



1992

## The Environmental Prosecutor: New Jersey's Innovative Approach to Environmental Enforcement

Steven J. Madonna

Kathleen M. Breslin

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Steven J. Madonna & Kathleen M. Breslin, *The Environmental Prosecutor: New Jersey's Innovative Approach to Environmental Enforcement*, 3 Vill. Envtl. L.J. 47 (1992).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol3/iss1/3>

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

## THE ENVIRONMENTAL PROSECUTOR: NEW JERSEY'S INNOVATIVE APPROACH TO ENVIRONMENTAL ENFORCEMENT

STEVEN J. MADONNA†  
KATHLEEN M. BRESLIN‡

### TABLE OF CONTENTS

I. INTRODUCTION .....	47
II. NEW JERSEY - A CASE STUDY .....	49
A. Background - Foundation of Environmental Enforcement .....	49
1. <i>Criminal Enforcement</i> .....	52
2. <i>Civil Enforcement</i> .....	55
3. <i>Administrative Enforcement</i> .....	56
B. Problems Facing New Jersey .....	57
1. <i>Lack of Coordination Among Agencies</i> .....	57
2. <i>Lack of Comprehensive Planning</i> .....	61
3. <i>Inability to Expedite Priority Cases</i> .....	61
C. New Jersey's Solution - Office of the State Environmental Prosecutor .....	62
D. New Jersey's Experience .....	64
1. <i>Improved Coordination</i> .....	64
2. <i>Policy and Planning</i> .....	66
3. <i>Priority Cases</i> .....	67
III. CONCLUSION .....	69

### I. INTRODUCTION

**E**NFORCEMENT of environmental laws in the United States is accomplished through the use of a complex maze of civil, criminal and administrative remedies lodged within numerous divisions, departments and elements of state, county and local governments. As a consequence of the failure to coordinate state environmental enforcement efforts, multiple remedies have been inartfully utilized in numerous jurisdictions resulting in an ineffective "system" of environmental enforcement.<sup>1</sup> For example, in New Jersey, various

† State Environmental Prosecutor of New Jersey.

‡ Assistant State Environmental Prosecutor of New Jersey.

1. For a discussion of structural and procedural difficulties in state and local

forms of environmental remedies exist in numerous divisions within five departments of New Jersey State government as well as in the local police, fire, code enforcement and health departments.<sup>2</sup> Prior to 1990, no entity in the New Jersey government was responsible for coordinating the use or prioritization of remedies, or the deployment of manpower or resources in the environmental enforcement activities of state, county and local agencies. The problem of this "missing dimension" of coordination is inherent in government's piecemeal legislative response to the continually evolving problems of the pollution of our water and air and the destruction of our natural resources.<sup>3</sup>

The traditional governmental approach for solving environmental protection problems can be characterized as "crisis response." This may relate to the fact that we, as a society, continue to discover the problems created by our mishandling of wastes and pollutants. In the environmental area, a crisis emerges and legislation is proposed to solve the crisis.<sup>4</sup> It may have civil, criminal or administrative enforcement aspects. The legislation enacted usually establishes an environmental program with general statutory goals, provides funding and, in many cases, delegates the responsibility for developing and promulgating regulations to a state, county or local agency. In turn, the agency promulgates the regulations and, through its own regulatory enforcement power or with the civil or criminal enforcement assistance of some other state, county or local agency, enforces the law.

---

environmental regulation enforcement, see Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 906 (1990)[hereinafter Butler, *State Environmental Programs*]. See also Joel A. Mintz, *Clear the Air*, 21 ENVTL. L. 1543, 1547 (1991)("While some local governments may be entirely equipped to take on the responsibilities of environmental enforcement, many others lack ample legal authority, well trained professional enforcement staffs, and sufficient scientific and technical sophistication. These elements are all prerequisite to environmental enforcement success.").

2. See *infra* notes 44-53 and accompanying text.

3. See generally Butler, *State Environmental Programs*, *supra* note 1, at 861-69 ("[T]he ad hoc approach of the legislature has produced inconsistent management decisions and has led to a fragmented, inefficient and unclear administrative structure."). See, e.g., Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L., 1 (1982)(The Superfund legislation was "hurriedly put together . . . in the closing days of the lame duck session of an outgoing Congress . . . . Faced with a complicated bill on a take-it-or-leave-it basis, the House took it, groaning all the way.").

4. See Butler, *State Environmental Programs*, *supra* note 1, at 861 (discussion of state legislation "narrowly tailored to deal with the problems as they bec[o]me crises").

Ideally, the crisis has been successfully managed. Reflecting on this phenomenon of "crisis response," it is understandable why, over the years, the result has been a patchwork of programs and remedies in multiple agencies in all levels of government, devoid of centralized control or coordination.<sup>5</sup>

Thus, the challenge facing New Jersey, and probably all other states, is 1) to develop a "mechanism" to improve day-to-day communication and coordination, 2) to provide for comprehensive enforcement planning which is holistic in scope and not artificially constrained by the limits of the authority of a single governmental agency and 3) to ensure the commitment of personnel and resources for the effective and efficient resolution of priority cases.<sup>6</sup> This paper will explore New Jersey's response to this challenge - the recent creation of the Office of the State Environmental Prosecutor.

## II. NEW JERSEY - A CASE STUDY

### A. Background - Foundation of Environmental Enforcement

Realistic environmental laws with predictable and certain civil, criminal and administrative penalties are the foundation for effective environmental protection. Because compliance with environmental regulations is seemingly cumbersome and costly, it cannot be left to the regulated community to comply with the law voluntarily. The relevant statutes and regulations must have the potential bite of enforcement penalties to ensure compliance.<sup>7</sup>

As with most states, New Jersey's environmental laws are enforced through administrative, civil and criminal remedies.<sup>8</sup> All

---

5. *Id.* at 911 ("Promising environmental laws that have survived difficult political battles become meaningless in the absence of effective regulatory enforcement."). EPA is also focusing on restructuring efforts. *See, e.g., EPA Wants Enforcement Office Reorganization to Yield Stronger Relationship With Regions*, 20 Env't. Rep. (BNA) 1716 (Feb. 2, 1990). *See also EPA Sets Six Projects For Study as Part of Enforcement 1990's Review*, 20 Env't. Rep. (BNA) 1758 (Feb. 9, 1990) (EPA will examine, *inter alia*, federal and state enforcement relationship and role of local government).

6. Priority cases are cases involving chronic environmental offenders, syndicated criminals, or situations which pose an unusually serious threat to public health or the environment, or which, for any other reasons, have become "high profile."

7. *See, e.g., F. Henry Habicht II, The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 10478 (Dec. 1987) [hereinafter Habicht, *The Federal Perspective on Environmental Criminal Enforcement*] ("[E]xperience has shown that in the absence of consistent enforcement, [violators] have undue incentives to gain competitive advantage through noncompliance.").

