corporate officer doctrine under a number of statutes, including environmental laws.[78] For example, the Third Circuit, in *United States v. Johnson & Towers, Inc.*,[79] applied the responsible corporate officer doctrine to uphold the convictions of a plant supervisor and service manager for violations of the permit requirements of the Resource Conservation and Recovery Act (RCRA).[80] The court held that the RCRA penalty provisions applied to those responsible corporate officers because "they knew *or should have known* that there had been no compliance with the permit requirement."[81] The 1990 Amendments specifically incorporate

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72. *Id.* at 284.
73. 421 U.S. 658 (1975).
74. *Id.* at 673-74.
75. *Id.*
76. 933 F.2d 35 (1st Cir. 1991).
77. *Id.* at 55. According to the court: "In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge." *Id.*
78. *See* United States v. Johnson & Towers, Inc., 741 F.2d 662, 664-65 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) (applying the responsible corporate officer doctrine to uphold convictions of corporate officials under the Resources Conservation and Recovery Act); United States v. Frezzo Bros., 602 F.2d 1123, 1130 n.11 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (upholding convictions of corporate officers under the Clean Water Act on the basis of the responsible corporate officer doctrine); *see also* Alan Zarky, *The Responsible Corporate Officer Doctrine*, [Current Developments] Env't Rep. (BNA), at 987 (Jan. 1, 1991) (discussing the growing trend of prosecuting corporations and corporate officers for environmental crimes); Robert E. Cleaves, *White-Collar Crimes: Engineering Trends in Corporate Criminal Liability*, 5 ME. B.J. 28, 33 (Jan. 1990) (observing the growing trend of courts applying the responsible corporate officer doctrine to find criminal liability in the environmental area).
79. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).
80. *Id.* at 664-65. RCRA is codified at 42 U.S.C.A. §§ 6901-6922k (West 1983 & Supp. 1991).
81. *Id.* at 665 (emphasis added). *But see* United States v. White, 766 F. Supp. 873, 894-95

the concept of the responsible corporate officer into the definition of persons criminally liable for violations of the Clean Air Act.[82] Corporate officers and employees can be liable for actions taken on behalf of a corporation, even though those parties may not have actively participated in the alleged wrongdoing. Unless courts confine the responsible corporate officer doctrine to cases brought under statutory provisions that do not require a showing of willfulness or intent, corporate officers could face substantial terms of imprisonment simply because of their managerial status in a corporation.[83]

c. *Criminal Sanctions When "Knowing" Conduct Is Required*

Generally, when parties are prosecuted under statutes that mandate a *mens rea* requirement for conviction, courts have required at least some minimal showing of knowledge or acquiescence to hold corporate officials criminally liable.[84] At first glance, such a required showing appears to raise the level of proof above that necessary to impose liability on the official under the "responsible corporate officer" doctrine. This standard, however, does not demand a showing that a corporate official has distinct knowledge that the actions taken were unlawful. Courts have reduced the burden on federal prosecutors, requiring only that prosecutors establish the alleged offender's conduct was voluntary and intentional and not accidental.[85]

A number of cases have applied this knowledge standard to convict persons under environmental legislation. For example, the United States Supreme Court, in *United States v. International Minerals & Chemical*

(E.D. Wash. 1991) (casting doubt on whether enforcement provisions of RCRA requiring "knowing" conduct subject corporate officers to criminal liability under the "responsible corporate officer" doctrine).

82. 42 U.S.C.A. § 7413(c)(6) (West Supp. 1991).

83. *See* Addison & Mack, *supra* note 35, at 1435. *But see MacDonald & Watson Waste Oil*, 933 F.2d at 55 (limiting the extent to which the responsible corporate officer doctrine may be used to establish criminal liability under statutes requiring scienter); *see also* 42 U.S.C.A. § 7413(c)(1), (2), (3), (5) (West Supp. 1991). Under the 1990 Amendments, a corporate officer managing an operation may face criminal liability for the negligent release of a hazardous pollutant into the ambient air that negligently threatens another person with imminent danger of death or serious bodily harm. 42 U.S.C.A. § 7413(c)(4). By providing for the prosecution of negligent conduct under the Clean Air Act, Congress must have intended that the provisions of the Act describing liability for "knowing" conduct require a demonstration of actual knowledge, direct participation, or a willful refusal to act. *See White*, 766 F. Supp. at 894-95 (casting doubt on the determination that the provisions of RCRA that impose criminal liability for what a party "should have known" are applicable to corporate officials under the "responsible corporate officer" doctrine); Addison & Mack, *supra* note 35, at 1435 n.70.

84. *See MacDonald & Watson Waste Oil*, 933 F.2d at 55 (holding that in a statute containing an express knowledge requirement, the mere showing of an official's responsibility for corporate actions is not an adequate substitute for direct or circumstantial proof of knowledge); Addison & Mack, *supra* note 35, at 1435. *See generally* John F. Seymour, *Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws*, [Current Developments] Env't Rep. (BNA), at 342 (June 9, 1989) (asserting that under most federal environmental statutes the government must prove a corporate officer acted deliberately and had the requisite intent or knowledge to be held liable for the conduct of a subordinate).

85. *See* Addison & Mack, *supra* note 35, at 1435; *see also* McGovern, et al., *Criminal Enforcement of Hazardous Waste Laws*, *in* HAZARDOUS WASTES IN REAL ESTATE TRANSACTIONS (1990).

Corp.,[86] determined that federal prosecutors were not required to establish that a defendant possessed knowledge of the applicable federal regulations to secure a criminal conviction under the Interstate Commerce Commission regulations controlling the transportation of hazardous waste.[87] The Court held that prosecutors needed to prove only that the defendant possessed knowledge that the materials being transported were a defined hazardous waste.[88] Justice Douglas, writing for the majority, asserted that where the process under scrutiny concerns the handling of "dangerous or deleterious devices or products or obnoxious waste materials,"[89] the certainty of regulation is so evident that any party dealing with those substances must be presumed to have knowledge of the regulation.[90]

International Minerals exemplifies the standard of proof required in federal prosecutions under environmental statutes requiring *scienter* on the part of an offender. Federal courts do not require proof that a defendant possesses knowledge that its actions are illegal. The courts only require a showing that the defendant took intentional, voluntary actions in an area under obvious regulatory control.[91]

The Eleventh Circuit, in *United States v. Hayes International Corp.*,[92] applied the principles established by *International Minerals* in evaluating the knowledge required to sustain a criminal conviction under RCRA. The *Hayes* court determined that prosecutors were not required to prove a defendant's actual knowledge of the illegality of its conduct.[93] In *Hayes* the owner and an employee of an airplane repair operation were charged with violating RCRA provisions prohibiting the knowing transportation of hazardous waste to a disposal facility that lacked a required operating permit. The court upheld the conviction of the defendants even though both parties claimed not to have known their actions were illegal.[94] The court determined that prosecutors were only required to establish that the defendants knew or should have known that the disposal facility to which the waste was transported lacked a required permit.[95] The court asserted that the government could satisfy its proof burden by establishing knowledge through circumstantial evidence.[96] Additionally, the court held that the prosecutors sustained their burden by establishing that the waste disposal contract was obtained for an unusually low price that should have prompted the defendants to further investigate the permit status of the disposal facility.[97]

86. 402 U.S. 558 (1971).
87. *Id.* at 563.
88. *Id.*
89. *Id.* at 565.
90. *Id.*
91. 402 U.S. at 564-65.
92. 786 F.2d 1499 (11th Cir. 1986).
93. *Id.* at 1503, 1505.
94. *Id.*
95. *Id.* The court stated, "a defendant acts knowingly if he willfully fails to determine the permit status of the facility." *Id.* at 1504.
96. *Id.*
97. 786 F.2d at 1504.

