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## Criminal Enforcement of Environmental Laws: A Corporate Guide to Avoiding Liability

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## CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS: A CORPORATE GUIDE TO AVOIDING LIABILITY

### I. INTRODUCTION

Over the past several decades, the discovery of severe environmental damage caused by unregulated waste has become a widespread concern in America.<sup>1</sup> Today's society, faced with tremendous environmental deterioration, is calling for a strong-arm approach to polluters.<sup>2</sup> Congress addressed this public concern by enacting tough environmental legislation and turning corporate offenders into public enemy number one.<sup>3</sup> The United States Environmental Protection Agency (EPA) no longer merely fines corporations for environmental violations; it now criminally prosecutes employees of corporate violators.<sup>4</sup> Nearly every environmental statute enacted since the dawn of the environmental movement initially contained, or has been amended to include, a criminal enforcement section.<sup>5</sup> These enforcement mechanisms

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1. See Kenneth A. Hodson et al., *The Prosecution of Corporations and Corporate Officers for Environmental Crimes: Limiting One's Exposure for Environmental Criminal Liability*, 34 ARIZ. L. REV. 553 (1992).

2. ENVIRONMENT OPINION STUDY, INC., A SURVEY OF AMERICAN VOTERS: ATTITUDES TOWARD THE ENVIRONMENT 14 (1990). Over 70% of Americans favor incarceration "when companies are found guilty of deliberately violating pollution laws." *Id.* This 1990 telephone survey of 1004 United States households posed the following question:

Right now a company is usually fined if it violates state or federal pollution levels, but rarely has anyone gone to prison. Now, would you favor or oppose changing the law so that when companies are found guilty of deliberately violating pollution laws, the officials responsible could be sentenced to jail terms?

*Id.* The results indicated that 72% of those surveyed supported prison terms, while only 24% were opposed. *Id.*

3. See Robert Abrams, *The Maturing Discipline of Environmental Prosecution*, 16 COLUM. J. ENVTL. L. 279, 280-81 (1991) (discussing reciprocal relationship between changes in society's recognition of dire need to protect environment and significant increase in federal legislation).

4. See Paul G. Nittoly, *Environmental Criminal Cases: The Dawn of a New Era*, 21 SETON HALL L. REV. 1125 (1991) (discussing growing trend of courts to enforce environmental laws and punish corporate offenders). For specific statistics of corporate indictments and resulting prison time, see *infra* note 12.

5. See Hodson, *supra* note 1, at 555-59. For a discussion of environmental statutes which contain criminal enforcement provisions, see *infra* notes 29-53 and accompanying text.

prove to be powerful tools for punishing corporate offenders.<sup>6</sup> As the Federal Sentencing Guidelines demonstrate,<sup>7</sup> environmental violators receive strict punishment for their crimes.<sup>8</sup> Congress enacted these measures to send a wake-up call to corporations and their officers throughout the United States.<sup>9</sup>

In today's environmentally conscious world,<sup>10</sup> all corporate officials, including processors, transporters and receivers of toxic waste, must be equally aware of the dangers of non-compliance with

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6. Keith A. Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 ENVTL. L. REP. 10,099 (Feb. 1992). The authors explain, "[t]he Justice Department has sought to use the responsible corporate officer doctrine in an attempt to circumvent RCRA's slender knowledge requirement and to enforce this public health statute as if it imposed vicarious criminal liability upon CEOs for the crimes of corporate subordinates." *Id.* at 10,102.

7. U.S. Sentencing Guidelines Manual (1995) (codified as amended at 18 U.S.C.A. § 2Q (1996)). The Guidelines are specifically geared toward punishing environmental violators because the United States Sentencing Commission was "aware that Congress had expressed views in favor of tougher penalties for white-collar offenses . . . Environmental offenses can, and quite often do, pose a threat to society that far outweighs their number." Judge William A. Wilkins, Chairman, U.S. Sentencing Commission, Address at the National Conference on Local and State Enforcement of the Environmental Laws (Mar. 30, 1989).

The United States Sentencing Commission is an eight-member panel established by the Comprehensive Crime Control Act of 1984, 28 U.S.C. §§ 991-98 (1988). In 1987, the Commission published the Federal Sentencing Guidelines. The two primary goals of the Guidelines are: (1) "ensur[ing] proportionality in sentencing among defendants found guilty of similar conduct;" and (2) "remov[ing] the uncertainty that previously characterized the sentencing process." 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. 10,096, 10,097 (Mar. 1990). Furthermore, in *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court upheld the constitutionality of the act creating the Sentencing Commission and the Guidelines. *Id.* at 412.

8. U.S. Sentencing Guidelines Manual (1995) (codified as amended at 18 U.S.C.A. § 2Q (1996)). "The Guidelines divide environmental offenses into four categories: (1) [k]nowing endangerment of human life; (2) [o]ffenses involving hazardous or toxic substances; (3) [o]ffenses involving other pollutants; and (4) [o]ffenses against conservation and wildlife." Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 798 (1991).

9. Starr & Kelly, *supra* note 7, at 10,104. The wake-up call means, "one does not have to *be* bad to *do* bad when it comes to environmental crimes. The 'black heart' requirement commonly associated with other criminal activity is not necessary to sustain a conviction." *Id.* (emphasis in original).

10. Although this Comment deals specifically with EPA's attack on corporate America, EPA has also expanded its attack globally. See F. James Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 ENVTL. L. REP. 10,171 (Apr. 1989). A growing problem worldwide is the illegal export and import of hazardous waste. *Id.* Many companies are tempted to transport waste to countries where environmental laws are less stringent and enforcement less sophisticated. *Id.* Obviously, since exporting waste to these countries is less expensive, higher profits are realized. Robert E. Lutz, *The Export of Danger: A View From the Developed World*, 20 N.Y.U. J. INT'L L. & POL. 629 (1988).

environmental regulations and the availability of criminal enforcement for violations.<sup>11</sup> Any corporation faced with environmental concerns is on notice that the EPA watchdog has exchanged the pestering bark of civil fines with the resounding bite of prison time.<sup>12</sup> Gone are the days when a company could simply buy property, take over a building, or conduct its everyday business affairs

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11. Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900 (1991). "[T]he threat of incarceration undoubtedly deters other corporate officials from engaging in or countenancing similar misconduct and causes them to become more compliance-conscious." *Id.* at 901.

12. James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916 (1991). "Environmental crime does not pay! This is the message of the United States Environmental Protection Agency (EPA) for the 1990s . . . Today there is no question that criminal enforcement is EPA's most effective deterrent." *Id.*

In fact, since the beginning of 1983 until December 13, 1995, the Department of Justice (DOJ) has recorded environmental criminal indictments against 1,674 corporate and individual defendants and 1,176 guilty pleas and convictions. Recorded as of September 29, 1995, nearly \$309 million in criminal penalties were assessed (this number includes federal and state restitutions and known costs for remediation) and 517 years of imprisonment imposed (374 of which account for actual confinement).

Of the 1,674 defendants indicted, 495 were corporations or organizations and the remaining 1,179 were individuals. Of the 1,176 convictions, 365 were against organizations, and the remaining 809 were against individuals.

<u>Year</u>	<u>Indictments</u>	<u>Pleas/Convictions</u>
FY83	40	40
FY84	43	32
FY85	40	37
FY86	94	67
FY87	127	86
FY88	124	63
FY89	101	107
FY90	134	85
FY91	127	96
FY92	187	104
FY93	218	176
FY94	182	129
FY95	257	154
<b>TOTAL</b>	<b>1674</b>	<b>1176</b>

without concern for the environment.<sup>13</sup> Presently, a company must fully inform its employees that EPA, when prosecuting violations, will pursue stiff jail sentences for employees connected with the violation.<sup>14</sup> Furthermore, courts have enforced EPA's new-found emphasis on criminal sanctions,<sup>15</sup> making it abundantly clear that a

Note: The following prison calculations are current according to data entered as of September 29, 1995. More dispositions are expected.