8. *See, e.g., Wendy E. Wagner, Liability for Hazardous Waste Cleanup: An Exami-*

three serve necessary but somewhat different functions. A reasonable and realistic administrative enforcement program is essential to secure broad-based environmental compliance because it is best suited to deal en masse with generalized program requirements. The use of easily administered fines and penalties sets the general parameters of the enforcement program.<sup>9</sup> Civil enforcement is more case specific. It brings to bear the general civil remedies available in the state court system in the form of prohibitory and mandatory injunctive orders, civil trial and penalty proceedings. Criminal enforcement is most effective in deterring the repeat offender, the syndicated criminal and others who engage in crime for profit or otherwise consider civil penalties as the cost of doing business.<sup>10</sup> In addition, criminal prosecution, with its potential for incarcerating individuals, sends a clear and unmistakable message to the regulated community that the state is serious about enforcing its environmental laws.

While each enforcement mode has the potential to be effective when used properly, each can be grossly ineffective and even counterproductive if used in an untimely or uncoordinated manner. For example, in the event of a hazardous substance discharge, the immediate goal is to contain and stabilize any environmental damage. This goal can best be achieved with the polluter's "cooperation," proceeding in an administrative or civil enforcement context. A criminal investigation initiated in an untimely fashion, however, thwarts such cooperation and may undermine the immediate success of stabilization attempts. Thus, in such a setting, civil or administrative enforcement techniques are

---

*nation of New Jersey's Approach*, 13 HARV. ENVTL. L. REV. 245 (1989) (examining New Jersey's tough new regulatory approach embodied in the Environmental Cleanup Responsibility Act (ECRA)). For a general discussion of state implementation of environmental enforcement legislation, see DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW, Sec. 16 (2d ed. 1991) [hereinafter Selmi & Manaster, *State Environmental Law*].

9. See Selmi & Manaster, *State Environmental Law*, *supra* note 8, at Sec. 16.04 ("The various methods of administrative enforcement available to [state] environmental agencies occupy a hierarchy from the proverbial 'slap on the wrist' to the ultimate sanction of a permit revocation that puts the defendant out of business.").

10. See generally, Roger R. Marzulla & Beth L. Kappel, *Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990's*, 16 COLUM. J. ENVTL. L. 201, 216 (1991) (Prison sentences and heavy criminal fines provide "a powerful incentive to voluntarily comply with the environmental laws."). See also Habicht, *The Federal Perspective on Environmental Criminal Enforcement*, *supra* note 7, at 10478 ("[T]he successful businesses of the future will be those that recognize the significance of the civil and criminal sanctions now prescribed for environmental violations and make efforts through compliance to avoid prosecution.").

initially more appropriate. On the other hand, civil and administrative enforcement tends to be ineffective when used against the repeat offender or members of organized crime.<sup>11</sup> Matching and sequencing the appropriate enforcement mechanism to the particular case is, therefore, essential to the effective enforcement of environmental laws and policies.

For instance, the mere presence and periodic interaction of the criminal justice system, in appropriate cases, enhances the credibility of the broad-based administrative enforcement program. No longer does the regulated community view the regulatory inspector as having limited power and ineffective authority. A series of timely criminal prosecutions apprises the regulated community that ignoring the regulatory inspector carries with it the certain prospect of more heavy-handed criminal prosecution, including criminal search warrants, the grand jury subpoena, indictment and the potential for incarceration.<sup>12</sup> Administrative enforcement, viewed in this context, is imminently more effective in ensuring broad-based compliance.

Matching and sequencing the appropriate enforcement mechanism(s) to the appropriate case is not only more effective, it is also more efficient since resources are not wasted on unproductive endeavors. At a time when government is reassessing its commitment of resources and its expenditure of tax dollars, it is only fitting that governmental institutions work to ensure that personnel and resources are utilized in the most effective and efficient manner.<sup>13</sup>

---

11. See generally, Selmi & Manaster, *State Environmental Law*, *supra* note 8, at Sec. 16.06 ("[A]gency enforcement efforts almost always are initially geared toward cooperative solutions, with the agency's posture becoming increasingly aggressive only after repeated instances of disregard for its orders."). See also, Habicht, *The Federal Perspective on Environmental Criminal Enforcement*, *supra* note 7, at 10480. Among the factors prosecutors examine in deciding whether to proceed with a criminal prosecution are: (1) the harm caused by a violation; (2) the economic gain to the violator; and (3) whether the violations were repeated.

12. See Habicht, *The Federal Perspective on Environmental Criminal Enforcement*, *supra* note 7, at 10479. The author noted the following:

The government's increased resort to criminal enforcement of the environmental laws has one principal, overarching goal: deterrence. The stigma that attaches to a criminal conviction and the dislocation inherent in actual incarceration combine to make the threat of criminal prosecution a major tool in obtaining greater compliance with the nation's environmental laws.

*Id.*

13. See, e.g., *Consolidation of Environmental Agencies Expected to Resurface in Budget Package*, 22 Env't. Rep. (BNA) 568 (July 5, 1991) (proposal under consideration in Texas would consolidate several state agencies into single Department of the Environment).

In order to understand the full potential of a coordinated enforcement initiative, it is necessary to survey the scope of the tools provided by the key criminal, civil and administrative enforcement statutes. These tools are the foundation of any environmental enforcement program.

### 1. Criminal Enforcement

It is essential that the threat of incarceration be a sure and present risk for a willful disregard of appropriate environmental statutes. In New Jersey, the most potent weapon is Section 2C:17-2 of the Code of Criminal Justice,<sup>14</sup> which classifies the knowing or purposeful release or abandonment of hazardous waste, toxic pollutants or other "harmful or destructive substance[s]" as a second degree crime<sup>15</sup> under which it is presumed that a convicted person will be incarcerated for five to ten years.<sup>16</sup>

---

14. N.J. STAT. ANN. § 2C:17-2 (West 1982 & Supp. 1991).

15. Section 2C:17-2a of the New Jersey Code of Criminal Justice reads as follows:

(1) A person who, purposely or knowingly, unlawfully causes . . . [the] release or abandonment of . . . any . . . harmful or destructive substance commits a crime of the second degree.

(2) A person who, purposely or knowingly, unlawfully causes a hazardous discharge required to be reported pursuant to the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23:11 et seq.) or any other rules and regulations adopted pursuant thereto, or who, purposely or knowingly, unlawfully causes a release or abandonment of hazardous waste as defined in section 1 of P.L.1976, c.99 (C.13:1E-38) or a toxic pollutant as defined in section 3 of P.L.1977, c.74 (C.58:10A-3) commits a crime of the second degree. Any person who recklessly violates the provisions of this paragraph is guilty of a crime of the third degree. The provisions of N.J.S. 2C:1-6 to the contrary notwithstanding, a prosecution for a violation of the provisions of this paragraph shall be commenced within five years of the date of the discovery of the violation.