Other courts have applied the constructive knowledge standard espoused in *Hayes* to uphold findings of requisite criminal intent.[98] In *United States v. Carr*[99] the Second Circuit broadened the scope of the constructive knowledge to incorporate criminal culpability for even low ranking employees if those parties were "in a position to detect, prevent, and abate a release of hazardous substances."[100] *Carr* has sanctioned, in essence, the imposition of knowing criminal liability upon lower level employees that exercise some supervisory control over the corporate actions giving rise to an alleged violation.[101]

Although courts and commentators have attempted to distinguish the proof burden resting on the government in prosecuting defendants under environmental statutes containing *scienter* requirements from the prosecutorial burden under general regulatory statutes, no measurable evidentiary distinction exists. Both types of cases establish criminal liability for corporate officials who, based on their position, knew or should have known of the alleged activities giving rise to the violation.[102] Furthermore, this proof burden has been lessened substantially because circumstantial evidence may establish the requisite intent. Consequently, even though an environmental statute may provide a *scienter* requirement, corporate employees face criminal sanctions for reckless or negligent decisions and actions, including the failure to perform the proper regulatory review.[103]

Many of the newly enacted statutory prohibitions under the 1990 Amendments require knowing violations before criminal liability is imposed.[104] If the analysis in *Johnson & Towers*, *Hayes*, and *Carr* applies to criminal prosecutions initiated under those sections, however, the government's proof burden to establish the liability of corporate officials is greatly diminished.[105] Corporate officials in supervisory positions, who do not possess actual knowledge and have remained somewhat removed from the environmental

98. *See* United States v. Johnson & Towers, Inc., 741 F.2d 662, 669-70 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) (holding that the knowledge requirement for certain RCRA violations could be established under a constructive knowledge standard inferred from circumstantial evidence); *see also* Addison & Mack, *supra* note 35, at 1435-38 (discussing cases setting forth the knowledge requirement for violations of environmental regulations).

99. 880 F.2d 1550 (2d Cir. 1989).

100. *Id.* at 1554.

101. The 1990 Amendments explicitly declare that lower level employees may be held criminally liable for their knowing violations of the Clean Air Act. *See* 42 U.S.C.A. § 7413(h) (West Supp. 1991) (stating that "*[e]xcept in the case of knowing and willful violations*, . . . the term 'a person' shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer" and "*[e]xcept in the case of knowing and willful violations*, . . . the term 'a person' shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.") (emphasis added).

102. Addison & Mack, *supra* note 35, at 1438.

103. *Id.*; *see also* Stanley S. Arkin, *Crime Against the Environment*, N.Y.L.J., Aug. 9, 1990, at 3.

104. *See* 42 U.S.C.A. § 7413(c)(1)-(3), (5) (West Supp. 1991).

105. The 1990 Amendments themselves incorporate the reduced proof burden for establishing criminal liability by expressly permitting the proof of requisite "knowledge" by circumstantial evidence, including "evidence that the defendant took affirmative steps to be shielded from relevant information." *Id.* § 7413(c)(5)(B).

activities of the corporation, are no longer safe from prosecution under the Clean Air Act.[106] These officials are required to assert stricter, more informed control over a company's daily operations, ensuring compliance with all regulatory requirements and carefully documenting any preventive or corrective actions taken.

d. Prosecuting Parties Under the Clean Air Act

Increasingly, regulatory agencies are seeking to prosecute high corporate officials in an attempt to deter environmental crimes by establishing guidelines to structure their criminal prosecutions. For example, the EPA has formulated a series of considerations to determine whether the agency will invoke criminal sanctions. The agency's criteria include: (1) the existence of proof of the required criminal intent (where necessary), (2) the nature and seriousness of the offense, (3) the deterrent effect of the prosecution, (4) the subject's history of compliance, and (5) whether an alternative remedy would be more practicable.[107] Through the implementation of these standards the EPA stresses its primary objective — deterrence of future violations.[108]

Once the EPA designates a case as prime for prosecution, the agency refers the case to the Department of Justice (DOJ). In all federal criminal actions, the final decision of whether to pursue a conviction rests with the DOJ.[109] The determination by the DOJ of whether to seek an indictment does not hinge simply on whether an indictment can be obtained, but focuses instead on whether a felony conviction is the probable case outcome.[110] As a result, the conviction rate in environmental criminal prosecutions is approaching ninety-five percent.[111]

In conjunction with the prosecutorial guidelines promulgated by the EPA, the DOJ has formulated the following list of factors that should be considered to determine if a criminal indictment is warranted: (1) federal law enforcement priorities, (2) the nature and seriousness of the charged offense, (3) the deterrent effect of the prosecution, (4) the person's culpability in connection with the offense, (5) the person's history with respect to criminal

106. Many legal commentators assert that cases such as *Hayes*, *Carr*, and *Johnson & Towers* have initiated the demise of basic constitutional protections in the realm of environmental regulation. *See* Addison & Mack, *supra* note 35, at 1438 n.99; Arkin, *supra* note 103, at 3; Daniel Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 Envtl. L. Rep. (Envtl. L. Inst.), at 10,065 (Mar. 1985); Jonathan Weber, *Corporate Crime of the '90s: Prosecutors Are Aiming for the Boardroom in a Growing Push Against Polluters*, L.A. TIMES, Nov. 25, 1989, at 1.

107. Addison & Mack, *supra* note 35, at 1439. *See also* Robert J. Kafin & Gail Port, *Environmental Enforcement: Criminal Sanctions Lead to Higher Fines and Jail*, NAT'L L. J., July 23, 1990, at 20 (citing Memorandum from Robert M. Perry, Associate Administrator of the EPA, to Regional Counsels, Criminal Enforcement Priorities for the Environmental Protection Agency (Oct. 12, 1982)).

108. *See* Addison & Mack, *supra* note 35, at 1439; *see also* Kafin & Port, *supra* note 107, at 21.

109. Addison & Mack, *supra* note 35, at 1438.

110. *Id.*

111. Thornburgh, *supra* note 36, at 5 (in 1990, the conviction rate was 95%, with 55% of the individuals convicted receiving prison sentences).

activity, (6) the person's willingness to cooperate in the investigation, and (7) the probable sentence or other consequence if the person is convicted.[112]

The decision to prosecute also involves a consideration of whether the alleged violation detracts from the regulatory process.[113] Both the DOJ and the EPA are more likely to seek an indictment for those alleged violations that diminish the integrity of an industry's reporting system. Offenses that involve the falsification of documents or other disingenuous reporting procedures also provide the federal government with a specific incentive to prosecute and secure a conviction.[114]

The federal government has announced its intention to utilize an active prosecutorial agenda to enforce environmental standards and to deter future misconduct.[115] Through the introduction of extensive criminal enforcement provisions into the Clean Air Act, the 1990 Amendments provide federal prosecutors with sufficient ammunition to pursue environmental offenders holding high-ranking positions in the corporate hierarchy. The emerging prosecutorial policy of the federal government focuses the burden of criminal liability on these "responsible" corporate officers in an attempt to deter future corporate environmental offenses.

B. Return of the Bounty Hunter

In the faithful tradition of the Old West, many statutes are reincarnating the bounty hunter. The amended Clean Air Act is no exception. The 1990 Amendments allow the Administrator to "pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation" of the Act or for any other statutory requirements enforced under the Act.[116] In addition, the Administrator has the power to "prescribe additional criteria for eligibility for such an award" through regulation.[117]

Although the regulations pertaining to the awards provision of the 1990 Amendments are not required to be promulgated until 1992,[118] the Compliance Monitoring Branch of EPA's Stationary Source Compliance Division has begun to formulate policy concerning the implementation of the pro-

112. United States Dep't of Justice, PRINCIPALS OF FEDERAL PROSECUTION (1980), *cited in* Seymour, *supra* note 84, at 343.