	Penalties Imposed [Including Federal, State and Local]	Prison Terms Imposed [Excluding suspended portions]	Actual Confinement
FY83	\$ 341,100	11 yrs.	5 yrs.
FY84	384,290	5 yrs. 3 mos.	1 yr. 7 mos.
FY85	565,290	5 yrs. 5 mos.	2 yrs. 11 mos.
FY86	1,917,602	64 yrs. 2 mos.	31 yrs. 4 mos.
FY87	3,046,060	32 yrs. 4 mos.	14 yrs. 9 mos.
FY88	7,091,876	39 yrs. 3 mos.	8 yrs. 3 mos.
FY89	12,750,330	51 yrs. 25 mos.	36 yrs. 14 mos.
FY90	*29,977,508	71 yrs. 11 mos.	47 yrs. 13 mos.
FY91	18,508,732	24 yrs. 8 mos.	22 yrs. 8 mos.
FY92	**169,359,344	37 yrs. 6 mos.	34 yrs. 1 mo.
FY93	18,992,968	62 yrs. 8 mos.	55 yrs. 4 mos.
FY94	27,714,286	69 yrs. 7 mos.	69 yrs. 7 mos.
FY95	18,996,735	43 yrs. 1 mo.	43 yrs. 1 mo.
<b>TOTAL</b>	<b>\$ 308,990,584</b>	<b>513 yrs. 53 mos.</b>	<b>367 yrs. 10 mos.</b>

\* FY90: This total includes a \$22 million forfeiture that was obtained in a RICO/mail fraud case against three individuals and six related waste disposal and real estate development companies. A major portion of this forfeiture was designated for hazardous waste cleanup upon liquidation of assets. Included in the terms of imprisonment are two 12 year/7 month sentences against two of the individuals in the same case.

\*\* FY92: This total includes \$125 million in criminal assessments against Exxon Corp. and Exxon Shipping Co. for the Valdez oil spill. Half of the original \$250 million criminal sentence was remitted for pledges by Exxon to expenditures far exceeding this amount on environmental safety projects, a contribution to a response fund for large-scale oil spills, and committing 25% of its total research expenditure on environmental and safety research. Forty-four million dollars in penalties [were] assessed at federal sentences in FY92 besides the \$125 million Exxon assessment.

Memorandum from Peggy Hutchins, Paralegal to Ronald A. Sarachan, Chief, Environmental Crimes Section (Mar. 19, 1996) (on file with authors).

13. See Starr & Kelly, *supra* note 7, at 10,097 (positing that "[n]o longer can one charged with environmental wrongdoing take refuge in relatively light sentences typically imposed for environmental violations").

14. See Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169 (1994) (fleshing out EPA's enforcement policy against corporate personnel and framework of "responsible corporate officer" doctrine). The authors point out that individual employees comprised nearly 80% of those prosecuted for environmental claims between 1983 and 1989. *Id.* at 169. With the significant increase in personal culpability, it is imperative that employees are made aware of the law. See *id.*

15. Starr & Kelly, *supra* note 7, at 10,096. The Sentencing Guidelines have mandated that judges strictly enforce environmental crimes. *Id.*

modern business person must adapt to a new corporate environment.<sup>16</sup>

The purpose of criminal enforcement is to shatter corporations' belief that civil fines are merely a license to pollute or a business cost that can be passed on to the consumer.<sup>17</sup> Indeed, according to Joseph Block, Chief of the Environmental Crimes Division of the Department of Justice (DOJ), "[i]ncarceration is the one cost of business that you can't pass to the consumer."<sup>18</sup> Furthermore, some commentators believe that Chief Executive Officers (CEOs) view civil fines as nothing more than a nuisance; and thus, monetary penalties have little effect on the corporate mindset.<sup>19</sup> Peter Beeson, a former DOJ employee, explained the impact of criminal prosecutions on executives: "[p]rosecution may be more effective for crime in the suites than it is for crime in the

16. See Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821 (1990) (discussing harsh reality of actual incarceration for EPA violations).

17. See National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, §§ 101-207, 83 Stat. 852 (current version at 42 U.S.C. § 4331(a) (1994)). These new criminal sanctions are in accordance with EPA's long term goal of remedying and protecting the environment. *Id.* EPA's policy is clearly delineated in Title I of the National Environmental Policy Act. NEPA obligates the federal government to:

[cooperate] with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

*Id.* (emphasis added). The government's duties and NEPA's ends are enumerated as follows:

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically [sic] and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

*Id.* § 101, 42 U.S.C. § 4331(b).

18. Joseph Block, Chief of Environmental Crimes Division of DOJ, An Address to the Office of Legal Education, Environmental Law Conference (Oct. 11-13, 1989).

19. See William F. Jung, *Recognizing a Corporations' Rights Under the Indictment Clause*, 1983 UNIV. ILL. L. REV. 477, 496 (1983).

streets: '[d]eterrence works best on people who have not had contact with criminal justice and for whom prosecution or even investigation will have severe personal consequences.'<sup>20</sup>

Although the rise of criminal prosecutions for environmental offenses is a concern for corporate employees, a fairly easy and practical solution exists.<sup>21</sup> The purpose of this Comment is to alert the corporate world to the seriousness of criminal prosecution for violations of environmental laws and to provide a guide on how to avoid such liability.<sup>22</sup> Specifically, this Comment focuses on simple compliance, disclosure, education and integrity.<sup>23</sup>

Part II of this Comment presents a background of the legislation enacted to protect the environment and a discussion of Congress's intent to use fines and incarceration as strong deterrents for environmental violations.<sup>24</sup> Part III discusses corporate and individual liability and the judicial trend throughout the United States to strictly adhere to the letter of the law.<sup>25</sup> Finally, this Comment provides a checklist for corporations to follow in order to avoid criminal liability.<sup>26</sup>

## II. TOUGH EPA LEGISLATION

### A. Congress Gives Corporate America a Wake-Up Call

Before Congress decided to place the responsibility of cleaning up and protecting the environment on corporations, a corporate

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20. Joseph F. DiMento, *Environmental Law and American Business: Dilemmas of Compliance*, 42-43 (1986) (quoting William Greider, *Fines Aren't Enough: Send Corporate Polluters to Jail*, ROLLING STONE, Mar. 29, 1984, at 10).

21. For a discussion of a corporate guide to avoiding corporate liability, see *infra* notes 134-64 and accompanying text.

22. For a discussion of criminal liability for environmental crimes, see *infra* notes 63-85 and accompanying text. For a checklist on how to avoid corporate liability, see *infra* notes 134-64 and accompanying text.

23. For a discussion of practical considerations to avoiding criminal liability, see *infra* notes 165-74 and accompanying text.

24. For a detailed discussion of the legislative history of the criminal enforcement provisions of environmental legislation, see *infra* notes 28-53 and accompanying text. For DOJ statistics on corporate criminal prosecutions for environmental crimes, see *supra* note 12.

25. For a discussion of the Responsible Corporate Officer doctrine (RCO doctrine), see *infra* notes 54-85 and accompanying text. For a discussion of the RCO doctrine and the Clean Water Act, see *infra* notes 86-105 and accompanying text. For a discussion of corporate liability under Resource Conservation and Recovery Act, see *infra* notes 106-21 and accompanying text. For a discussion of the RCO doctrine and the Clean Air Act, see *infra* notes 122-33 and accompanying text.

26. For a discussion of EPA's new self-policing policy and a guide to avoiding criminal liability for environmental violations, see *infra* notes 134-64 and accompanying text.

CEO never had to worry about going to prison for polluting the environment.<sup>27</sup> This “business as usual” outlook abruptly changed when Congress effectuated its desire to have corporate America spearhead the environmental movement by enacting comprehensive environmental schemes that give EPA the power to pursue, not only civil, but criminal punishment for pollution.<sup>28</sup>

Three statutes illustrate Congress’s growing emphasis on criminal punishment for environmental infractions. The Resource Conservation and Recovery Act of 1976 (RCRA),<sup>29</sup> renowned for its high financial penalties, is the most expansive of the environmental statutes.<sup>30</sup> The other two statutes, the Clean Water Act of 1977 (CWA)<sup>31</sup> and the Clean Air Act of 1967 (CAA),<sup>32</sup> laid the groundwork for modern environmental laws by placing emphasis on financial sanctions for violators.<sup>33</sup> Generally, these laws are enforced through monetary penalties which serve the dual purpose of punishing offenders and financing cleanup operations.<sup>34</sup> Dissatisfied with the result garnered by the imposition of solely monetary penalties, EPA turned to criminal prosecution of corporate offenders.<sup>35</sup>

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27. See G. Nelson Smith, III, *No Longer Just a Cost of Doing Business: Criminal Liability of Corporate Officials for Violations of the Clean Water Act and the Resource Conservation and Recovery Act*, 53 LA. L. REV. 119 (1992) (detailing past corporate apathy of environmental enforcement and new, stringent prosecution laws).

28. See generally Truxtun Hare, *Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. PA. L. REV. 935, 938 (1990) (exploring criminal penalties against unsuspecting corporate officers).