N.J. STAT. ANN. §§ 2C:17-2a(1) to -2a(2) (West 1982 & Supp. 1991). Until the recent amendment to the New Jersey Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-1 to -20 (West 1982 & Supp. 1991), by the Clean Water Enforcement Act of 1990, N.J. STAT. ANN. §§ 58:10A-1 to -20 (West Supp. 1991), section 2C:17-2a was the only New Jersey statute that classified an environmental crime as a second degree offense.

16. Section 2C:43-6a of the New Jersey Code of Criminal Justice reads as follows:

a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment as follows:

(1) In the case of a crime of the first degree, for a specified term of years which shall be fixed by the court and shall be between 10 years and 20 years;

(2) In the case of a crime of the second degree, for a specified term of years which shall be fixed by the court and shall be between five years and 10 years;

(3) In the case of a crime of the third degree, for a specified term

Since successful prosecutions under this statute usually result in jail time, the threat of criminal prosecution under this provision is a successful deterrent.

In addition, this statute also provides that the "reckless" release or abandonment of hazardous waste, toxic pollutants or other harmful or destructive substances is a third degree crime<sup>17</sup> in which a conviction may result in imprisonment for three to five years.<sup>18</sup> These criminal provisions are particularly effective because they are not limited to one form of pollution, but can be used for the release or abandonment of any "harmful or destructive substance."<sup>19</sup>

In April 1990, the Clean Water Enforcement Act<sup>20</sup> amended New Jersey's Water Pollution Control Act<sup>21</sup> to include an expanded range of criminal provisions.<sup>22</sup> The base provision

---

of years which shall be fixed by the court and shall be between three years and 5 years;

(4) In the case of a crime of the fourth degree, for a specified term which shall be fixed by the court and shall not exceed 18 months.

N.J. STAT. ANN. §§ 2C:43-6a(1) to -6a(4) (West 1982 & Supp. 1991).

17. N.J. STAT. ANN. § 2C:17-2a(2).

18. N.J. STAT. ANN. § 2C:43-6a(3).

19. N.J. STAT. ANN. § 2C:17-2a. While such broad provisions may be vulnerable to overkill, criminal prosecutions under this statute are tempered by the general penal law proscription against "de minimus" prosecutions.

20. Clean Water Enforcement Act of 1990, N.J. STAT. ANN. §§ 58:10A-1 to -20 (West Supp. 1991).

21. Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-1 to -20 (West 1982 & Supp. 1991).

22. The criminal provisions of the amended Water Pollution Control Act provide as follows:

(1)(a) Any person who purposely, knowingly, or recklessly violates this act, and the violation causes a significant adverse environmental effect, shall, upon conviction, be guilty of a crime of the second degree, and shall, . . . , be subject to a fine of not less than \$25,000 nor more than \$250,000 per day of violation, or by imprisonment, or by both. (b) As used in this paragraph, a significant adverse environmental effect exists when an action or omission of the defendant causes: serious harm or damage to wildlife, freshwater or saltwater fish, any other aquatic or marine life, water fowl, or to their habitats, or to livestock, or agricultural crops; serious harm, or degradation of, any ground or surface waters used for drinking, agricultural, navigational, recreational, or industrial purposes; or any other serious articulable harm or damage to, or degradation of, the lands or waters of the State, including ocean waters subject to its jurisdiction . . . .

(2) Any person who purposely, knowingly, or recklessly violates this act, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failure to submit a monitoring report, or any portion thereof, required pursuant to this act, shall upon conviction



designates any purposeful, knowing or reckless violation of the Water Pollution Control Act as a third degree crime.<sup>23</sup> Where a person acts only with criminal negligence, however, the statute reduces the crime to the fourth degree,<sup>24</sup> whereby a convicted party may be subjected to a maximum period of eighteen months incarceration.<sup>25</sup> In the event a person acts purposely, knowingly or recklessly and causes a "significant adverse environmental effect,"<sup>26</sup> the criminal penalty is elevated to the second degree.<sup>27</sup> For the first time in New Jersey, an environmental crime is enhanced a degree because of the impact on the environment rather than on a more sophisticated *mens rea*. The Act also creates a first degree environmental crime for the knowing discharge without a permit or in violation of a permit condition, whereby a person knowingly places another person in imminent danger of death or serious bodily injury.<sup>28</sup> Conviction under this provision results in the presumption of incarceration, for ten to twenty years.<sup>29</sup> This

---

tion, be guilty of a crime of the third degree, and shall, . . . , be subject to a fine of not less than \$5,000 nor more than \$75,000 per day of violation, or by imprisonment, or by both.

(3) Any person who negligently violates this act, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failing to submit a discharge monitoring report, or any portion thereof, required pursuant to this act, shall upon conviction, be guilty of a crime of the fourth degree, and shall, . . . , be subject to a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment, or by both.

(4) Any person who purposely or knowingly violates an effluent limitation or other condition of a permit, or who discharges without a permit, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, . . . , shall, upon conviction, be guilty of a crime of the first degree, and shall, . . . , be subject to a fine of not less than \$50,000 nor more than \$250,000, or, in the case of a corporation, a fine of not less than \$200,000 nor more than \$1,000,000, or by imprisonment, or by both.

N.J. STAT. ANN. § 58:10A-10f (West 1982 & Supp. 1991).

23. N.J. STAT. ANN. § 58:10A-10f(2).

24. N.J. STAT. ANN. § 58:10A-10f(3).

25. N.J. STAT. ANN. § 2C:43-6a(4) (West 1982 & Supp. 1991). For the applicable text of section 2C:43-6a(4), see *supra* note 16.

26. A "significant adverse environmental effect" is defined in N.J. STAT. ANN. § 58:10A-10f(1)(b). For the applicable text of this section, see *supra* note 22.

27. N.J. STAT. ANN. § 58:10A-10f(1)(a).

28. N.J. STAT. ANN. § 58:10A-10f(4).

29. N.J. STAT. ANN. § 2C:43-6a(1) (West 1982 & Supp. 1991). For the applicable text of this section, see *supra* note 16.

is the only environmental first degree crime for the State of New Jersey.

In addition to these sample statutes, there are numerous other environmental statutes which criminalize pollution.<sup>30</sup> Another critical statutory tool is the tolling of the usual five year statute of limitations until the date of discovery.<sup>31</sup> This is critical for environmental enforcement because environmental crimes often are not discovered until years after the incident.