113. Kafin & Port, *supra* note 107, at 20.

114. *Id. See* Habicht, *supra* note 67, at 10,481 ("Actions to conceal or to mislead the government, along with a substantive violation of pollution laws, will virtually guarantee felony indictment and conviction . . . .").

115. "Effectively preying on corporate America's fear of incarceration and the associated stigma, including, in most cases, the complete destruction of an individual's professional career, the EPA and the Department of Justice seek to weed out environmental offenders and deter future degradation of the environment." Addison & Mack, *supra* note 35, at 1440 (citations omitted).

116. 42 U.S.C.A. § 7413(f) (West Supp. 1991).

117. *Id.*

118. Telephone Interview with Mamie Miller, Chief of the Compliance Monitoring Branch of the Stationary Source Compliance Division (July 15, 1991). Ms. Miller is listed as the EPA contact for information on the Clean Air Act award provision. 56 Fed. Reg. 18,035 (1991).

gram.[119] The regulations are expected to track those issued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) award program[120] and certain Fish and Wildlife award programs[121] administered under the guidance of the Fish and Wildlife Enforcement Policy Manual.[122]

There are two major differences between the CERCLA award program and the Fish and Wildlife programs. First, the CERCLA program allows individuals to submit claims directly,[123] while the Fish and Wildlife programs only recognize claims submitted at the recommendation of an agent.[124] Second, CERCLA only offers awards for information leading to a criminal conviction of a party violating specific provisions of CERCLA,[125] while the Fish and Wildlife programs offer awards for information serving as the basis for a civil, criminal, or administrative penalty against an offender.[126]

The CERCLA regulations also contain certain additional limitations for those parties submitting an award claim. The CERCLA program offers awards only for information that leads to the criminal conviction of parties who either failed to give required notice of a release of a reportable quantity of a hazardous substance[127] or who destroyed or concealed records required to be maintained under CERCLA.[128] Under the regulations, corporations or associations, law enforcement officers, persons convicted in the case giving rise to the award claim, or persons who obtained the information disclosed to the EPA while employed by the EPA or who are so employed at the time of disclosure cannot claim awards.[129] Eligibility for an award under the CERCLA program requires the claimant to disclose the identity of the person or persons (or provide information that leads to the disclosure of the person or persons) criminally culpable for the alleged violations. The disclosure of information must be made to an agent, representative, or employee of the EPA.[130] An award claim must be filed within forty-five days after the conviction of the person or persons about whom information was

119. Telephone Interview with Clara Poffenberger, Staff, Compliance Monitoring Branch of the Stationary Source Compliance Division (July 15, 1991).

120. 42 U.S.C. § 9609(d) (1988); 40 C.F.R. § 303 (1990).

121. Endangered Species Act, 16 U.S.C. § 1540(d) (1988); Lacey Act, 16 U.S.C. § 3375(d) (1988).

122. FISH & WILDLIFE SERV., DIV. OF LAW ENFORCEMENT, LAW ENFORCEMENT POLICY MANUAL (1990).

123. *See* 40 C.F.R. § 303 (1990) (CERCLA regulations allowing any "individual" to make a claim).

124. *See* UNITED STATES DEPT. OF THE INTERIOR LAW ENFORCEMENT MEMORANDUM, *Deposit of Civil Penalty Payments, Fines, and Proceeds of Forfeited Property Sales Into, and Payment of Rewards From, the Law Enforcement Reward Account*, File No. FIS 1-002570, No. LE-118 (issued Sept. 18, 1984) [hereinafter LAW ENFORCEMENT MEMORANDUM].

125. *See* 40 C.F.R. § 303.10-303.12 (1990).

126. *See* 16 U.S.C. §§ 1540(d), 3375(d) (1988).

127. 40 C.F.R. § 303.12(a) (1990) (citing 42 U.S.C. § 9603(a)).

128. *Id.* § 303.12(b) (citing 42 U.S.C. § 9603(d)).

129. *Id.* § 303.20(a)-(b).

130. *Id.* § 303.20(c).

provided.[131] All such claim submissions then should be transmitted to the EPA's Office of Criminal Enforcement Counsel.[132] The EPA's determinations of an individual's eligibility and award amount constitute final agency action, subject to a corresponding right of administrative and judicial review for any party with a claim to the award.[133]

The Fish and Wildlife Service's award programs differ from the CERCLA program. Fish and Wildlife Service rewards are payable to individuals furnishing information leading to an arrest, criminal conviction, civil penalty assessment, or forfeiture of property for the associated violation.[134] Award requests must be submitted by the Special Agent in Charge (SAC) of the investigation on behalf of the individual making the claim.[135] Each reward payment request must be submitted in a specific, described format and must be signed by the Assistant Regional Director for Law Enforcement.[136] Payment of an award to any official of a foreign government or any employee of the federal, state, or local government, any member of the immediate family of such an official, or any person for whom the payment of such a reward would create a conflict of interest or give the appearance of impropriety is prohibited.[137]

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131. *Id.* § 303.33(a).

132. 40 C.F.R. § 303.33(c) (1990). In determining whether to grant a submitted award claim under the CERCLA program, the EPA must consider all relevant criteria including:

> (a) Whether the claimant's information constituted the initial, unsolicited notice to the Government of the violation;
>
> (b) Whether the Government would readily have obtained knowledge of the violation in a timely manner absent claimant's information;
>
> (c) Importance of the case, egregiousness of the violation, potential for or existence of environmental harm;
>
> (d) Concealment of a person criminally culpable or existence of an organized criminal conspiracy to conceal the offense(s) committed by the named defendant(s);
>
> (e) Willingness of the claimant to assist the Government's prosecution of the offense(s), which assistance includes providing further information and grand jury testimony, participation in the trial preparation, and trial testimony if consistent with the limits [established to protect against disclosure of a claimant's identity where necessary] . . . .
>
> (f) Value of the claimant's assistance in comparison to that given by all other sources of information and evidence which led to [the defendant's] arrest and conviction.

Id. § 303.30.

133. *Id.* § 303.21.

134. *See* 16 U.S.C. § 1540(d) (1988) (Lacey Act award provision); 16 U.S.C. § 3375(d) (1988) (Endangered Species Act award provision).

135. *See* LAW ENFORCEMENT MEMORANDUM, *supra* note 124, at 1.

136. FISH & WILDLIFE SERV., DIV. OF LAW ENFORCEMENT, LAW ENFORCEMENT POLICY MANUAL, § 6.8(A) (1990).

137. *Id.* § 6.8(B) (1990). The information required within a reward request under the Fish and Wildlife Service's programs includes:

> (1) The name, address, occupation, and employer of the individual for whom the reward is requested.
>
> (2) The permanent informant identification number if one has been assigned.
>
> (3) The case number and the title of the case for which the reward is requested.
>
> (4) The amount of reward requested, including an explanation of how the amount requested was derived.
>
> (5) A statement of justification that must at a minimum include:

The 1990 Amendments incorporate a "bounty hunter" provision into the Clean Air Act similar to the provisions in the Endangered Species Act[138] and the Lacey Act[139] administered by the Fish and Wildlife Service. The Clean Air Act's bounty hunter provision allows individuals to seek awards for information or services leading to a criminal conviction or a judicial or administrative civil penalty for any violation under the Act. The new provision also excludes any state or federal officer from eligibility for an award if that person furnishes information or services in the performance of an official duty.[140] The regulations promulgated to implement the award program require that an EPA agent submit claims and that they contain specific, detailed information regarding the claimant's actions that allegedly warrant issuance of a monetary award.[141] The information required is similar to the

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(a) A summary of the investigations [and] a specific description of the individual's involvement in that investigation.
(b) The number of subjects involved.
(c) The number of subjects against whom charges were filed, the nature of those charges, and the results of any prosecutions.
(d) The total fines, jail, civil penalties, and forfeiture of property obtained in the case.
(e) If all prosecutions have not been completed, a statement of why the reward should be paid prior to completion of such prosecutions and a statement that the prosecution attorney has been advised of the request for reward and concurs with paying a reward while the prosecution is still pending.
(f) If the individual for whom the reward is requested is known to have now or has ever had any relationship, other than the involvement in the investigation [detailed to the extent described to establish how the information was obtained], with any Special Agent of the [Fish and Wildlife] Service, with any family member of any Special Agent or with any other person involved in the investigation or family member of such person, the details of that relationship must be provided.
(g) The total amount of compensation the individual has already received for assistance in the case, and the total amount of compensation the individual has been paid within the last fiscal year for any case.
(h) The name to whom the check is to be issued.