29. Resource Conservation and Recovery Act (RCRA) §§ 10002-11012, 42 U.S.C. §§ 6901-92 (1994).

30. For a discussion of corporate criminal liability under RCRA, see *infra* notes 106-21 and accompanying text.

31. Federal Water Pollution Control Act (CWA) §§ 101-606, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)).

32. Clean Air Act (CAA) §§ 101-618, Pub. L. No. 90-148, 77 Stat. 392 (1967) (codified as amended at 42 U.S.C. §§ 7401-7671 (1994)).

33. For a discussion of criminal prosecution under the CWA and the CAA, see *infra* notes 86-105 and 122-33 and accompanying text.

34. See, e.g., Shahrzad Heyat et al., *Environmental Crimes*, 31 AM. CRIM. L. REV. 475 (1994) (discussing EPA’s move toward criminal enforcement of environmental crimes).

35. Strock, *supra* note 12, at 916. Strock writes, “[d]uring the first ten years of the EPA’s history, industries all too often regarded civil and administrative penalties for violations of environmental laws all as a cost of doing business. The addition of criminal sanctions to environmental laws was therefore necessary to build an effective enforcement program.” *Id.*



## B. Statutory Departure: From Civil Fines to Prison Time

### 1. Criminal Sanctions Under RCRA

RCRA was passed in response to the growing waste disposal problems throughout the country.<sup>36</sup> At its inception, RCRA contained provisions allowing for criminal sanctions,<sup>37</sup> however, for sev-

36. *Id.* Congress decided to add criminal provisions to help EPA combat the tremendous environmental challenge. *Id.* The statute goes into great detail in describing these criminal penalties. See RCRA § 3008(d), (e), 42 U.S.C. § 6928(d), (e). The statute provides in pertinent part:

[a]ny person who-

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subtitle [RCRA, 42 U.S.C. §§ 6921] to a facility which does not have a permit under this subchapter [RCRA, 42 U.S.C. §§ 6921] . . . or pursuant to Title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. §§ 1411 et seq.] . . . shall, upon conviction, be subject to a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed two years . . . If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

*Id.* § 3008(d), 42 U.S.C. § 6928(d). The statute also contains a "Knowing Endangerment" section which states:

[a]ny person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter [RCRA, 42 U.S.C. § 6928] . . . shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.

*Id.* § 3008(e), 42 U.S.C. § 6928(e).

37. See H.R. REP. NO. 94-1491, pt. 1, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238. From the beginning, the bill's legislative purpose was to remedy the growing problems associated with the three to four billion tons of solid waste that are generated by our country each year. *Id.* As proposed, this was to be accomplished through implementation of management plans and facilities to assist in recovering resources from discarded material. *Id.* The House Report expresses the bill's intention in the following few sentences:

The problems associated with discarded materials which prompted the committee to enter an area which has been traditionally considered the sphere of local responsibility are greater than just the increasing volume of the discarded materials. Yet a few words on volume are in order.

Over the last few years the amount of discarded materials to be disposed of has grown to approximately 4 billion tons per year. An annual increase of 8 percent is anticipated through the next decade. The most widespread method of disposal is to landfill the discarded materials. However, land has become a scarce resource in the nation's metropolitan areas. Many of our major cities will be out of landfill capacity within 5 years. Some are already seeking disposal sites outside their corporate limits.

Some states have moved to ban the importation of wastes as have their political subdivisions. These actions have raised serious questions relative to restraint of trade and interference with interstate commerce.

eral years after RCRA's approval, EPA gave no indication that it intended to enforce the statute's criminal provisions on corporate individuals.<sup>38</sup> This reluctance to impose criminal sanctions suddenly changed with the enactment of the Hazardous and Solid Waste Amendments of 1984.<sup>39</sup> The tremendous financial resources and enforcement direction stemming from the act prompted EPA

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The Committee is also concerned with the consumption of this nation's domestic raw materials and the potential for future material shortages. Already an increasing portion of our balance of trade deficit is caused by the need to import raw materials. Are there ways to reclaim for reuse those resources now disposed of and thereby reduce the need for virgin raw materials?

The overriding concern of the Committee however, is the effect on the population and the environment of the disposal of discarded hazardous wastes- those which by virtue of their composition or longevity are harmful, toxic, or lethal.

*Id.* at 6240-41.

Generally, Congress believed that its purpose could be effectuated. Legislative history outlines this primary enforcement method. *See generally id.* at 6297 (discussing federal enforcement through strict fines). Nevertheless, the following statement shows Congress did not totally rely on civil enforcement:

[e]nforcement under this section is accomplished by a variety of provisions: inspections by authorized federal or state inspectors, compliance orders issued by the Administrator and enforced in court, and civil and criminal penalties.

This array of enforcement mechanisms is so that punishment is related to the offense. Many times civil penalties are more appropriate and more effective than criminal. However, many times when there is a willful violation of a statute which seriously harms human health, criminal penalties may be appropriate.

*Id.* at 6268. This language indicates that Congress placed criminal penalties in the statute as a last resort.

38. *See Smith, supra* note 27, at 140-41. It is important to note that RCRA has been amended extensively since its inception. *Id.* The most important of these amendments was entitled the Comprehensive Environmental Resource, Conservation and Liability Act (CERCLA) of 1980. CERCLA §§ 101-405, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9600-75 (1994)). Initially, CERCLA contained provisions that allowed EPA to enforce its purported purpose through the use of criminal sanctions. *Id.* § 103(b), 42 U.S.C. § 9603(b). In its early years, these provisions were rarely used. *Smith, supra* note 27, at 141. Likewise, when the Superfund Amendments were added to the Act in 1986, these criminal sanctions remained an inconspicuous aspect of the drive to cleanup hazardous waste. *Strock, supra* note 12, at 925. Although these provisions appeared in the 1980 Act and were further strengthened in the 1986 Amendments, corporate America was given no indication that EPA would go on an environmental vendetta and begin holding corporate management, supervisors and employees criminally liable for environmental transgressions. *Id.* at 925-26.

39. *See RCRA* § 3001(d), 42 U.S.C. § 6921(d) (specifically providing for criminal penalties under RCRA).

to demand strict compliance.<sup>40</sup> Suddenly, corporations all over America became prime targets for EPA's new-found enthusiasm.<sup>41</sup>

## 2. Criminal Sanctions Under CWA

Congress passed the CWA in 1948 to prevent and control water pollution.<sup>42</sup> Although the original bill contained criminal provi-

40. H.R. REP. NO. 98-616, at 18 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576. The bill not only authorized almost \$500 million for environmental enforcement over a three-year span but also gave EPA great latitude in trying cases and conducting criminal investigations. *Id.*

The amendments added an entirely new section allowing EPA to try suits in which the DOJ had not promptly acted. *See* Margaret K. Minister, *Federal Facilities and the Deterrence of Environmental Laws: The Case for Criminal Prosecution of Federal Employees*, 18 HARV. ENVTL. L. REV. 137, 155 (1994). Ordinarily, EPA would refer the case to the DOJ, who would then proceed with the litigation. *Id.* Under this new section, EPA could bring an action themselves if the DOJ did not act quickly on these referrals. *Id.* The procedures state:

[o]nce a referral has been made by Administrator, the Attorney General is expected to act promptly to initiate a civil litigation. If he does not inform the Administrator that he will commence the litigation and represent the agency within 30 days after the referral is transmitted to the Justice Department, and if he does not file the action within 150 days after the referral, the Administrator then has "exclusive authority" to decide to commence the action and to represent himself in the federal district and appeals court.

H.R. REP. NO. 98-616, at 49, 1984 U.S.C.C.A.N. at 5608.

Through the amendments, Congress gave EPA the power to conduct criminal investigations which EPA had never before initiated. The pertinent excerpt of the House Report states:

[t]he Committee has also determined that in order for EPA to adequately fulfill its law enforcement functions under RCRA, its criminal investigators must be granted authority to carry firearms; execute and serve warrants, summons and subpoenas; administer oaths, make arrests without a warrant for offenses against the United States committed in their presence and for felonies if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

*Id.* at 5611.

41. *See* Hodson, *supra* note 1, at 554.

42. CWA §§ 101-606, 33 U.S.C. §§ 1251-1387 (1994). *See* Hodson, *supra* note 1, at 555 (discussing circumstances under which corporations or their officers can be held liable for environmental crimes).

sions,<sup>43</sup> until recently they were not utilized.<sup>44</sup> Currently, EPA has exhibited a “sobering trend” and now enforces the CWA, through strict criminal penalties, against corporate violators.<sup>45</sup> In fact, EPA has even imposed penalties in situations where the violators did not specifically intend to violate the CWA.<sup>46</sup>

43. See CWA § 309, 33 U.S.C. § 1319. Section 1319 provides in pertinent part:

(1) Any person who willfully or negligently violates section 1311, 1312, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than \$25,000 per day of violation, or by imprisonment for not more than one year or both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document or filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained by this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term “person” shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officers.