## 2. *Civil Enforcement*

The civil tools and remedies, although not as coercive a deterrent as the criminal sanctions, are also dramatically important. The Deputy Attorneys General within the Department of Law and Public Safety's Division of Law<sup>32</sup> have a significant number of civil remedies provided by the various statutes, in addition to the usual forms of common law equitable relief. Through civil enforcement, the State has the power to obtain temporary injunctions to remedy emergencies, and the power to recoup the costs of

---

30. New Jersey's environmental crimes statutes include statutes which criminalize the failure to use the required manifest in connection with the shipment of hazardous waste, N.J. STAT. ANN. § 13:1E-9i (West 1991), or the shipment of regulated medical waste, N.J. STAT. ANN. § 13:1E-48.20i (West 1991), regardless of the perpetrator's intent.

In addition to the usual array of Resource Conservation and Recovery Act (RCRA) formatted provisions, New Jersey statutes criminalize the purposeful, knowing or reckless violation of the Air Pollution Control Act, N.J. STAT. ANN. §§ 26:2C-1 to -36 (West 1987 & Supp. 1991), or any code, rule, regulation, administrative or court order issued pursuant thereto, N.J. STAT. ANN. § 26:2C-19f (West Supp. 1991); the intentional dumping of materials into ocean waters, N.J. STAT. ANN. § 58:10A-49a (West 1982 & Supp. 1991); the purposeful, knowing or reckless causing of widespread injury (defined generally as serious bodily injury to ten or more people, or damage to ten or more habitations, N.J. STAT. ANN. § 2C:17-2e (West 1982 & Supp. 1991)), N.J. STAT. ANN. §§ 2C:17-2a(1), -2b (West 1982 & Supp. 1991); the purposeful, knowing, reckless or negligent disposal or storage of regulated medical waste, N.J. STAT. ANN. §§ 13:1E-48.20g to -48.20h (West 1991); the knowing violation of the provisions of the Solid Waste Utility Control Act, N.J. STAT. ANN. §§ 48:13A-1 et seq., at -12 (West Supp. 1991); and the willful or negligent violation of the Freshwater Wetlands Protection Act, N.J. STAT. ANN. §§ 13:9B-1 et seq., at -21f (West 1991).

31. N.J. STAT. ANN. § 2C:17-2a(2) (West 1982 & Supp. 1991).

32. The New Jersey State Attorney General is the head of the Department of Law and Public Safety. Both the Division of Law, which handles all civil suits on behalf of the State, and the Division of Criminal Justice, which handles all criminal actions on behalf of the State, are housed within the Department of Law and Public Safety. See N.J. STAT. ANN. § 52:17B-3 (West 1986) (establishing Division of Law within Department of Law and Public Safety); N.J. STAT. ANN. § 52:17B-99 (West 1986) (establishing Division of Criminal Justice within Department of Law and Public Safety).

remediation, investigation and litigation.<sup>33</sup> For example, the Solid Waste Management Act<sup>34</sup> establishes a comprehensive civil enforcement scheme illustrating many of the available civil remedies.<sup>35</sup> Section 9d of the Solid Waste Management Act provides an action in the State Superior Court for injunctive or other relief “including the appointment of a receiver for any violation of this act, or of any code, rule or regulation promulgated, permit issued or solid waste management plan adopted pursuant to this act and said court may proceed in the action in a summary manner.”<sup>36</sup> Under the statute, this relief may include, singly or in combination:

- a. A temporary or permanent injunction;
- b. Assessment of investigation and litigation costs;
- c. Assessment of state remediation costs;
- d. Assessment of compensatory damages for loss or destruction of natural resources and other actual damages.<sup>37</sup>

### 3. *Administrative Enforcement*

Finally, administrative enforcement has its own tools and remedies. For example, the Department of Environmental Protection and Energy (DEPE) has the power to require the registration and filing of reports by persons engaged in operations which may cause pollution.<sup>38</sup> DEPE may enter and inspect any building to investigate suspected pollution or to ascertain compliance with

---

33. See, e.g., Solid Waste Management Act, N.J. STAT. ANN. §§ 13:1E-1 to -48, at -9d (West 1991); Freshwater Wetlands Protection Act, N.J. STAT. ANN. §§ 13:9B-1 et seq., at -21c (West 1991); and Water Pollution Control Act as amended by the Clean Water Enforcement Act, N.J. STAT. ANN. §§ 58:10A-1 to -20, at -10c (West 1982 & Supp. 1991).

34. Solid Waste Management Act, N.J. STAT. ANN. §§ 13:1E-1 to -48 (West 1991).

35. *Id.* at § 13:1E-9d.

36. *Id.*

37. *Id.* at §§ 13:1E-9d(1) to (4). The civil remedies of the Water Pollution Control Act, as amended by the Clean Water Enforcement Act, mirror those of the Solid Waste Management Act, but include the added remedy of assessing the actual amount of any economic benefit accruing to the violator, which may include the amount of any savings realized from avoided capital and non-capital costs, benefits from competitive market advantage, or any other benefits resulting from the violation. N.J. STAT. ANN. §§ 58:10A-1 to -20, at -10c(5) (West 1982 & Supp. 1991). Moreover, the Freshwater Wetlands Protection Act adds the remedy that the violator restore the site to the maximum extent practicable and feasible. N.J. STAT. ANN. §§ 13:9B-1 et seq., at -21c(5) (West 1991).

38. N.J. STAT. ANN. § 13:1D-9c (West 1991).

codes, rules and regulations.<sup>39</sup> These general enforcement powers are supplemented by powers created under specific environmental statutes. For example, the Solid Waste Management Act gives DEPE the enforcement power to issue an administrative order directing a person found in violation to come into compliance<sup>40</sup> and to issue a civil administrative penalty ranging from \$10,000 to \$50,000 per violation.<sup>41</sup> In addition, the Spill Compensation and Control Act<sup>42</sup> provides that DEPE can sue a responsible party for treble damages for failing to respond to a cleanup directive.<sup>43</sup>

## B. Problems Facing New Jersey

Despite the strong laws which were on New Jersey's books, enforcement was still problematic. Essentially, there were three problems facing New Jersey: (1) an inability to coordinate enforcement among agencies in a particular case; (2) an inability to engage in comprehensive environmental enforcement planning not constrained by the limits of authority of a single governmental agency; and (3) an inability to identify and insure the commitment of personnel and resources for the effective and efficient resolution of high priority cases. The cause and nature of each of these problems will be discussed below.

### 1. *Lack of Coordination Among Agencies*

As a result of the "piecemeal" development of the environmental enforcement programs in the context of crisis management, New Jersey's environmental laws are fragmented. Each environmental law was passed to solve a crisis and not as part of a comprehensive scheme for environmental enforcement. As a result, no one agency has had responsibility for enforcing or coordinating the enforcement of environmental laws. Rather, many agencies have been involved. For example, DEPE, through its di-

---

39. *Id.* at § 13:1D-9d.