Id. § 6.8(C). Additional information to support the requested reward might include:

- The significance to the resource of the case(s) that was furthered by the information provided.
- The risk, if any, to the individual of collecting the information provided.
- The probability that the investigation would have been successfully concluded/prosecuted without the information provided.
- The relationship, if any, between the success of prosecution (fines, penalties, and sentences awarded) and the information provided.
- The degree of cooperation exhibited by the individual who provided the information (use of personal contacts to further the investigation).

LAW ENFORCEMENT MEMORANDUM, *supra* note 124, at 1.

138. 16 U.S.C. § 9609(d) (1988).

139. 16 U.S.C. § 3375(d) (1988).

140. 42 U.S.C.A. § 7413(f) (West Supp. 1991).

141. The staff at the Compliance Monitoring Branch of the Stationary Source Compliance Division of the EPA responsible for formulating the regulations that will control the Clean Air Act award program asserts that the general information required in an award request will be the same as that required under the CERCLA program or those systems orchestrated by the Fish and Wildlife Service. Telephone Interview with Clara Poffenberger, Staff, Compliance Monitoring Branch of the Stationary Source Compliance Division (July 15, 1991). The staff

material required under both the CERCLA program and the award programs regulated by the Fish and Wildlife Service.[142]

C. *Affirmative Monitoring Requirements*

The 1990 Amendments allow the EPA to require sources to monitor emissions levels and to certify compliance with specific emissions limitations. A person who fails either to perform the required monitoring or report accurately the results of any tests may be subject to administrative penalties, a civil enforcement action, and even criminal sanctions.[143] In addition to the obvious expense and effort necessary to comply with the reporting requirements, it is important to consider the effect these mandatory disclosures will have in any prospective administrative or judicial action. Affirmative reporting requirements compel parties to disclose to the EPA any non-complying conduct. The EPA then may take the self-reported information and institute some action against the reporting party for the non-complying conduct disclosed. Furthermore, in any prospective administrative or civil action, the party may find it has waived certain discovery privileges by having disclosed the information.

Under the Clean Air Act, most records, reports, or information provided to the EPA pursuant to mandatory monitoring requirements become agency documents subject to public disclosure.[144] An exception is made for records, reports, or information provided to the Administrator that would, if made public, divulge trade secrets of the responding party. The party seeking confidentiality for disclosed information must make a satisfactory showing to the EPA Administrator that the information deserves the requested protection.[145]

The 1990 Amendments expand the scope of the reporting requirements under the Clean Air Act. The 1990 Amendments allow the EPA to require the owner or operator of a facility to sample emissions and make one-time, periodic, or continuous records or reports certifying the compliance status of the emissions source.[146] Such certifications include: "(A) identification of the applicable requirement that is the basis of the certification, (B) the method used for determining the compliance status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, [and] (E) such other facts as the Administrator may require."[147]

Under these disclosure requirements, a person is compelled to submit to

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also reports that an agent of the Division will be required to submit an award request on behalf of a claimant and that no requests from individuals will be entertained unless so sponsored. *Id.*

142. *Id.*

143. Under 42 U.S.C.A. § 7413(a)(3), the Administrator may issue an administrative penalty, issue a compliance order, initiate a civil enforcement action, or request the Attorney General to commence a criminal action against a party that fails to abide by any monitoring requirements. Parties that do not report as required are subject to criminal penalties, including substantial fines and jail time. *See id.* § 7413(c).

144. 42 U.S.C. § 7414(c) (1988).

145. *Id.*

146. 42 U.S.C.A. § 7414(a)(1) (West Supp. 1991).

147. *Id.* § 7414(a)(3).

the EPA information that would serve as the basis for an agency enforcement action, an assessment of administrative penalties, or even a criminal prosecution. The disclosure of the required information could also provide individual citizens with the necessary data to institute citizen suits or toxic tort actions.

A person statutorily required to make reports to the EPA is faced with a perplexing problem. On the one hand, the party may desire to avoid discovery of certain internal information concerning compliance activities which could subject the party to significant claims by the government or the public. On the other hand, a regulated entity and any of its officers or employees want to comply completely and satisfactorily with the disclosure requirements to avoid administrative, civil, or criminal liability for a failure to report.

1. Federal Privileges

Compliance with the disclosure requirements of the 1990 Amendments may cause a person to waive privileges that initially would have protected the disclosed information. In civil or criminal actions under the Clean Air Act, federal law will control the extent to which the court will recognize any privileges.[148] Such privileges are not applied by federal courts unless their application promotes sufficiently important interests which outweigh the general need for probative evidence.[149] The scope of any such asserted privilege must be strictly construed.[150]

a. The Fifth Amendment Privilege

Under the Fifth Amendment to the United States Constitution, individuals have the right to refuse to disclose information that could incriminate them.[151] Corporations, associations, or other collective entities, however, have no right to invoke the protection of the Fifth Amendment.[152] The United States Supreme Court has held:

> [if] a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only . . . the privilege [against self-incrimination] cannot be invoked on behalf of the

148. *See* In re Pebsworth, 705 F.2d 261, 262 (7th Cir. 1983) (holding that the contours and exceptions of privileges in nondiversity cases are a matter of federal common law and not state law); *see also* United States v. Craig, 528 F.2d 773, 776 (7th Cir. 1976), *cert. denied*, 425 U.S. 973 (1976) (finding that federal privilege law applies in criminal cases filed in federal court); Urseth v. City of Dayton, 110 F.R.D. 245, 252-53 (S.D. Ohio 1986) (holding that federal law controls the applicability of privileges where the basis of the court's jurisdiction was a federal statute).

149. University of Pa. v. E.E.O.C., 493 U.S. 182, 189 (1990).

150. *Id.*

151. U.S. CONST. amend. V.

152. Braswell v. United States, 487 U.S. 99, 103 (1988). *See also* United States v. White, 322 U.S. 694, 701 (1944) (cited in (Under Seal) v. United States, 634 F. Supp. 732, 734 (E.D.N.Y. 1986)).

organization or its representatives in their official capacity.[153]

The past few years have seen a tremendous increase in the number of prosecutions for environmental crimes, with the focus of the prosecutions being high-ranking corporate officers. Generally, these corporate employees seeking to avoid personal criminal liability will want to invoke the Fifth Amendment privilege against self-incrimination. However, the Fifth Amendment does not appear to offer these officials protection from the Act's statutory reporting requirements.[154]

Corporate officials do not have a right to withhold required information or documentation even if the disclosure could subject those parties to criminal liability.[155] Under this rationale, a corporate officer has no Fifth Amendment privilege against disclosure of information mandatorily maintained pursuant to statute even if that information could implicate criminal wrongdoing on the officer's part.[156] Therefore, corporate officers cannot assert the Fifth Amendment privilege against self-incrimination in an attempt to escape the disclosure of records maintained under the requirements of the amended Act.

It is critical to recognize that the restrictions on a corporate officer's Fifth Amendment protection only extend to matters disclosed in the officer's official capacity as a corporate representative. A corporate officer will still have the right to Fifth Amendment protection in actions instituted against the officer in a personal capacity.[157] While there are no environmental cases that directly address the issue of self-incrimination, courts frequently have addressed similar issues within the realm of the securities laws and the Internal Revenue Code. A number of cases have held that a party cannot resist required disclosures under the protection of the Fifth Amendment privilege.[158] The courts faced with interpreting the scope of statutory reporting requirements outside the environmental area have held uniformly that the statutory mandates do not implicate the Fifth Amendment. The protection

153. *White*, 322 U.S at 701.