*Id.* at § 309(c), 33 U.S.C. § 1319(c).

44. See Hodson, *supra* note 1, at 555-56. The authors state:

Congress enacted the Federal Water Pollution Control Act, or “Clean Water Act” (CWA) as it was commonly known, in 1948. It contains a comprehensive system designed to prevent and control water pollution. Among other things, the CWA regulates the discharge of pollutants into the surface water. Statutes and regulations set forth performance standards. The CWA is enforced through civil, criminal, and administrative penalties.

The CWA includes criminal penalties for knowing and negligent violations, as well as knowing endangerment, and false statements. In addition, under the CWA liability attaches directly to a “responsible corporate officer.” Penalties for individuals range from fines of \$2,500 and prison terms of not more than a year for negligent violations, to \$250,000 fines and fifteen-year prison terms for knowing endangerment. Corporations can be fined up to one million dollars for violating the CWA knowing endangerment provisions. A “person” subject to CWA criminal penalties includes a “responsible corporate officer.”

*Id.*

45. *Id.* See generally *United States v. Frezzo Bros.*, 546 F. Supp. 713 (E.D. Pa. 1982), *aff'd*, 707 F.2d 68 (3d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983) (exemplifying EPA’s strict prosecutorial policy when defendants willfully or negligently violate Clean Water Act).

46. *Frezzo Bros.*, 546 F. Supp. at 715. Hodson posits: “[t]he cases show a sobering trend toward strict criminal penalties for even minor violations of the CWA. One of the early cases brought under the CWA held that a defendant need not specifically intend to violate the CWA for conviction.” Hodson, *supra* note 1, at 556 (discussing *Frezzo Bros.* case).

### 3. Criminal Sanctions Under CAA

The CAA was amended in 1977<sup>47</sup> for the sole purpose of subjecting corporate officers to misdemeanor sanctions.<sup>48</sup> However, in practice, EPA and the courts rarely used the sanctions for punishment.<sup>49</sup> In 1990, Congress added felony sanctions to the CAA, “requiring the imposition of substantial periods of incarceration” for persons lacking actual knowledge of the violation.<sup>50</sup> In recent years, the number of felony charges brought against corporate officers has increased by an alarming number.<sup>51</sup>

As evidenced by the growing case law in this area, EPA is dedicated to continuing criminal enforcement under RCRA, the CWA, and the CAA.<sup>52</sup> Understanding the means by which EPA employs these criminal provisions is a corporation’s best defense against criminal prosecution.<sup>53</sup> The following explanations and recommendations will educate corporations and prepare them for attacks by the zealous EPA.

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47. See CAA § 113, 42 U.S.C. § 7413 (1994). Under the heading “Criminal Penalties” the statute reads:

(1) [a]ny person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section . . . shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

*Id.* § 113(c), 42 U.S.C. § 7413(c).

48. Barry M. Hartman & Charles A. DeMonaco, *The Present Use of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 ENVTL. L. REP. 10,145, 10,148 (Mar. 1993). “The 1977 amendments to the CAA made it abundantly clear that Congress intended the responsible corporate officer to be subject to criminal penalties.” *Id.* The legislative history of the CAA reads in part:

[f]or the purpose of liability for criminal penalties the term “person” is defined to include any responsible corporate officer. This is based on a similar definition in the enforcement of the [CAA]. The Committee intends that criminal penalties be sought against those corporate officers under whose responsibility a violation has taken place, and not just those employees directly involved in the operation of violating source.

S. REP. NO. 94-717, at 40 (1976), reprinted in 6 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, NO. 95-16, 470, 474 (1978).

49. Hartman & DeMonaco, *supra* note 48, at 10,148.

50. *Id.* See CAA § 113, 42 U.S.C. § 7413.

51. For specific statistics regarding felony charges, see *supra* note 12.

52. See Hartman & DeMonaco, *supra* note 48, at 10,145.

53. For a discussion of EPA’s compliance guidelines, see *infra* notes 134-64 and accompanying text.

### III. CORPORATE LIABILITY

The first question a CEO is apt to ask is "How do they get to me?" Unfortunately for the CEO, the corporate veil is pierced quite easily in criminal prosecutions for environmental crimes.<sup>54</sup> While many commentators argue that such liability violates basic constitutional rights,<sup>55</sup> case law indicates that courts have not adjudged criminal prosecution as being unconstitutional.<sup>56</sup> CEOs, therefore, may no longer hide behind a desk to avoid criminal liability.

The government utilizes uniform measures when prosecuting corporations and their management for environmental crimes.<sup>57</sup> Usually, the DOJ, in coordination with EPA, utilizes the Responsible Corporate Officer doctrine (RCO doctrine) in the prosecution of environmental crimes.<sup>58</sup> Under the RCO doctrine, a corporation and its officers are held strictly liable for any environmental violation caused by an employee of that corporation.<sup>59</sup> Simply stated, the government uses the doctrine of respondeat superior to link corporate management to environmental violations.<sup>60</sup> Under this theory, CEOs and other corporate officers should be aware of the very real possibility that courts, using the RCO doctrine, will ignore the *mens rea* component of a criminal prosecution in cases that indicate "willful blindness" on the part of CEOs and other corporate officers, or other circumstantial evidence demonstrating that the corporation permitted the violation.<sup>61</sup> Thus, a CEO could be convicted solely on the basis of the corporate position held by the individual.<sup>62</sup>

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54. See Jay C. Magnuson & Garrett C. Levit, *Policy Considerations in Corporate Criminal Prosecutions after People v. Film Recovery Systems, Inc.*, 62 N.D. L. REV. 913, 922 (1987).

55. Onsdorff & Mesnard, *supra* note 6, at 10,102-03.

56. For a discussion of the trend of courts across the United States to strictly punish environmental violations, see *infra* notes 86-133 and accompanying text.

57. See Arnold S. Hogeland, *Criminal Enforcement of Environmental Laws*, 75 MASS. L. REV. 112 (1990) (discussing need for uniformity in enforcing EPA guidelines).

58. For a definition and discussion of the RCO doctrine, see *infra* notes 59-85 and accompanying text.

59. Onsdorff & Mesnard, *supra* note 6, at 10,102.

60. *Id.*

61. For a further discussion of corporate liability and circumstantial evidence under the RCO doctrine, see *supra* notes 58-60 and accompanying text, *infra* notes 62-85 and accompanying text.

62. See, e.g., Lisa Ann Harig, *Ignorance is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145 (1992).

### A. The RCO Doctrine

The RCO doctrine is a useful tool in EPA's campaign against corporate violators.<sup>63</sup> The doctrine circumvents the knowledge requirement of environmental statutes by imposing vicarious criminal liability upon CEOs for the environmental violations of their subordinates.<sup>64</sup> Although this approach seems to be a violation of the constitutional right to due process, the apparent need to remedy environmental pollution appears to outweigh the constitutional rights of corporations and their officers.<sup>65</sup> Most courts continue to require some level of knowledge of wrongdoing in order to secure a conviction under the criminal provisions of the various environmental schemes, but the threshold is extremely low.<sup>66</sup> In fact, courts will sustain convictions where the evidence only circumstantially demonstrates that a corporate officer knew of a violation or deliberately avoided such knowledge.<sup>67</sup>

The development of the RCO doctrine began with the Supreme Court's decision in *United States v. Dotterweich*.<sup>68</sup> Dot-

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63. Oliver Wendell Holmes best summarized the rationale behind the RCO doctrine when he wrote:

[i]f I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like.

1 HOLMES-LASKI LETTERS 806 (Mark Howe ed. 1953).

64. Onsdorff & Mesnard, *supra* note 6, at 10,102. The core of this article deals with the reality of a fading *mens rea* requirement for environmental criminal liability. The editors summarize the article, stating:

EPA and the Department of Justice are aggressively enforcing the criminal provisions of federal environmental laws. Companies and their officers are subject to large fines and jail terms if convicted. Corporate officers should be aware of a recent trend in RCRA criminal enforcement in which the Justice Department has attempted to hold corporate officers and chief executive officers criminally liable for the actions of their subordinates, even when the officers did not have actual knowledge of their employees' illegal conduct. The Justice Department has attempted to apply a theory known as the responsible corporate officer doctrine to override the knowledge requirements in RCRA's criminal liability provision . . . [A]lthough the Justice Department has not been outwardly successful in advancing this approach, it may have shifted the burden of proof in RCRA cases.