40. N.J. STAT. ANN. § 13:1E-9b(1) (West 1991).

41. *Id.* at §§ 13:1E-9b(3), -9e.

42. Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11 to -23.11z (West 1982 & Supp. 1991).

43. *Id.* at § 58:10-23.11f(a).

visions, regulates air<sup>44</sup> and water pollution,<sup>45</sup> solid waste,<sup>46</sup> recycling,<sup>47</sup> and regulated medical<sup>48</sup> and hazardous waste.<sup>49</sup> The Department of Health does complementary regulating in the regulated medical waste<sup>50</sup> and asbestos removal areas.<sup>51</sup> The Department of Labor also regulates asbestos licensing and removal.<sup>52</sup> In addition, the Department of Law and Public Safety, through the Divisions of Law and Criminal Justice, plays a vital role in environmental enforcement by representing the agencies in all civil and administrative court proceedings and through its criminal investigation and prosecution efforts.<sup>53</sup>

Although there is a significant commitment of resources allocated to environmental enforcement, prior to 1990 there was no mechanism to match the peculiar resources and remedial tools, personnel or information to demands that crossed department and division lines. This was occasionally accomplished on a "catch as catch can" basis dependent on the professionalism, motivation and "people skills" of the operatives. It was the exception and not the rule.

In addition to the lack of coordination among departments, there was also a lack of coordination between civil and criminal enforcement. For example, at times within the Department of Law and Public Safety, the Division of Law would be pursuing a

---

44. N.J. STAT. ANN. § 13:1D-18 (West 1991) (transferring responsibilities of Clean Air Council, as enumerated in Air Pollution Control Act, N.J. STAT. ANN. §§ 26:2C-1 to -36 (West 1987 & Supp. 1991), to Department of Environmental Protection and Energy).

45. *See, e.g.*, Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-1 to -20, at -5 (West 1982 & Supp. 1991) (granting Department of Environmental Protection and Energy power to regulate water pollution).

46. *See, e.g.*, Solid Waste Management Act, N.J. STAT. ANN. §§ 13:1E-1 to -48, at -4 (West 1991) (granting Department of Environmental Protection and Energy power to regulate solid waste collection and disposal).

47. *See* Clean Communities and Recycling Act, N.J. STAT. ANN. §§ 13:1E-92 to -99.43, at -96.1 (West 1991).

48. *See* Comprehensive Regulated Medical Waste Management Act, N.J. STAT. ANN. §§ 13:1E-48.1 to -48.28, at -48.5 (West 1991) (requiring Department of Environmental Protection and Energy to consult with Department of Health in promulgating rules and regulations governing disposal of regulated medical waste).

49. *See, e.g.*, Major Hazardous Waste Facilities Siting Act, N.J. STAT. ANN. §§ 13:1E-49 to -91, at -55.3 (West 1991).

50. *See supra* note 48.

51. *See* N.J. STAT. ANN. §§ 34:5A-32 to -42 (West 1988) (Department of Health works with Department of Labor in regulating asbestos licensing and removal).

52. *Id.*

53. *See supra* note 32.

matter in the civil court system, when, unknown to them, the Division of Criminal Justice was developing the matter on a cross theory of prosecution. Ultimately, the criminal and civil interests would clash and perhaps jeopardize the success of both investigations. On the other hand, in order to protect the integrity of the evidence developed in parallel proceedings, it may be necessary to construct a "Chinese" wall. For example, the secrecy of the Grand Jury must be maintained. Therefore, the "Chinese" wall must ensure that nothing discovered during the Grand Jury proceeding is shared with the civil investigation. Moreover, civil investigators may only share information with criminal investigators if the civil investigation is a good faith investigation and not a ploy to circumvent the constitutional mandates of the Fifth Amendment<sup>54</sup> and *Miranda*<sup>55</sup> protections. These concerns can only be addressed if someone is able to recognize the need and facilitate the necessary coordination.

Although coordination between civil and criminal investigations has always been desirable for many reasons, including the aforementioned, it is now crucial to avoid the potential double jeopardy issue formulated in *United States v. Halper*.<sup>56</sup> In *Halper*, the defendant was convicted of sixty-five counts of violating the

---

54. U.S. CONST. amend. V. The sharing of information between civil and criminal investigators may implicate the Fifth Amendment privilege against self-incrimination where the civil investigation is not conducted in good faith. *See, e.g., United States v. Powell*, 379 U.S. 48, 57-58 (1964). In *Powell*, the Court held that, prior to a recommendation for criminal prosecution to the Department of Justice, the Internal Revenue Service ("IRS") must use its summons authority in good faith. 379 U.S. at 57-58. In doing so, the Court announced several elements of a good faith exercise of civil investigative powers:

[The IRS] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the [IRS] Code have been followed . . . . [A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

*Id.* In *United States v. LaSalle National Bank*, the U.S. Supreme Court said that another improper purpose which the IRS may not pursue in good faith with a summons is to gather evidence solely for use in a criminal investigation. 437 U.S. 298, 314-17 (1978).

55. *Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment privilege against self-incrimination requires that suspects in criminal investigations be fully apprised of their constitutional rights before interrogation or questioning by police).

56. 490 U.S. 435 (1989).

criminal false-claims statute<sup>57</sup> and sentenced to imprisonment for two years and fined \$5,000.<sup>58</sup> The Government then sued the defendant under the civil False Claims Act<sup>59</sup> and sought the prescribed civil penalty of \$130,000.<sup>60</sup> The Supreme Court held that the defendant was not subject to the civil penalty under the double jeopardy clause if the civil penalty is not remedial, but rather is a deterrent or is for retribution.<sup>61</sup>

While *Halper* is limited to the double jeopardy issue in which criminal penalties were imposed prior to civil litigation, other courts have held that the *Halper* principle applies when civil penalties are imposed prior to criminal prosecution. For example, in New Jersey, the Appellate Division of the Superior Court held that if civil penalties were imposed as a punitive measure, the State would be barred from criminally prosecuting the defendant under the double jeopardy clause.<sup>62</sup>

This interpretation is not limited to New Jersey. The United States Court of Appeals for the Eleventh Circuit observed, without deciding the issue, that the *Halper* principle applied where civil penalties were imposed first. The court noted, “[a]lthough in this case the civil penalty preceded, rather than followed the criminal indictment, the *Halper* principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties come

---

57. 18 U.S.C. § 287 (1988). The criminal false-claims statute prohibits “make[ing] or present[ing] . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent.” *Id.*

58. 490 U.S. at 437.

59. 31 U.S.C. §§ 3729-3731 (1988).

60. 490 U.S. at 438. At the time, the remedial provision of the civil False Claims Act stated that a person in violation is “liable to the United States Government for a civil penalty of \$2,000, an amount equal to two times the amount of damages the Government sustains, because of the act of that person and costs of the civil action.” 31 U.S.C. § 3729 (1982), amended by 31 U.S.C. § 3729 (1988). “Having violated the Act 65 separate times, Halper thus appeared to be subject to a statutory penalty of more than \$130,000.” 490 U.S. at 438.