154. In re 25 Grand Jury Subpoenas, 654 F. Supp. 647, 651-52 (N.D. Ind. 1987) (holding that officers or custodians of a collective entity may not invoke a personal privilege so as to avoid the production of documents on behalf of the collective entity).

155. Davis v. United States, 328 U.S. 582, 590 (1946). The United States Supreme Court explained: "The state requires the books be kept, but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law." *Id.* (quoting Wilson v. United States, 221 U.S. 361, 380 (1911)).

156. *See Wilson*, 221 U.S. at 380 (holding that a corporate officer has no Fifth Amendment privilege to halt the disclosure of corporate records even though the records contain entries made by the officer that disclose his criminal activity); *see also* United States v. Stirling, 571 F.2d 708, 728 (2d Cir. 1978), *cert. denied*, 439 U.S. 824 (1978) (finding that where an individual has chosen to engage in a lawful activity in an unlawful manner, the unlawfulness cannot be used to excuse that party from regulatory disclosure requirements, even though such disclosure could lead to criminal prosecution).

157. *Braswell*, 487 U.S. at 113.

158. *See* United States v. Sullivan, 274 U.S. 259, 263-64 (1927) (holding that a party may not refuse to file a tax return based on the Fifth Amendment privilege against self-incrimination); United States v. Turk, 722 F.2d 1439, 1441 (9th Cir. 1983), *cert. denied*, 469 U.S. 818 (1984) (citing *Sullivan*).

against self-incrimination does not apply even though the record-keeping requirements may result in the disclosure of statutory violations that subject the reporting party to a civil, administrative, or criminal penalty.[159]

As early as 1948, in *Shapiro v. United States*,[160] the Supreme Court fashioned an exception to the Fifth Amendment privilege against self-incrimination for required records. The *Shapiro* court determined that the privilege protecting private papers cannot be extended to business records kept in accordance with law, where the transactions recorded are the appropriate subject of governmental regulation and the enforcement of restrictions is validly established.[161] This principle is known as the "required records" exception to the Fifth Amendment. Under this exception, persons who are required by law to maintain certain records have no claim to the Fifth Amendment protection against self-incrimination when the persons are required to produce those records for review.[162] To come within the bounds of the required records exception, documents must satisfy a three-pronged test: (1) the mandate requiring the maintenance of the documents must be essentially regulatory, (2) the maintained records must be the type of records customarily kept by the regulated party, and (3) the records themselves must have assumed "public aspects" which render them analogous to public documents.[163]

Documents maintained under the record-keeping requirements of the Clean Air Act should satisfy the three prongs of the required records exception. First, the records the amended Act requires a regulated party to maintain obviously are kept as part of a mandatory regulatory scheme.[164] Second, the maintained records are the type of documents customarily kept by such parties under a regulatory scheme. In addition, the reporting requirements in the amended Clean Air Act are analogous to record-keeping requirements in other environmental statutes.[165] Third, because the parties assembling the required documents will know, or should know, that the records are subject to review by the EPA,[166] those records will take on a

159. *See Stirling*, 571 F.2d at 727-28 (finding that the fact that the disclosure of the true nature of a stock transaction to the Securities Exchange Commission could have formed the basis of a criminal prosecution under the Taft-Hartley Act does not put the reporting requirements of the securities laws in conflict with the Fifth Amendment); United States v. Scherer, 523 F.2d 371, 375-76 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976) (holding that the 1968 Gun Control Act does not implicate the Fifth Amendment even though record-keeping requirements could result in the disclosure of any violations of the statute).

160. 335 U.S. 1 (1948).

161. *Id.* at 17-20.

162. In re Doe, 711 F.2d 1187, 1191-92 (2d Cir. 1983).

163. *Id.* at 1191.

164. *See* California v. Byers, 402 U.S. 424, 430-31 (1971) (holding that the requirement that drivers stop and report accidents in which they were involved is part of a regulatory scheme); United States v. Warren, 453 F.2d 738, 742 (2d Cir. 1972), *cert. denied*, 406 U.S. 944 (1972) (holding that record-keeping requirements under 21 U.S.C. § 360a(d) pertaining to certain controlled substances are part of a regulatory scheme).

165. *See* Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1991).

166. Documents or information disclosed to the EPA under the Clean Air Act generally becomes subject to public disclosure. *See* 42 U.S.C. § 7414(c) (1988).

public aspect.[167] Consequently, the records maintained under the mandates of the amended Act may not receive Fifth Amendment protection.

b. State Privileges

In state court actions initiated by state agencies or by individuals against an alleged environmental offender, and in federal diversity actions,[168] state law will govern the possible applicability of any evidentiary privileges. Consequently, in these types of cases, questions as to the right of regulated parties to protect information disclosed under the amended Clean Air Act would be controlled by state law.

(1) The Investigative Privileges

a. Anticipation of Litigation

The Texas Rules of Civil Procedure recognize four specific investigative privileges that a party may invoke to resist discovery.[169] All of these recognized privileges, however, protect only materials that were created in anticipation of litigation (*i.e.*, after the institution of a suit or after there was good cause to believe a suit would be filed).[170] If an action has not been filed prior to the time the materials were prepared, a party invoking one of the investigative privileges must satisfy two criteria to establish that there was "good cause" to believe an action would be commenced.[171] First, the person seeking to withhold requested documents that were created prior to an action must offer objective evidence that establishes there was good cause to believe a suit would be filed. Second, the person must show that he had a subjective

167. In re Doe, 711 F.2d at 1192 (finding that because the parties compiling the required documents possessed knowledge that the documents would be subject to review and public disclosure, the third prong of the "required records" exception concerning the "public aspect" of the records was satisfied).

168. In diversity actions, a federal district court is required to apply the law of privilege that would be applied by the courts of the state in which the federal court sits. *See* In re California Pub. Util. Comm'n, 892 F.2d 778, 781 (9th Cir. 1989) (holding that in diversity actions, questions of privilege are determined by state law); Samuelson v. Susen, 576 F.2d 546, 549-50 (3d Cir. 1978) (holding that a federal district court should look to state privilege law in diversity actions).

169. TEX. R. CIV. P. 166b (the four privileges are in the areas of attorney work product, party communications, witness statements, and non-testifying consulting experts).

170. Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 39-41 (Tex. 1989).

171. The Texas Supreme Court articulated the test as follows:

> Determining whether there is good cause to believe a suit will be filed, so that an investigation is done in anticipation of litigation, requires a two-prong analysis. The first prong requires an objective examination of the facts surrounding the investigation. Consideration should be given to outward manifestations which indicate litigation is imminent. The second prong utilizes a subjective approach. Did the party opposing discovery have a good faith belief that litigation would ensue? There cannot be good cause to believe a suit will be filed unless elements of both prongs are present. Looking at the totality of the circumstances surrounding the investigation, the trial court must then determine if the investigation was done in anticipation of litigation. Unless there is an abuse of discretion, the trial court's ruling should not be disturbed.