*Id.* at 10,099.

65. *Id.* at 10,103-05 (discussing constitutional issues surrounding *mens rea* requirement in criminal prosecution under RCRA).

66. For an explication of cases discussing the level of knowledge required for conviction under the criminal provisions of CAA, RCRA and CWA, see *infra* notes 86-133 and accompanying text.

67. Hartman & DeMonaco, *supra* note 48, at 10,151-53 (reviewing circuit court cases embracing RCO doctrine).

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

terweich, as president of the Buffalo Pharmaceutical Company, was convicted of three misdemeanor violations under the Federal Food, Drug, and Cosmetic Act (FDCA)<sup>69</sup> for shipping misbranded and adulterated drugs in interstate commerce.<sup>70</sup> The Supreme Court held that the FDCA “dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing.”<sup>71</sup> The Court stated that, “[i]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”<sup>72</sup> Thus, corporate officers who have a “responsible share in the furtherance of the transaction which the statute outlaws” will be held liable for violations of these statutes.<sup>73</sup>

The RCO doctrine was further articulated in *United States v. Park*.<sup>74</sup> In *Park*, the president of ACME Markets, Inc. was prosecuted after the company held food, shipped through interstate commerce, in a building exposed to rodent contamination.<sup>75</sup> The *Park* decision clarified the RCO doctrine, imposing two primary duties on executives.<sup>76</sup> First, the Court stated that corporate officers have a duty to implement procedures that will prevent violations of environmental statutes.<sup>77</sup> Second, the Court required officers to remedy existing violations.<sup>78</sup> Moreover, the Court stated that fail-

69. 21 U.S.C. § 303 (1982).

70. *Dotterweich*, 320 U.S. at 281. Dotterweich was convicted on all counts, but the company was acquitted. *Id.* at 278. He appealed on the grounds that he was an individual and that he did not have knowledge of any wrongdoing. *Id.* at 281. In rejecting his argument, the Supreme Court stated that “the historic conception of a ‘misdemeanor’ makes all those responsible for it equally guilty.” *Id.* The Court held that because a corporation by its very nature acts through individuals, and because Dotterweich was in such an influential position as president, he was liable even if he was “otherwise innocent.” *Id.*

71. *Id.* at 281.

72. *Id.* Justice Frankfurter wrote:

[b]alancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent people who are wholly helpless.

*Id.* at 285.

73. *Id.* at 284.

74. 421 U.S. 658 (1975).

75. *Id.* at 673. In convicting ACME’s president, the Court held that “Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligations of the courts is to give them effect so long as they do not violate the Constitution.” *Id.*

76. *Id.*

77. *Id.* at 672.

78. *Id.* The *Park* Court stated:



ure to comply with either of these duties could possibly satisfy the causation requirement for negligence, and hence, criminal liability would attach.<sup>79</sup>

Although courts have refined the RCO doctrine in relation to environmental crimes, the doctrine continues to have severe ramifications.<sup>80</sup> Under a strict liability environmental statute, a corporate executive or officer is criminally liable for the corporation's actions, regardless of knowledge or intent, if that officer "had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."<sup>81</sup> It is clear that a "responsible" corporate officer with substantial corporate clout could be prosecuted for violating environmental statutes without evidence of criminal intent or knowledge of wrongdoing, as long as the relevant statute so provides and circumstantial evidence shows that the officer turned a blind eye to wrongful conduct.<sup>82</sup>

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[t]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

*Id.* at 673-74.

79. *Park*, 421 U.S. at 673-74.

80. See generally Jeremy D. Heep, *Adapting the Responsible Corporate Officer Doctrine in Light of United States v. MacDonald & Watson Waste Oil Co.*, 78 MINN. L. REV. 699 (1994).

81. *Park*, 421 U.S. 658, 673-74. See also *United States v. Starr*, 535 F.2d 512 (9th Cir. 1976) (convicting secretary-treasurer for violation of Federal Food, Drug, and Cosmetic Act because of duty of foresight and vigilance imposed on corporate officers); *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230 (D. Mass. 1980) (holding defendant could be guilty if found to have "responsible relationship" to violations of Food, Drug and Cosmetic Act). For a discussion of the RCO doctrine under RCRA, see *infra* notes 106-21.

82. *Park*, 421 U.S. at 673-74. Initially, *Park* was found guilty on all counts, but the Fourth Circuit reversed his conviction holding that due process required the government to prove wrongful action on the part of the corporate officer. *Id.* at 666. In reversing, the Supreme Court held:

Thus, *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission—and this is by no means necessarily confined to a single corporate agent or employee—the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are not more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

*Id.* at 672.

Consistent with courts' trend toward imposing corporate liability, Congress explicitly incorporated the RCO doctrine into two environmental statutes.<sup>83</sup> Specifically, Congress amended the definition of the term "person," as defined in the penalty provisions of the CWA<sup>84</sup> and the CAA,<sup>85</sup> to include the RCO doctrine definition. Thus, courts now have direct legislative authority for holding CEOs and other corporate violators criminally liable for environmental violations.

## B. The Responsible Corporate Officer and the CWA

Under the CWA, a defendant need not specifically intend to violate the law for a court to convict a corporate officer.<sup>86</sup> Instead, a court may convict a defendant who violates an environmental statute in a willful or negligent manner.<sup>87</sup> In *United States v. Frezzo Bros., Inc.*,<sup>88</sup> the United States District Court for the Eastern District of Pennsylvania found a president, secretary and corporation guilty on six counts of willful or negligent discharge of pollutants in violation of the CWA.<sup>89</sup> Applying the RCO doctrine, the court explained to the jury that in order to convict, the jury need only find that: "1) the defendants discharged a pollutant; 2) the defendants' discharge of the pollutant was done willfully or negligently; [and] 3) the defendants did not have a permit to discharge the pollutant."<sup>90</sup> Consequently, the defendants in *Frezzo Bros.* were each fined

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83. For a discussion of the CWA and CAA, see *infra* notes 86-105 & 122-33 and accompanying text.

84. CWA § 309(c)(3), 33 U.S.C. § 1319(c)(3) (1994). This section states that "[f]or purposes of this subsection, the term 'person' shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer." *Id.* The general definitions provided in 33 U.S.C. § 1362(5) define the term person as including "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State or any interstate body." CWA § 501(5), 33 U.S.C. § 1362(5).

85. CAA § 113(c)(6), 42 U.S.C. § 7413(c)(6) (1994). "For the purpose of this subsection, the term 'person' includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer." *Id.* The general definitions in 42 U.S.C. § 7602(e) (1996) define the term "person" to include "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." *Id.*

86. *United States v. Frezzo Bros.*, 546 F. Supp. 713, 720 (E.D. Pa. 1982). For a discussion of the legislative history of the criminal provisions of CWA, see *infra* notes 87-105 and accompanying text.

87. *Frezzo Bros.*, 546 F. Supp. at 720.

88. 546 F. Supp. 713 (E.D. Pa. 1982).

89. *Id.* at 714-15. The defendants' corporation was held responsible for allowing run-off waste to be discharged into navigable waters. *Id.* at 714.

90. *Id.* at 722.

\$25,000 and sentenced to thirty days in prison, and the corporation was fined \$50,000.<sup>91</sup> Thus, as early as 1980, the broad jury instructions utilized by courts<sup>92</sup> and the stiff penalties imposed, sent a message to corporations and their officers that the courts intended to strictly enforce the criminal provisions of the various environmental statutes at their disposal.<sup>93</sup>

91. *Id.* at 715. The defendants' challenge to the convictions failed on appeal.

92. In *Frezzo Bros.*, the lower court instructed the jury as follows:

Now, I want to point out to you that if you have found beyond a reasonable doubt, in your consideration of this case, that the Government has proved all of those three essential elements of the crime against the corporation, or the corporate defendant; and if you, in the course of your deliberation, found that the Government failed to prove each of those three essential elements of the crime against one or both of these individual defendants; if you find in addition, that the Government proved beyond a reasonable doubt that either or both of the individual defendants was a responsible corporate officer and held a position of authority in the operation of the business of the corporate defendant at the time, on or about the time or times alleged in the indictment, then, of course, you may find that responsible corporate officer guilty of the crime committed by the corporation.

In other words, this particular Act [CWA] specifically provided that responsible corporate officers can be held criminally responsible for the acts of their corporation.