61. 490 U.S. at 448.

[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

*Id.* at 448-49 (citations omitted).

62. *State v. Darby*, 587 A.2d 1309, 1315-16 (N.J. Super. Ct. App. Div. 1991).

before or after the criminal indictment.<sup>63</sup> Since a criminal or civil investigation can be compromised under the *Halper* principle, but may be avoided by a single proceeding,<sup>64</sup> a mechanism to identify and coordinate potential civil/criminal conflicts is essential.

### 2. *Lack of Comprehensive Planning*

Another problem endemic to this environmental framework is the inability or unwillingness of any agency to transcend its own jurisdictional limits in addressing holistic environmental enforcement solutions. Thus, an agency adopting regulations pursuant to a legislative directive tends to focus myopically on what resources are available within the agency and not on what resources are available throughout the state to address the particular issue. This narrow focus precludes agencies from tapping the vast reservoir of expertise, information and tangible resources available in other agencies. Moreover, this narrow focus causes a proliferation of duplicative and sometimes conflicting regulations because agencies fail to consider other agency regulations. In addition, this system increases the risk that all relevant areas are not regulated.

### 3. *Inability to Expedite Priority Cases*

Prior to the creation of the Office of the State Environmental Prosecutor, there was no mechanism to ensure that priority cases had the commitment of personnel, resources and coordination necessary to effect the most efficient and effective disposition. Consequently, cases involving the potential for substantial harm to the environment have languished in the system. Since the civil and criminal penalties and remediation costs in these cases can be exorbitant and the legal issues complex, the defendants typically have no motivation to resolve them.<sup>65</sup> Without a mechanism in

---

63. *United States v. Mayer*, 897 F.2d 1126, 1127 (11th Cir. 1990); *see also United States v. Marcus Schlos & Co., Inc.*, 724 F. Supp. 1123 (S.D.N.Y. 1989).

64. 490 U.S. at 450-51. In *Halper*, the Court stated:

[The decision does not] prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding the multiple punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature. Finally, nothing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment.

*Id.* (citations omitted).

65. Due to the complexity of the legal issues involved in these cases and the lack of coordination of state environmental enforcement efforts, cases may lan-



state government to monitor and expedite the movement of these cases, they are "lost" in the system. The harm is not merely the delay in collecting fines or in meting out justice, but is the very real damage to the environment caused by the delay in stabilization and remediation. Identifying and expediting priority cases ensures that environmental concerns are addressed promptly while these complex cases are litigated.

### C. New Jersey's Solution - Office of the State Environmental Prosecutor

Despite the expenditure of significant tax dollars to fund this commitment of personnel and resources in the various departments and divisions, the State is still confronting the continued pollution of its air and water and egregious assaults upon its beaches, rivers, lakes and other natural resources. Part of this problem is attributable to the fragmented approach of the sundry environmental statutes and regulations and the lack of coordination among the agencies.<sup>66</sup> Consider this "war" against polluters in the context of a military campaign. The success of any such campaign hinges on the coordination among the commanders of the Army, Air Force, Navy, Coast Guard and Marines. This is usually accomplished through the appointment of a single commander who oversees the strategy of war, and coordinates the timing and use of weapons and personnel. As fundamental as this concept is to a military campaign, it is universally disregarded by the states in the "war" against polluters.

In response to this shortcoming, on January 25, 1990, the then newly-appointed Governor, James J. Florio, issued Executive Order No. 2.<sup>67</sup> The Order established the position of the State Environmental Prosecutor<sup>68</sup> in New Jersey government. Selected

---

guish in the system for years. This fact, combined with the consequent delay in the ultimate collection of criminal penalties and remediation costs, creates a disincentive for a rational defendant, concerned with the time value of money, to settle a case on a timely basis. Timely and effective reaction to such priority cases by the enforcement authorities, however, will cause defendants to respond quickly to environmental violations. See discussion *infra* part II.D.3.

66. See *supra* notes 1-5, 44-53 and accompanying text.

67. Executive Order No. 2 of 1990, N.J. STAT. ANN. § 52:17B-1 (West Supp. 1991).

68. *Id.* The title "Environmental Prosecutor" is somewhat of a misnomer in the sense that the title "prosecutor," in common parlance, means an attorney who investigates and prosecutes violations of the state's criminal laws. What makes this prosecutor's position so unique - one that has been referred to as the first of its kind in the world - is the fact that this environmental prosecutor is also responsible for the investigation and "prosecution" of regulatory offenses and

by the Governor and the Attorney General, and appointed by the Governor, the State Environmental Prosecutor is currently an Assistant Attorney General and Director of the Office of the State Environmental Prosecutor. The Office of the State Environmental Prosecutor is in, but not of, the Department of Law and Public Safety, which is the cabinet-level department headed by State Attorney General Robert J. Del Tufo. The State Environmental Prosecutor's responsibilities are two-fold. First, he is responsible for the establishment of a comprehensive environmental enforcement program and second, he is responsible for the prosecution of priority cases, whether civil, criminal or administrative.<sup>69</sup>

At the time Order 2 was issued, Attorney General Del Tufo and Steven J. Madonna, then the Environmental Prosecutor designee, conceptualized the new office around a management core concept. Rather than attempt to create an additional bureaucracy in the enforcement effort, or to transfer significant resources to the State Environmental Prosecutor for the handling of priority enforcement cases, it was deemed more efficient to establish the Office of the State Environmental Prosecutor as a management core to supervise, manage and coordinate all of the existing resources of State government that are components of the environmental enforcement program. The Office of the State Environmental Prosecutor is currently comprised of seven Deputy Attorneys General, designated "Assistant State Environmental Prosecutors," who assist the State Environmental Prosecutor in coordinating the various civil, criminal and administrative elements of the enforcement program. Specifically, the Assistant Environmental Prosecutors coordinate and supervise the enforcement effort with DEPE and its Division of Solid Waste Management, the Divisions of Law and Criminal Justice within the Department of Law and Public Safety, the State Police A-901 program, Marine Police activities and the State Department of Health. The State Environmental Prosecutor is assisted by an Administrator of Investigations and two State Investigators, whose responsibility it is to track the progress of the priority cases and provide sufficient initial investigative assistance to enable the State Environmental Prosecutor to evaluate the immediate needs and direction of each case. Additionally, this group takes the ini-

---

the use of the civil laws for environmental enforcement purposes. As strange as it may seem, it has taken until the year 1990 for any state to establish, in effect, a unified commander for its "war" on pollution.