Id. at 40-41.

good faith belief that a suit would be commenced.[172]

The mere fact that an accident has occurred or a party is not in compliance with statutory regulations is not sufficient to establish good cause for anticipation of a suit. Good cause to believe a suit will be filed requires some outward manifestations of future litigation by the party having a cause of action, not by the party trying to resist discovery.[173] The bare assertion of a generic anticipation of litigation based upon patterns of prior injuries and litigation is also insufficient to make the required showing, absent some outward manifestations that a suit is imminent.[174] The requisite outward manifestations may consist of a party making a demand for damages, hiring an attorney or private investigator, or commencing an investigation of the accident or occurrence.[175]

The Texas Supreme Court has held that the filing of a claim with an administrative agency may not satisfy the anticipation of litigation standard that is a requisite for protection of allegedly privileged investigative materials.[176] The court based its ruling on the fact that the action before the agency was an uncontested hearing subject to de novo review. More recently, however, a state court of appeals found that a claim filed with an administrative agency, combined with other factors, could lead a trial judge to conclude that relevant investigative materials are protected by privilege because the materials were prepared in anticipation of litigation.[177] Under the mandatory reporting requirements of the Clean Air Act, however, the reports compiled by regulated parties generally will not be privileged under Texas law.[178] Such reports are not created in anticipation of litigation, and thus the information contained in those documents is likely to be subject to public disclosure and not protected from discovery.[179]

D. Attorney-Client Privilege

The reporting and certification requirements of the 1990 Amendments could work as a broad waiver of other evidentiary privileges. The attorney-

172. Boring & Tunneling Co. of America, Inc. v. Salazar, 782 S.W.2d. 284, 287 (Tex. App.—Houston [1st Dist.] 1989, no writ.).

173. *Id.*

174. Foster v. Heard, 757 S.W.2d 464, 465 (Tex. App.—Houston [1st Dist.] 1988, no writ.).

175. *Id. See also* Child World v. Solito, 780 S.W.2d 954, 956-57 (Tex. App.—Houston [14th Dist.] 1989, no writ.) (holding that a settlement demand letter that threatened the commencement of litigation if the settlement offer was not accepted was sufficient to sustain the "outward manifestation" requirement of the anticipation of litigation standard).

176. *Flores*, 777 S.W.2d at 39-40 (finding that a claim filed before the Industrial Accident Board did not constitute "litigation" to protect materials prepared for hearing under an asserted investigative privilege because the hearing was uncontested and subject to de novo judicial review).

177. American Home Assurance Co. v. Cooper, 786 S.W.2d 769, 771-72 (Tex. App.—El Paso 1990, orig. proceeding [leave denied]).

178. Under 42 U.S.C. § 7414(c) (1988), a party may petition the Administrator to withhold certain reported information from public disclosure as confidential because that information would divulge trade secrets of the regulated party.

179. Furthermore, the provisions of the Act specifically make such records subject to public disclosure. *See id.*

client privilege, which was created to promote full and frank client disclosure,[180] is one such privilege which is probably affected. Under the attorney-client privilege, communications from a client to an attorney are protected if they are made in furtherance of legal representation, have an expectation of confidentiality, and the privilege has not been waived.[181] The privilege also protects any communication from an attorney to a client that is made in furtherance of legal representation.[182] Only the actual communications between attorney and client are protected and not the facts underlying those communications.[183] While the attorney-client privilege also applies when the client is a corporation,[184] the scope of the privilege in a corporate setting is more limited. The corporate attorney-client privilege generally protects communications made by corporate employees to corporate counsel if the information is relayed at the direction of supervisory personnel, the information conveyed relates to matters within the scope of the employees' duties, and the employees know that they are cooperating in the investigation in order to obtain legal advice for the corporation.[185]

The attorney-client privilege may be waived voluntarily or inadvertently.[186] Furthermore, the partial disclosure of a confidential communication may initiate a waiver as to the remainder of the communication, and as to the subject matter of the communication.[187] To constitute such a waiver,

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180. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

181. The court in United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), formulated an oft-cited definition of the privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

182. *See* In re LTV Litig., 89 F.R.D. 595, 602-03 (N.D. Tex. 1981).

183. *Upjohn*, 449 U.S. at 395-96.

184. *Id.* at 389-90.

185. *Id.* at 394-97. *But see* TEX. R. CIV. EVID. 503 and TEX. R. CRIM. EVID. 503. In Texas, the protection offered to a corporation under the attorney-client privilege may be more limited than that recognized under federal law. The rules in Texas limit the attorney-client privilege to protect only the communications between corporate counsel and corporate "representatives" who have authority to obtain professional legal services on behalf of the corporation and to act on the legal advice secured. *See* TEX. R. CIV. EVID. 503(a)(2); TEX. R. CRIM. EVID. 503(a)(2). The Texas Rules appear to exclude from the protection of the attorney-client privilege communications between counsel and middle or lower level employees who have no authority to hire counsel and who follow the instructions of administrative superiors, rather than the advice of counsel.

186. *See* In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982); *see also* 4 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.60 [2] (2d ed. 1991).

187. *See* Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981) (finding that the voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161-62 (D.S.C. 1975) (finding that waiver of attorney-client privilege applies to all communications on related subject matter, even if the initial waiver was made with express limitations); MOORE, *supra* note 186, at § 26.60 [2].

however, the specific content of a privileged communication must be the subject of disclosure, not merely the underlying facts of that communication.[188] A party's subjective intent is only one factor that courts focus on to determine if a waiver should be implied.[189] Furthermore, if communications between an attorney and client occur in connection with a continuing crime or fraud, the attorney-client privilege does not protect those communications made during or prior to the perpetration of the offense.[190] The attorney's lack of knowledge of the improper conduct does not affect the waiver of the attorney-client privilege.[191]

Generally, the voluntary disclosure of confidential information to the government acts as a waiver of the attorney-client privilege.[192] The filing of statutorily required records or reports with the government may make those documents subject to public disclosure thus waiving a claim of privilege.[193] There are limited situations in which a litigant in a private action will not be required to produce copies of documents filed with the government in accordance with statutory mandate.[194] The government also has the right to assert a privilege against disclosure of the documents even though the private litigant is willing to produce the materials to the opposing party.[195] In

188. Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 458 (N.D. Ill. 1974). *See also* International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185-86 (M.D. Fla. 1973) (finding that the disclosure of facts underlying privileged communications does not waive that privilege).

189. *Weil*, 647 F.2d at 24; *Duplan Corp.*, 397 F. Supp. at 1162. *But see* United States v. Lipshy, 492 F. Supp. 35, 44 (N.D. Tex. 1979) (holding that a corporation's disclosure of a report investigating its own alleged misconduct did not act as an implied waiver justifying disclosure of the evidence underlying the report).

190. *See* In re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979); Garner v. Wolfinbarger, 430 F.2d 1093, 1102 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *see also* MOORE, *supra* note 186, § 26.60 [2]. *But see* In re Grand Jury Subpoenas Duces Tecum, 798 F.2d 32, 33-34 (2d Cir. 1986) (holding that confidential corporate documents created during an on-going crime were still protected by the attorney-client privilege because the documents did not facilitate or conceal the criminal activity).

191. Clark v. United States, 289 U.S. 1, 15 (1933). *See also* In re Grand Jury Proceedings, 680 F.2d 1026, 1028-29 (5th Cir. 1982) (holding that lawyers' skills may not be employed, even without their knowledge, in furthering crimes); MOORE, *supra* note 186, § 26.60 [2].

192. *See* In re Sealed Case, 676 F.2d 793, 822-24 (D.C. Cir. 1982) (holding that the voluntary disclosure of information to a government agency waives the attorney-client privilege); Permian Corp. v. United States, 665 F.2d 1214, 1219-22 (D.C. Cir. 1981) (holding that the disclosure of privileged information to the Securities Exchange Commission (SEC) waived the attorney-client privilege as to that information); *see also* MOORE, *supra* note 186, § 26.60 [2] n.31.

193. *See* Southern Film Extruders, Inc. v. Coca-Cola Co., 117 F.R.D. 559, 561-62 (M.D.N.C. 1987) (holding that the preparation by attorneys of a party's proxy statement that would be filed with the SEC manifests the lack of intention necessary to invoke the attorney-client privilege to protect the information contained therein). However, there are certain statutorily required reports that are protected from public disclosure as confidential. *See* Young v. Terminal R.R. Ass'n, 70 F. Supp 106, 108-09 (E.D. Mo. 1947) (holding that a registrant's Selective Service file is privileged and in absence of waiver cannot be introduced into evidence by the defendant in an action by the registrant); Federal Life Ins. Co. v. Holod, 30 F. Supp. 713, 713-14 (M.D. Pa. 1940) (holding that Selective Service records are protected from disclosure as confidential information).