Now, I want to say to you that not every corporate officer is a responsible corporate officer, or one in a position of authority upon whom Congress has placed the burden of vigilance and foresight. A "responsible corporate officer," or one in a "position of authority" for these criminal purposes, has been defined as one who has a responsible share in the furtherance of the transaction or occupancy which the statute forbids.

Another way of defining it is as follows: If the officer has the responsibility and powers commensurate with that responsibility to devise whatever measures are necessary to ensure compliance with the statute and regulations, then that officer is a responsible corporate officer.

So what I am trying to say to you: That if you find the corporate defendant, the corporation, was guilty of the crime charged in any one of these counts, because of the acts or omissions of its agents; and if you also find beyond a reasonable doubt that the defendant, for instance Guido, had by virtue of his position in the corporation, the power to prevent or correct the violation; and if you find that he failed to exercise that power to prevent or correct the wrongdoing, then you may also find him guilty.

And by the same token, I want to say: If you found the corporate defendant guilty of the crime charged in any count of this indictment because of the acts or omissions of its agents; and if you find beyond a reasonable doubt that the defendant, James L. Frezzo had by virtue of his position in the corporation the power to prevent or correct the violation; and if you find that he failed to exercise that power to prevent or correct the wrongdoing, then you may also find him guilty. But you must take up each one of their cases separately in this connection.

United States v. Frezzo Bros., Criminal No. 78-218, Charge Volume IVb 27-29, *decided in*, 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

93. *See, e.g.*, United States v. Marathon Dev., Corp., 867 F.2d 96 (1st Cir. 1989). In *Marathon* the defendant bulldozed approximately five acres of federally-protected wetlands. *Id.* at 97. For failing to obtain the proper wetland permits,

The trend<sup>94</sup> to criminally enforce the CWA by means of the RCO doctrine was again illustrated eleven years later in *United States v. Brittain*.<sup>95</sup> The defendant in *Brittain* was a public utilities director.<sup>96</sup> The plant supervisor informed the defendant that the plant was discharging raw sewage, and also that the supervisor had witnessed two of the discharges.<sup>97</sup> The terms of the plant's utilities permit allowed discharges at only one point source, and the defendant was required to report any discharges from other sources.<sup>98</sup> In violation of this duty, the defendant instructed the plant supervisor not to report the discharges to EPA.<sup>99</sup> The defendant argued that he was not a "person" liable for criminal prosecution within the terms of the CWA because the government failed to prove that he was a "responsible" corporate officer.<sup>100</sup> However, the United States Court of Appeals for the Tenth Circuit disagreed, and affirmed the conviction.<sup>101</sup>

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Marathon and its senior vice president were each indicted on 25 counts of violating the CWA. *Id.* at 97-98. The defendants plead guilty, but specifically preserved for appeal a defense that their activities were protected by a headwaters nationwide permit. *Id.* at 98. Marathon's arguments were unsuccessful and the corporation was fined \$100,000. *Id.* More importantly, Marathon's senior vice president was fined \$10,000, and sentenced to a six-month suspended jail sentence and one year of probation. *Id.*

94. See, e.g., *United States v. Wells Metal Finishing, Inc.*, 922 F.2d 54 (1st Cir. 1991) (same); *United States v. Boldt*, 929 F.2d 35 (1st Cir. 1991) (describing the jail sentences available under CWA); *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989) (same); *United States v. Rutana*, 932 F.2d 1155 (6th Cir. 1991), *cert. denied*, 502 U.S. 907 (1991) (same); *United States v. Bogas*, 920 F.2d 363 (6th Cir. 1990) (same); *United States v. Buckley*, 934 F.2d 84 (6th Cir. 1991) (same); *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990) (holding director of public works department can be convicted under RCRA without government having established that he knew city did not obtain or possess permit to dispose of hazardous waste); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978) (discussing FIFRA and Migratory Bird Treaty Act); *United States v. Alley*, 755 F. Supp. 771 (N.D. Ill. 1990) (describing prison sentences under CWA).

95. 931 F.2d 1413 (10th Cir. 1991).

96. *Id.* at 1415.

97. *Id.* at 1420.

98. *Id.* The City of Enid, Oklahoma, the holder of the wastewater permit, was allowed to discharge pollutants from the city's wastewater treatment plant into a nearby creek. *Id.* at 1417. The original permit allowed for discharges in two places, but was later modified to allow only one point source. *Id.*

99. *Id.* at 1420.

100. *Brittain*, 931 F.2d at 1418.

101. *Id.* at 1420. At the time of the offense the CWA prohibited the willful or negligent discharge of a pollutant into waters of the United States and was punishable as a misdemeanor. CWA §§ 301(a), 309(c), 33 U.S.C. §§ 1311(a), 1319(c) (1984). The penalty was incarceration not to exceed one year, or a fine of not less than \$2,500 or more than \$25,000 per day of violation, or both. In February 1987, Congress amended subsection (c)(1) of the CWA and eliminated the term "willful" while adding subsection (c)(2), which made a knowing violation of the Act a fel-

Interestingly, although the government never presented the RCO doctrine at trial, on appeal the Tenth Circuit analyzed the RCO doctrine when determining whether the defendant was a "person" liable under the CWA.<sup>102</sup> In finding the defendant liable, the court based its decision on the underlying rationale of the *Dotterweich* decision.<sup>103</sup> In *Dotterweich*, the Supreme Court reasoned that public health concerns outweighed the hardship suffered by a criminally responsible corporate officer.<sup>104</sup> The *Brittain* court's conclusion suggests that a CEO or other responsible corporate actor does not have to be personally involved in a violation of the CWA in order to be found criminally liable; rather, guilt may be imputed based simply on one's corporate position.<sup>105</sup>

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ony punishable by a period of incarceration of not more than three years, or a fine of not less than \$5,000 or more than \$50,000 per day of violation, or both. CWA § 301, 33 U.S.C. § 1311 (1988). The defendant was also convicted on 18 counts of falsely reporting a material fact to a government agency. *Brittain*, 931 F.2d at 1419. See also 18 U.S.C. § 1001 (1994) (punishment for making false statements).

102. *Brittain*, 931 F.2d at 1419. The court began by stating:

Section 1319(c)(3) does not define a "responsible corporate officer" and the legislative history is silent regarding Congress's intention in adding the term. The Supreme Court, however, first recognized the concept of "responsible corporate officer" in 1943 (citations omitted). The *Dotterweich* Court held that a corporation's misdemeanor offense under the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA) was committed by all corporate officers "who do have . . . a responsible share in the furtherance of the transaction which the statute outlaws . . . though consciousness of wrongdoing be totally wanting."

*Id.*

103. *Id.* (discussing the *Dotterweich* RCO doctrine analysis under the CWA).

For a full discussion of *Dotterweich*, see *supra* notes 68-73 and accompanying text.

104. *Id.* The court stated:

[t]he rationale for this harsh rule lay in the type of legislative action that the *Dotterweich* Court was interpreting. Congress passed the FDCA in order to protect the public health, and, according to the Court, Congress perceived the public health interest to outweigh the hardship suffered by criminally liable responsible corporate officers who had no consciousness of wrongdoing (citations omitted). The same rationale applies to the Clean Water Act. Congress intended, with the Act, "to restore and maintain the chemical, physical, and biological integrity of the nation's waters . . . [and that] the discharge of pollutants into the navigable waters be eliminated by 1985."

*Id.* (second omission in original).

105. See Joseph G. Block & Nancy A. Voisin, *Criminal Enforcement of Environmental LAWS: The Responsible Corporate Officer Doctrine—Can You Go To Jail for What You Don't Know?*, 1992 *Env'tl Law* 1347, 1354 (1992) (discussing the availability of conviction based on officer's position).

### C. Corporate Liability Under RCRA

Courts have also extended criminal liability to corporate officers for RCRA violations.<sup>106</sup> In *United States v. MacDonald & Watson Waste Oil Co.*,<sup>107</sup> the United States Court of Appeals for the First Circuit clarified the constitutional issue implicated by the RCO doctrine.<sup>108</sup> Specifically, the court confronted the question of whether removal of the *mens rea* requirement for criminal prosecution of corporate officers comports with the United States Constitution.<sup>109</sup> The court stated that, although the RCO doctrine includes corporate actors in the definition of "person," it does not eliminate the requirement of knowledge in a criminal prosecution.<sup>110</sup> The First Circuit stated that the original jury instructions were improper be-

106. Ornsdorff & Mesnard, *supra* note 6, at 10,102-03.

107. 933 F.2d 35 (1st Cir. 1991).