69. *Id.*

tial report from applicants filing for cash awards under the Citizen Information Awards Program. The Office of the State Environmental Prosecutor is also supported by an Executive Assistant, a Secretarial Assistant, a senior secretary and two additional secretaries. With the exception of the State Environmental Prosecutor himself and two of his Assistant Prosecutors, the balance of the personnel have been drawn from within the existing cadre of state government employees.

There is one essential prerequisite without which the Office of the State Environmental Prosecutor could not function, and that is the support of the Governor and Attorney General. Since the State Environmental Prosecutor is a sub-cabinet level position, yet must interact with numerous divisions and departments of state government, several of which are presided over by cabinet level commissioners, the Office of the State Environmental Prosecutor could not be operated as envisioned without the express support of the Governor and Attorney General.

#### D. New Jersey's Experience

##### 1. *Improved Coordination*

The State Environmental Prosecutor has undertaken numerous initiatives to improve the coordination and utilization of resources among agencies. First, the Office of the State Environmental Prosecutor has been structured to facilitate coordination. Assistant State Environmental Prosecutors are assigned to coordinate day-to-day management activities of the agencies as previously described.

Second, the State Environmental Prosecutor has developed protocols of operation for the various agencies. These protocols ensure that the State Environmental Prosecutor is notified of all "priority" cases and that non-priority cases are handled in a standardized manner. Protocols are currently in operation with the local county prosecutors and the Division of Criminal Justice within the Department of Law and Public Safety. Protocols are being finalized with the Division of Law within the Department of Law and Public Safety and DEPE. Informal protocols of operation have been or are being structured with the County Health Officers, the Marine Services Bureau and the Solid and Hazardous Waste Investigations Unit within the New Jersey State Police, and the State Department of Health.

Third, the State Environmental Prosecutor has commenced

cross-media training for certain environmental enforcement agency personnel. For example, solid waste inspectors from the Board of Public Utilities and DEPE have received cross-training in anticipation of the merger of the solid waste enforcement functions of the Board into those of DEPE; county health officers have received environmental crimes training; and the Marine Services Division of the State Police has been given more intensive environmental crimes training.

Fourth, the State Environmental Prosecutor has effectively coordinated efforts between agencies to solve several problems that plague the State. For example, the State Environmental Prosecutor has coordinated the efforts of the New Jersey State Police and the Solid Waste Divisions of the Board of Public Utilities and DEPE to check interstate solid waste haulers on the highways. This initiative has resulted in the discovery of 1,727 violations. Without the cooperation of the three agencies, none of these violations would have been detected because the regulators do not have the state police power to stop motor vehicles, and the typical state police road trooper does not have the expertise in the state regulations to recognize violations of solid waste registration, vehicle markings and transportation requirements. The State Environmental Prosecutor has also initiated a "direct discharge" initiative coordinating resources within the State Marine Police, County Health Departments and DEPE to ferret out, cite and secure a termination of the direct discharge of "black and gray water" into the rivers and bays of the state.

Fifth, the State Environmental Prosecutor has been responsible for developing long term solutions for coordination among state agencies. Perhaps the most essential initiative has been the computer project aimed at linking computers and data among the divisions and departments of state government involved in environmental enforcement. Currently, every division and department has its own computer system and data base. The departments have not been capable of accessing information regarding a particular company or case that another agency may possess. In fact, departments have had difficulties communicating between their own divisions. Consequently, one division within a department may be targeting a company for environmental violations while another division has approved and possibly expanded the permitted scope of the same company's environmental activities. The potential embarrassment and obvious inefficiencies in-

herent in the present "system" will be eliminated when this computer project has been completed.

## *2. Policy and Planning*

Since the State Environmental Prosecutor's focus is not limited to a particular agency but is comprehensive, he is able to consider creative solutions to environmental enforcement problems. Currently, the State Environmental Prosecutor is reviewing the present statutes and regulations within each enforcement area, focusing on whether additional laws are needed and how coordination among the agencies can be achieved.

The State Environmental Prosecutor is transcending the traditional boundaries of state government by reaching out to the counties and municipalities within the State to enlist their involvement in the environmental enforcement effort. The State Environmental Prosecutor, working with the State County Prosecutor's Association, has arranged for the training of legal and investigative personnel in each of the twenty-one County Prosecutors Offices. It is planned that the County Prosecutor's Offices will form the hub of a county environmental enforcement task force which will work with the county health officers, County Emergency Response Units and county sheriffs. The protocol between the Office of the State Environmental Prosecutor and the counties enables the State Environmental Prosecutor to review all environmental cases that come to the County Prosecutor's attention and to determine with the County Prosecutor whether the case should be prosecuted by the State or county in a civil, criminal or administrative mode. In addition, the State Environmental Prosecutor arranges technical and legal support for the County Prosecutor. Similar programs are being planned for municipal prosecutors and police, health, code enforcement and fire safety officers.

The State Environmental Prosecutor also recognizes the rich untapped resource of citizen participation in the State. New Jersey citizens are cognizant of the need to protect the environment but often feel frustrated by their own inability to be actively involved. Just as local police departments across the country have instituted town watches to deter crime, the State Environmental Prosecutor is revitalizing river watches and similar programs to deter pollution. Through these programs, the State Environmental Prosecutor will educate concerned citizens about the detection of pollution crimes. For example, the Passaic River Coalition, a

citizen's environmental group that protects the Passaic River, has worked closely with the Office of the State Environmental Prosecutor to stop discharges of chemicals and other waste products into the river and has instituted regular river cleanups. The State Environmental Prosecutor has been working with the Coalition and interested citizens to replicate their program in other areas of the State.

Another innovative approach that the State Environmental Prosecutor is developing is a partnership with environmentally sensitive industries. Since the best environmental pollution policy is prevention, the State Environmental Prosecutor is developing voluntary compliance plans to assist industry in inspecting and auditing their environmental procedures.

### 3. *Priority Cases*

Perhaps the most frustrating and dangerous problem in environmental enforcement are the high profile environmental cases that drag on in the court system for years. Because the stakes are so high for the defendant and the litigation so complex, the cases are often delayed, sometimes at the cost of the further degradation of the environment. By seizing priority cases, the State Environmental Prosecutor can evaluate the case and garner the necessary personnel and resources to expedite the resolution of the litigation.