194. *See* Castellano v. Pennsylvania Reading Seashore Lines, 15 F.R.D. 276, 276 (E.D. Pa. 1953) (finding that reports filed with the Interstate Commerce Commission were protected from disclosure); MOORE, *supra* note 186, § 26.61 [5.-2].

195. *See* Overby v. United States Fidelity & Guar. Co., 224 F.2d 158, 163 (5th Cir. 1955)

most cases, however, a private litigant can be compelled to disclose such documents.[196]

The confidentiality of required reports, either under the attorney-client privilege or any other asserted privilege, depends primarily on the statutory language creating the affirmative reporting duty. The Supreme Court, in *St. Regis Paper Co. v. United States*,[197] specifically addressed the issue of whether statutorily required reports can be protected from discovery as confidential. In *St. Regis Paper Co.* the Federal Trade Commission directed a regulated corporation to submit copies of its census reports to the Commission for review. The corporation refused to submit the reports based on a claim of confidentiality. The Supreme Court rejected the corporation's claim that the documents were confidential.[198] Justice Clark, writing for the majority, found that the Census Act, which required the compilation of the reports, did not award the documents the asserted protection.[199] Because the requested documents were not offered protection from disclosure by the Census Act, the corporation's claim could not be sustained.

Even though the 1990 Amendments require regulated parties to file numerous reports concerning their compliance status, the Act only grants those documents limited protection from disclosure.[200] If the Act is construed strictly, regulated parties will not be able to protect the information pursuant to traditional privileges. Furthermore, a partial disclosure of confidential information could waive the attorney-client privilege as to all confidential information on the subject matter of the disclosure.

The Act may weaken claims under the attorney-client privilege in two ways. First, the disclosure requirements of the Act may simply force regulated persons to release information that might otherwise be privileged. Second, the increased criminalization of the Act broadens the scope of communications that could come within the crime/fraud exception to the attorney-client privilege. For example, as every day of non-compliance con-

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(holding that the right to assert a privilege against disclosure of certain bank records belonged to the Government and could not be claimed or waived by a private party); MOORE, *supra* note 186, § 26.61[5.-2].

196. *See* Lamorte v. Mansfield, 438 F.2d 448, 451-52 (2d Cir. 1971) (finding that a private litigant can be compelled to produce copies of documents or testimony given to the SEC).

197. 368 U.S. 208 (1961).

198. *Id.* at 218.

199. Justice Clark stated:

> We fully realize the importance to the public of the submission of free and full reports to the Census Bureau, but we cannot rewrite the Census Act. It does not require petitioner to keep a copy of its report nor does it grant copies of the report not in the hands of the Census Bureau an immunity from legal process. Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result. That this statute does not do. Congress did not prohibit the use of reports *per se* but merely restricted their use while in the hands of those persons receiving them, i.e., the government officials.

Id.

200. *See* 42 U.S.C.A. § 7414(c) (West Supp. 1991) (making all reports, records, or information submitted to the EPA under the Act subject to public disclosure, except upon a showing that the materials deserve to be treated as confidential so as not to divulge trade secrets).

stitutes a violation, an attorney who knows of the client's violation may be assisting the illegal activity. The scope of the reporting requirements signifies Congress' belief that the public necessity to obtain such information outweighs a regulated person's private right to maintain the confidentiality of that information.

E. Ethical Considerations

The 1990 Amendments specifically implicate a number of ethical considerations for Texas lawyers who represent parties regulated under the Clean Air Act. The increased criminalization of the Act may cause Texas attorneys to come into direct conflict with the mandates of the Texas Disciplinary Rules of Professional Conduct (Texas Disciplinary Rules).[201] Under the Texas Disciplinary Rules, practitioners face strict requirements regarding the maintenance of confidentiality of client information. The Texas Disciplinary Rules specifically demand that attorneys maintain the confidentiality of two types of information.[202] The first type is client information protected by the lawyer-client privilege described in Tex. R. Civ. Evid. 503, Tex. R. Crim. Evid. 503, or by the principles of the attorney-client privilege defined in Fed. R. Evid. 501.[203] The second protected category is unprivileged client information, which is much broader than the evidentiary privilege. Unprivileged client information is defined as "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client."[204] The definition of unprivileged client information includes materials that otherwise would be unprotected and readily accessible to others, such as publicly filed documents or conduct in hearings or other case proceedings.[205]

Generally, an attorney may not disclose confidential information of a client or former client to either (1) any person that the client has instructed is not to receive the information; or (2) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the attorney's law firm.[206] Furthermore, even if a practitioner does not disclose the confidential information of a client or former client, there are specific mandates restricting the attorney from using the information to the client's disadvantage without the client's consent.[207]

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201. The professional conduct of practitioners licensed in Texas after January 1, 1990, is governed by the Texas Disciplinary Rules of Professional Conduct, promulgated by the Texas Supreme Court on October 17, 1989. *See* SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) Rule 1.01-8.05 (1990) [hereinafter TEX. DISCIPLINARY RULES OF PROF. CONDUCT] (located in pocket part for Volume 3 of the Texas Government Code in title 2, subtitle G app., following § 83.006 of the Government Code).

202. *Id.* Rule 1.05(a).

203. *Id.* Rule 1.05(a).

204. *Id.*

205. CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE AND LAWYER DISCIPLINE § 4.25 (1991).

206. TEXAS DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 201, Rule 1.05(b)(1).

207. *Id.* Rule 1.05(b)(2)-(3).

The Texas Disciplinary Rules create certain exceptions to the general rules of confidentiality that allow or require an attorney to disclose all or part of a client's confidential information. A client may solicit the representation of a lawyer for the specific purposes of eliciting aid in illegal or fraudulent conduct, or counsel may learn of such improper conduct at some point after representation has begun. Depending upon the time and circumstances under which information of improper conduct is acquired, different duties may arise.[208]

First, an attorney may not assist or counsel a client in conduct that is criminal or fraudulent.[209] On the other hand, a lawyer may discuss the consequences of any proposed course of conduct with a client and present an analysis of the legal aspects of questionable conduct.[210] The lawyer may not, however, with impunity recommend the means by which a crime or fraud may be committed.[211]

An attorney also has certain other affirmative duties when the issue of criminal or fraudulent conduct arises. The Texas Disciplinary Rules create disclosure guidelines pursuant to which an attorney may or must disclose confidential client information.[212] Specifically, counsel is permitted to reveal confidential client information when the lawyer "has reason to believe it is necessary" to comply with any of the Texas Disciplinary Rules or any other law,[213] to prevent the client from committing a criminal or fraudulent act,[214] or to the extent reasonably necessary to rectify the consequences of a client's criminal or fraudulent act committed using the lawyer's services.[215] In addition, the attorney may have the obligation to make reasonable efforts to dissuade the client from committing the crime or fraud or persuade the client to take necessary corrective action.[216]

An attorney must reveal confidential client information when the lawyer has information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person.[217] Furthermore, an attorney must disclose confidential

208. HERRING, *supra* note 205, § 4.43.

209. TEXAS DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 201, Rule 1.02(c). In a situation where an attorney's services are innocently involved in past conduct by the client that was criminal or fraudulent, the lawyer has not violated the Disciplinary Rules because to "counsel or assist" criminal or fraudulent conduct requires knowing actions by that lawyer. *Id.* Rule 1.02 comment 12.

210. *Id.* Rule 1.02(c) comment 7.

211. *Id.* Rule 1.02 comment 7.

212. *Id.* Rule 1.05(c)-(f).