108. *Id.* In *MacDonald*, the company, its president and owner and two employees were convicted under RCRA § 3008(d)(1) for knowingly transporting and causing the transportation of hazardous waste, toluene and soil contaminated with toluene, to a facility without a permit. *Id.* at 39.

109. *Id.* The First Circuit reversed the lower court's decision because the following jury instructions allowed the jury to convict with a simple finding of negligence rather than actual knowledge:

[w] an individual Defendant is also a corporate officer, the Government may prove that individual's knowledge in either of two ways. The first way is to demonstrate that the Defendant had actual knowledge of the act in question. The second way is to establish that the defendant was what is called a responsible corporate officer of the corporation committing the act. In order to prove that a person is a responsible corporate officer three things must be shown.

First, it must be shown that the person is an officer of the corporation, not merely an employee.

Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question.

And the third requirement is that the officer must have known or believed that the illegal activity of the type alleged occurred.

*Id.* at 50-51.

110. *Id.* at 55. The court specifically held:

[w]e agree with the decisions discussed above that knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions. Further, willful blindness to the facts constituting the offense may be sufficient to establish knowledge. However, the district court erred by instructing the jury that proof that a defendant was a responsible corporate officer, as described, would suffice to conclusively establish the element of knowledge expressly required under § 3008(d)(1). Simply because a responsible corporate officer believed that on a prior occasion illegal transactions occurred, he did not necessarily possess knowledge of the violation charged. In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an ade-

cause they allowed the jury to *conclusively* presume knowledge based on circumstantial evidence.<sup>111</sup> Thus, under *MacDonald*, knowledge *may* be inferred from circumstantial evidence coupled with a person's corporate position and responsibility, but a jury is not obligated to reach that conclusion.<sup>112</sup> The holding in *MacDonald*, therefore, places a limitation on the RCO doctrine because a person's corporate position alone is not sufficient to satisfy the knowledge requirement of a criminal prosecution.<sup>113</sup>

The decision in *United States v. Johnson & Towers, Inc.*<sup>114</sup> also addressed the use of the RCO doctrine when enforcing the criminal provisions of RCRA.<sup>115</sup> In *Johnson & Towers*, the Third Circuit held that corporate employees, in addition to CEOs, may be prosecuted under the RCO doctrine.<sup>116</sup> In *Johnson & Towers*, the defendants were charged with violations of RCRA after the company pumped waste chemicals from its cleaning operations into a trench.<sup>117</sup> The defendants, a foreman and the service manager of the company's trucking department, argued that they were not

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quate substitute for direct or circumstantial proof of knowledge (footnote omitted).

*Id.*

111. *Id.* at 54-55. The court analyzed the "willful blindness" doctrine in relation to the responsible corporate officer doctrine. *Id.* at 52-55. See also *United States v. Bernstein*, 533 F.2d 775, 796 (2d Cir. 1976), *cert. denied*, 429 U.S. 998 (1976) (allowing jury verdict to stand which used "conscious avoidance" in place of "knowledge"). See also I E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.09 (3d ed. 1977) which provides:

[t]he element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

*Id.*

112. *MacDonald*, 933 F.2d at 55. Had the instructions told the jury that corporate status could suffice as evidence of knowledge, as opposed to the instructions that the corporate status "would" suffice as evidence, then the lower court would not have erred. *Id.*

113. *Id.*

114. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, *Angel v. United States*, 469 U.S. 1208 (1985).

115. *Id.* For a discussion of the legislative history of the criminal provisions of the RCRA, see *supra* notes 36-41 and accompanying text.

116. *Johnson & Towers*, 741 F.2d at 664-65.

117. *Id.* at 664.

“owners and operators” under RCRA.<sup>118</sup> The court, however, concluded that knowledge of permit requirements may be imputed to individuals who hold responsible corporate positions within a defendant company.<sup>119</sup> Although some courts have declined to follow the holding in *Johnson & Towers*,<sup>120</sup> the decision nevertheless broadens criminal liability to include responsible corporate officers as well as CEOs.<sup>121</sup>

#### D. The Responsible Corporate Officer and the CAA

The CAA also allows for criminal prosecutions through application of the RCO doctrine.<sup>122</sup> Under the CAA, criminal sanctions apply to the following acts: (1) violating any requirements of state implemented schemes; (2) violating, failing or refusing to comply with any order under certain sections of the CAA; (3) violating new source performance standards; and (4) violating emission standards.<sup>123</sup> Like the CWA and RCRA, enforcement of the CAA ensures that responsible corporate officers pay for the consequences of their irresponsible actions.

For example, in *United States v. DAR Construction, Inc.*,<sup>124</sup> the Second Circuit found a foreman and his contracting firm guilty of violating asbestos removal and handling regulations.<sup>125</sup> Consequently, the court sentenced the foreman to 90 days in prison and three years of probation.<sup>126</sup> In *DAR*, the foreman had ordered workers to conceal asbestos waste; thus, the question of corporate

118. *Id.* at 664-65.

119. *Id.* at 670. The court held that Section 6928(d)(2)(A) of RCRA “covers employees as well as owners and operators of the facility who knowingly treat, store or dispose of any hazardous waste . . .” *Id.*

120. *See, e.g., United States v. Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991) (declining to follow *Johnson & Towers* to extent that it would require actual knowledge of RCRA’s regulations for defendant to be guilty of RCRA violation); *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990) (affirming conviction on different grounds than RCO doctrine).

121. *See Johnson & Towers*, 741 F.2d at 662.

122. For a discussion of the legislative history of the criminal provisions of the CAA, see *supra* notes 39-43 and accompanying text.

123. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (1994).

124. *Foreman On New York Project, Contractor Sentenced For Clean Air Act NESHAP Offenses*, 20 ENV’T REP. (BNA) 21 (May 5, 1989) (citing *United States v. DAR Constr. Co.*, 888 F.2d 126 (2d Cir. 1989)).

125. *Id.* The defendants removed dry asbestos from building pipes and dropped it 25 feet to the ground, resulting in the release of hazardous amounts of asbestos. *Id.* DAR Construction pled guilty to three violations and was ordered to pay fines in excess of \$50,000. *Id.*

126. *Id.*



liability was not debated.<sup>127</sup> The DAR court's severe prison sentence and hefty fines reinforces the fact that responsible corporate officers will serve prison time for their environmental crimes.<sup>128</sup>

Furthermore, in *United States v. Import Certification Laboratories, Inc.*,<sup>129</sup> the United States District Court for the Central District of California sentenced the president of the company and several employees to prison terms and probation for submitting false reports.<sup>130</sup> These reports certified that imported vehicles, which the company tested, met air pollution laws.<sup>131</sup> Similarly, in *United States v. Custom Engineering, Inc.*,<sup>132</sup> the president received a six month jail sentence with five years probation for reporting false testing results, with the company receiving a similar probationary sentence.<sup>133</sup> These two cases further emphasize courts' trend toward strictly enforcing criminal provisions in environmental statutes.

#### IV. A CORPORATE GUIDE TO AVOIDING LIABILITY

Avoiding, or at least limiting the extent of corporate and individual liability, for environmental compliance violations, is truly in the hands of American businesspersons.<sup>134</sup> EPA sets forth basic incentives for self-policing and self-auditing, which in turn provide protection for corporations that follow the EPA guidelines.<sup>135</sup> At

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127. *Id.* Similarly, a corporation and four of its managers pled guilty to conspiracy to violate the CAA asbestos standards in *United States v. Cuyohoga Wrecking Co., Officials Of Cuyahoga Wrecking Co. Convicted in New York, Los Angeles Cases*, 19 ENV'T REP. (BNA) 1289 (Nov. 4, 1988) (citing *United States v. Schwab*, No. 87-1483M (E.D.N.Y. 1988)) (convicting president of corporation for bribing EPA official in charge of monitoring asbestos abatement projects; defendant faced possible sentence of thirty years).

128. *Forman On New York Project, Contractor Sentenced For Clean Air Act NESHAP Offenses*, 20 ENV'T REP. (BNA) at 21 (citing DAR 888 F.2d 126).

129. *Enforcement: Auto Shop Owner Fined \$37.8 Million for Leaking Oil Into Drinking Water Source*, 18 ENV'T REP. (BNA) 1993 (Jan. 8, 1988) (citing *United States v. Import Certification Lab., Inc.*, C.D. Cal., No. CR 87-249 AWT).