This strategy was effective in a recent case. XYZ Corporation<sup>70</sup> and Madison Industries in Old Bridge Township had been

---

70. "XYZ Corporation" is a fictitious name utilized as the result of an order granted by the Superior Court of New Jersey, Appellate Division, to expunge the records of two criminal indictments against XYZ Corporation. *State v. [XYZ Corp.]*, 557 A.2d 670 (N.J. Super. Ct. App. Div. 1989). In the first indictment, XYZ and four of its principals were charged with purposely, knowingly and recklessly discharging a harmful substance, complicity to release the substances and criminal mischief. *State of N.J. v. [XYZ Corp.]*, State Grand Jury Indictment No. SGJ102-82-2 (December 1983). These charges related to allegations that XYZ had discharged a substance known as "FM-2 HEELS" into sewerage systems operated by the Middlesex County Utilities Authority ("MCUA") and Old Bridge Township Sewerage Authority ("OBTSA"). See 557 A.2d 670, at 671. In the second indictment, XYZ and three of its principals were charged with conspiracy to tamper with physical evidence, public records and a witness, and complicity. *State of N.J. v. [XYZ Corp.]*, State Grand Jury Indictment No. SHJ102-82-2(2) (June 6, 1986). The State charged that XYZ had injected water into monitoring wells installed on XYZ's property during the pendency of consolidated civil proceedings initiated in 1977, entitled *City of Perth Amboy v. Madison Industries, Inc.*, No. L-28115-76 and *State of N.J., Dep't of Env'tl. Protection v. [XYZ Corp.]*, No. C-4474-76. See 557 A.2d 670, at 671.

On September 17, 1986, the State reached an agreement with XYZ and its principals in which the State agreed to dismiss both indictments and XYZ agreed

polluting the aquifer underlying the Runyon Watershed and ultimately threatening the City of Perth Amboy's water supply wells. Although this pollution was discovered in 1974, litigation did not produce the Court Order for remediation until 1981.<sup>71</sup> Despite the court's 1981 Order, continued litigation<sup>72</sup> delayed the implementation of the court ordered remediation to the point that not a single spade of dirt was turned and not a single ounce of water was pumped as of 1991. The plume of pollution had progressed over the ten year period to the edge of the zone of influence of the Perth Amboy wells. The State Environmental Prosecutor intervened and within six months removed the roadblocks to initiate remediation, which commenced in January 1991.<sup>73</sup>

Of course, the State Environmental Prosecutor's goal is to recognize priority cases early and prevent protracted delays in their resolution. For example, on January 1, 1990, an Exxon inter-refinery pipeline ruptured discharging 567,000 gallons of number two oil into the Arthur Kill. The State Environmental Prosecutor worked with New Jersey Attorney General Del Tufo and the New Jersey Divisions of Law and Criminal Justice, the United States Attorney, the New York Attorney General, and the Richmond County (New York) District Attorney to secure a guilty plea from Exxon to a criminal negligence violation of the Federal

---

to establish a \$250,000 trust for the purpose of cleaning and maintaining the sewer connection lines of the MUA to the OBTSA. State of N.J. v. [XYZ Corp.], State Grand Jury Indictment No. SGJ102-82-2 and No. SHJ102-82-2(2) (dismissed Oct. 30, 1986). After these indictments were dismissed, XYZ sought to have all records and information pertaining thereto expunged. See 557 A.2d 670.

71. City of Perth Amboy v. Madison Industries, Inc., No. L-28115-76, and State of N.J., Dep't of Env'tl. Protection v. [XYZ Corp.], No. C-4474-76 (N.J. Super. Ct. Law Div. Oct. 10, 1981) (consolidated) (consent order requiring installation of groundwater recovery system and monitoring of groundwater recovery through use of monitoring wells).

72. An amended final judgment was entered on June 14, 1983, after a remand by the Appellate Division. City of Perth Amboy v. Madison Industries, Inc., No. L-28115-76, and State of N.J., Dep't of Env'tl. Protection v. [XYZ Corp.], No. C-4474-76 (N.J. Super. Ct. Law Div. June 14, 1983) (consolidated) (consent order amending judgment of Oct. 10, 1981). Thereafter, XYZ moved for an amendment to the June 14, 1983 judgment to permit development of an alternative groundwater recovery program. City of Perth Amboy v. Madison Industries, Inc., No. L-28115-76, and State of N.J., Dep't of Env'tl. Protection v. [XYZ Corp.], No. C-4474-76 (N.J. Super. Ct. Law Div. April 27, 1988) (consolidated) (consent order amending judgment of June 14, 1983).

73. The remediation commenced pursuant to the amended order of April 27, 1988. See *supra* note 72.

Clean Water Act<sup>74</sup> on March 20, 1991.<sup>75</sup> A companion civil settlement which included civil fines, penalties and cleanup costs was reached on June 14, 1991.<sup>76</sup>

Another benefit of prioritizing cases is preventing environmental catastrophes. A case in point is the White Chemical Corporation facility in Newark which had 8,000 rusting drums of hazardous chemicals on site. The State Environmental Prosecutor learned of these conditions in April 1990. Within a month, search warrants were executed which resulted in the State Grand Jury returning a five count indictment<sup>77</sup> in December 1990, against the company and its president and owner for second, third and fourth degree crimes.<sup>78</sup> In addition, the State Environmental Prosecutor expedited the stabilization and remediation of the site with DEPE and the federal Environmental Protection Agency.<sup>79</sup>

### III. CONCLUSION

New Jersey's experience with the Office of the State Environmental Prosecutor has been very positive. The State Environmental Prosecutor's efforts to coordinate the multiple agencies, institute comprehensive environmental planning and expedite priority cases has resulted in a more efficient and effective environmental enforcement program in New Jersey. Moreover, the groundwork is being laid for continued cooperation among State, county and local government agencies, citizens and even industry. Although more time is needed to fully analyze the impact of the Office of the State Environmental Prosecutor on environmental enforcement, the early results are extremely positive.

---

74. Federal Water Pollution Control (Clean Water) Act, 26 U.S.C. §§ 1251-1387 (1988).

75. *United States v. Exxon Corp.*, Criminal Action No. 91-131 (D.N.J. March 20, 1991) (guilty plea entered).

76. *United States v. Exxon Corp.*, No. CV-91-1003 (E.D.N.Y. June 14, 1991) (consent order entered). The consent order entered in the federal case also served to settle a number of pending state court cases. See *City of Elizabeth v. Exxon Corp.*, No. UNN-L-05690 (N.J. Super. Ct. Law Div. June 14, 1991); *State of N.J., Dep't of Envtl. Protection v. Exxon Corp.*, No. UNN-L-0387-90 (N.J. Super. Ct. Law Div. June 14, 1991); *City of New York v. Exxon Corp.*, No. 0398-90 (N.Y. Sup. Ct. June 14, 1991).

77. *State of N.J. v. James W. White*, State Grand Jury Indictment No. SGJ271-90-1 (Dec. 7, 1991).

78. The State of New Jersey has since proceeded in the criminal case, but no decision has yet been rendered. *State v. James W. White*, No. 90-12-00164-S (N.J. Super. Ct. Law Div. filed Dec. 7, 1990).

79. *United States v. White Chemical Corp.*, Civil Action No. 90-3962 (D.N.J. Dec. 20, 1991) (consent order entered).