213. *Id.* Rule 1.05(c)(4).

214. TEXAS DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 201, Rule 1.05(c)(7).

215. *Id.*, Rule 1.05(c)(8). In determining whether to make a permissive disclosure, an attorney should consider factors such as "the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question." Such a disclosure should be no greater than the attorney believes necessary to fulfill the limited protective purposes of the exceptions. *Id.* Rule 1.05 comment 14.

216. *Id.* Rule 1.02(d), (e).

217. *Id.* Rule 1.05(e).

information to a third person when the disclosure of a material fact to that person is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a client's fraudulent act.[218] Counsel should limit these revelations to only the information necessary to prevent the criminal or fraudulent act.[219]

In addition to the disclosure requirements foisted upon attorneys by the Texas Disciplinary Rules, counsel also may be permitted or required to withdraw from representation because of the criminal or fraudulent acts of a client. An attorney may withdraw from representing a client if that client persists in a course of action involving the attorney's services that the attorney reasonably believes may be criminal or fraudulent, or the client has used the attorney's services to perpetuate a crime or fraud in the past.[220] Counsel must withdraw from the representation when a lawyer knows that the employment will result in the violation of a Disciplinary Rule or other law.[221] Generally, a withdrawal from representation must be accomplished with the utmost care taken so as not to adversely affect the clients interests.[222]

The 1990 Amendments will force attorneys representing regulated parties to constantly confront and assess their ethical obligations under the Texas Disciplinary Rules. Frequently, attorneys are hired to assist with the interpretation of environmental audits conducted by a company itself or an environmental consulting firm, that describe a company's compliance status with regard to permitted emissions levels or other regulatory mandates. These audits often contain information establishing the noncompliance of a regulated party.

Under the 1990 Amendments, a regulated party may be required to conduct investigations to measure emissions levels and report any noncompliance to the EPA. A party that fails or refuses to disclose information or that misstates the severity of possible violations to the EPA is subject to criminal sanction.[223] If an attorney employed by a regulated party has knowledge of confidential information that establishes such criminal violations, that attorney may have a duty to take reasonable steps to dissuade the client from conducting the criminal activity and may be permitted or even required to disclose the relevant data.

The attorney has the duty to make a reasonable attempt to dissuade the client from taking illegal actions[224] and may disclose the client's intended course of conduct[225] if the attorney reasonably believes it is necessary to do so to prevent the regulated party from committing a criminal or fraudulent act. An attorney also may be permitted to withdraw from the representation

218. *Id.* Rules 1.05(f), 4.01(b).
219. TEXAS DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 201, Rule 1.05(e).
220. *Id.* Rule 1.15(b)(2)-(3).
221. *Id.* Rule 1.15(a) comment 2.
222. *Id.* Rule 1.15 comment 7.
223. *See* 42 U.S.C.A. § 7413(c)(1)-(2) (West Supp. 1991).
224. TEXAS DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 201, Rule 1.02(d) (1990) (this obligation only applies if the client is likely to commit a criminal or fraudulent act that could likely result in substantial injury to the financial interest or property of another).
225. *Id.* Rule 1.05(c)(7).

of a regulated party in these circumstances where the client does not adhere to the attorney's advice and decides to proceed with conduct the lawyer reasonably believes is criminal or fraudulent.[226] The lawyer is not required to discontinue representation of the regulated party, however, until the lawyer knows that the conduct will be illegal or in violation of the Texas Disciplinary Rules.[227]

If during the course of representing a regulated party, an attorney comes across confidential information clearly establishing that the client is likely to take actions that are criminal or fraudulent and that are likely to cause the death of or substantial bodily harm to a person, that attorney is required to reveal the information to the extent reasonably necessary to prevent the illegal act.[228] The lawyer is also required to withdraw from representing the regulated party where the lawyer knows that the employment will result in a violation of the law or a Texas Disciplinary Rule.[229] Problems arise for attorneys under the mandatory disclosure requirement of the Act in determining whether the scrutinized conduct will cause the death of or serious bodily injury to a person. Attorneys confronted with this predicament will have to address a number of issues in determining the extent of their obligation to disclose the confidential information. For example, does it make a difference if the client's violation occurs in a relatively unpopulated area as opposed to a metropolitan center? What level of emissions are likely to cause death or substantial injury to a person? Is continual exposure to a moderate level of a regulated emissions likely to cause death or substantial injury to a person if that party would not become noticeably affected by the exposure for many years?

Attorneys possessing knowledge that their client is likely to commit a criminal or fraudulent act also may have an obligation to withdraw their representation of that party. If an attorney receives information that the regulated party is engaging in a course of action, involving the attorney's services, that the attorney reasonably believes may be a criminal violation of a permit requirement or a provision of the Act, withdrawal from the representation is permitted.[230] Withdrawal is mandatory, however, if that attorney knows that the asserted conduct is illegal or violates one of the Texas Disciplinary Rules.[231]

Furthermore, an audit of a client's emissions levels and other regulated processes may reveal information establishing that the participating attorney's services were used in the past to aid the client in the commission of a criminal or fraudulent act. If an attorney uncovers such information, the attorney may disclose such information if necessary to rectify the conse-

226. *Id.* Rule 1.15 comment 7.

227. *Id.*

228. *Id.* Rule 1.05(e).

229. TEXAS DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 201, Rule 1.15(a)(1) & comment 2.

230. *Id.* Rule 1.15(b)(2) comment 7.

231. *Id.* Rule 1.15 comment 2.

quences of such acts.[232] The attorney also should attempt to persuade the client to take necessary remedial action.[233] Finally, in this situation, the lawyer has the right to withdraw from the representation.[234]

The increased criminalization of the Act requires attorneys representing regulated parties to be uniquely aware of their rights and obligations under the Texas Disciplinary Rules. Even seemingly minute violations of permit requirements or provisions of the Act can foist obligations on an attorney that causes conflict with client interests. As the boundaries of the 1990 Amendments are delineated by regulations and rulings, the extent of counsels' ethical obligations under the Act should become more well-defined. Until that time, however, attorneys representing regulated parties must take precautions to limit the friction between their ethical obligations under the Texas Disciplinary Rules and their client's interests.

CONCLUSION

The 1990 Amendments to the Clean Air Act will have wide-ranging effects on the activities of persons regulated by the Act and their representatives. First, the 1990 Amendments have incorporated a significant number of new enforcement mechanisms into the Act. The threat of being penalized or prosecuted under one of these mechanisms should cause regulated parties and employees of regulated parties to become more aware of compliance status and to take specific actions to prevent or correct noncompliance.

Second, the amended Act may require regulated individuals to make a number of periodic affirmative disclosures to the EPA regarding compliance status. The compelled disclosure of compliance information may waive any shield of confidentiality that once protected that information. Consequently, regulated persons may lose any right to withhold that information from disclosure in an enforcement action or citizen suit.

Finally, the increased criminalization of the amended Act raises a number of serious ethical considerations for Texas attorneys representing regulated parties. The expansion of the Act's criminal penalties by the 1990 Amendments will force Texas practitioners to constantly assess their ethical obligations under the Texas Disciplinary Rules. Until the boundaries of the new provisions become more defined, Texas attorneys will be required to take extensive precautions to reduce conflict between their ethical obligations and client interests.

The 1990 Amendments enact changes to the Clean Air Act supporting the growing public sentiment to hold persons strictly culpable for their actions that place an unwarranted burden on the environment. Persons seeking to operate within the terms of the Act are faced with extended liability and a corresponding loss of personal protections when contesting alleged violations of the regulatory scheme. Consequently, regulated individuals will be

232. *Id.* Rule 1.05(c)(8).
233. *Id.* Rule 1.02(e).
234. TEXAS DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 201, Rule 1.05(b)(3) comment 7.

compelled to exercise extreme caution in conducting activities regulated by the amended Clean Air Act.