130. *Id.*

131. *Id.*

132. *Enforcement: EPA Seeks \$5.1 Million in Penalties For Allegedly High Lead Content in Fuel*, 18 ENV'T REP. (BNA) 465 (May 29, 1987) (citing *United States v. Custom Engineering, Inc.*, No. Cr. 86-0051301 (C.D. Cal. 1987)).

133. *Id.*

134. For a discussion of EPA compliance guidelines that corporate leaders need to institute, see *infra* notes 135-64 and accompanying text.

135. 60 Fed. Reg. 66706 (1996). The most current policy statement by EPA on self-policing became effective on January 22, 1996 and is entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations." *Id.* The summary of the statement is as follows:

[t]he Environmental Protection Agency [EPA] today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct

the core of EPA's guidelines are simple rules of disclosure, honesty, diligence and responsibility.<sup>136</sup> Although these guidelines do not completely insulate a corporate officer from criminal liability, compliance generally forecloses the possibility that EPA will recommend an officer for criminal prosecution.<sup>137</sup>

The new EPA policy is basically a three-part guidance incentive.<sup>138</sup> First, if companies or public agencies voluntarily conduct environmental audits or self-evaluations according to the policy's seven basic "conditions,"<sup>139</sup> EPA pledges not to seek gravity-based,

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violations of environmental requirement. Incentives include eliminating or substantially reducing the gravity component of civil penalties and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. The policy also restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. This policy was developed in close consultation with the U.S. Department of Justice, states, public interest groups and the regulated community, and will be applied uniformly by the Agency's enforcement programs.

*Id.*

136. *Id.*

137. *Id.* In the "Explanation of Policy" section EPA explains that:

[w]here violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity . . . *The policy includes important safeguards to deter irresponsible behavior and protect the public and environment.* For example, in addition to prompt disclosure and expeditious correction, the policy requires companies to act to *prevent* recurrence of the violation and to remedy any environmental harm which may have occurred. *Repeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy,* and companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. *Corporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct.*

*Id.* (emphasis added).

138. John J. Zodrow, *EPA's 'Mitigated Enforcement' Policy*, 10 WTR. NAT. RESOURCES J. 3, 60 (1996).

139. *Id.* Zodrow consolidated the policy into seven primary conditions:

- (1) [t]he entity discovers the violation through a voluntary environmental audit or self-evaluation appropriate to the size and nature of the regulated entity;
- (2) [v]iolations discovered through self-policing are fully and immediately disclosed to all appropriate agencies. Voluntary disclosure must occur prior to the commencement of an agency investigation, citizen suit, third-party complaint or the entity's knowledge that such action by a regulatory agency or third party was imminent;
- (3) [t]he regulated entity corrects the violation either within sixty days of discovering the violation or, if more time is needed, as expeditiously as possible;

punitive penalties.<sup>140</sup> Second, EPA will not recommend criminal prosecution for companies that act in "good faith" by identifying, disclosing and correcting violations, "as long as no serious harm has occurred."<sup>141</sup> Third, EPA will continue to refrain "from routine requests for environmental audit reports," both civil and criminal, if corporations demonstrate systematic compliance.<sup>142</sup>

Essentially, the new EPA policy encourages compliance by offering incentives rather than imposing sanctions for violations.<sup>143</sup> In a recent 1995 survey conducted by Price-Waterhouse, more than 90% of the corporations engaged in self-auditing stated that one "of the reasons they [audited] was to find and correct violations before they were found by government inspectors."<sup>144</sup> Moreover, if a corporation voluntarily discloses violations discovered through audits prior to a governmental investigation, the new EPA policy advocates discretion and leniency in criminal prosecution.<sup>145</sup>

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- (4) [t]he entity expeditiously remedies any condition that creates an imminent and substantial endangerment to human health or the environment;
  - (5) [t]he entity implements appropriate measures to remedy any environmental harm due to the violation and to prevent a recurrence of the violation;
  - (6) [t]he entity has not failed to take appropriate steps to avoid repeat violations;
  - (7) [t]he entity cooperates and provides information required by EPA, to include providing requested documents, access to employees and assistance in further investigation into the violations.

*Id.* at 61.

140. 60 Fed Reg. 66706 (1996). EPA will also reduce gravity-based penalties by 75% for violations that are voluntarily discovered, despite a company's failure to meet all seven required conditions. *Id.*

141. Zodrow, *supra* note 138, at 65.

142. 60 Fed. Reg. at 66707. "EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing." *Id.*

143. *Id.* at 66706-07. The purpose of the policy is described as follows: [t]his policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence . . . EPA's enforcement program provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance.

*Id.*

144. *Id.* at 66707. Interestingly, more than half of the same corporations said "they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected." *Id.*

145. *Id.* Specifically, EPA has stated that it "never recommended criminal prosecution of a regulated entity based on voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way." *Id.*

Most importantly, good faith is a requisite aspect of the new EPA policy.<sup>146</sup> Basically, under the RCO doctrine, willful blindness or knowing violations of environmental regulations are not to be protected under the new compliance incentives.<sup>147</sup> Furthermore, the new EPA policy does not apply when corporations cause serious actual harm to human health or the environment.<sup>148</sup> Thus, EPA may still prosecute culpable individuals that disregard or turn a blind eye to their corporate compliance responsibility.<sup>149</sup>

CEOs and their corporations need to recognize the wise investment of a self-policing, self-auditing environmental program for two simple reasons. First, EPA will severely punish those companies that fail to follow the established guidelines.<sup>150</sup> This outcome will undoubtedly prove to be much more costly to corporations than installing internal safeguards.<sup>151</sup> Second, case law suggests that courts will not hesitate to enforce criminal penalties.<sup>152</sup> In short, CEOs need to implement EPA's straightforward guidelines, which include the following: (1) systematic discovery of violations;<sup>153</sup>

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146. *Id.* Under section I(D)(3) the EPA states: "This policy is limited to good actors, and therefore has important limitations." *Id.*

147. 60 Fed. Reg. at 66707. The policy will not apply "where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance." *Id.*

148. *Id.*

149. See Zodrow, *supra* note 138, at 61. Zodrow explains that: EPA will not recommend to DOJ that criminal charges be brought against a regulated entity meeting all seven conditions so long as the violation does not encompass a corporate management philosophy that condones environmental violations, high-level corporate officials' involvement in or willful blindness to the environment. This policy does not apply to criminal acts of individual employees as EPA reserves the right to prosecute any individual for criminal misconduct, even though EPA does not proceed against the corporation.

*Id.*

150. For a discussion of decisions which demonstrate strict enforcement of EPA standards and criminal provisions, see *supra* notes 86-133 and accompanying text.

151. See Harig, *supra* note 62, at 146-150 (discussing high penalties and settlement costs for criminal enforcement cases). Therefore, self-regulation is economically sound. *Id.* at 156-57.

152. For a discussion of strict judicial enforcement, see *supra* notes 86-133 and accompanying text.

153. 60 Fed. Reg. 66707, 66711 (1996). Systematic discovery is defined as: (a) an environmental audit; or (b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

(2) voluntary disclosure;<sup>154</sup> (3) prompt disclosure;<sup>155</sup> (4) discovery of disclosure independent of the government or third party plaintiffs;<sup>156</sup> (5) correction and remediation measures;<sup>157</sup> (6) prevention

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*Id.*

154. *Id.* The violation must be identified voluntarily, not by an already established EPA requirement "regulation, permit, judicial or administrative order, or consent agreement." *Id.* This voluntary disclosure policy does not apply to:

- (a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;
- (b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; nor
- (c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

*Id.*

155. *Id.* Prompt disclosure occurs when "[t]he regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA." *Id.*

156. *Id.* The violation must also be identified and disclosed by the regulated entity prior to:

- (a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;
- (b) notice of a citizen suit;
- (c) the filing of a complaint by a third party;
- (d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
- (e) imminent discovery of the violation by a regulatory agency.

*Id.*

157. *Id.* at 66711. Corrective and remedial measures are defined as when: [t]he regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediation harm is required.

*Id.*

of recurrence;<sup>158</sup> (7) no repeat violations;<sup>159</sup> and (7) cooperation.<sup>160</sup>

EPA stands firm in its commitment to protect the environment. Nevertheless, a real and accessible solution for avoiding criminal liability exists.<sup>161</sup> Although compliance with the new EPA self-policing policy is not necessarily a "Get Out of Jail Free Card," it will certainly eliminate a substantial degree of potential exposure.<sup>162</sup> Investing in a detailed, systematic and thorough internal audit system today, coupled with corporate responsibility, will protect the corporation, corporate management and, most importantly, the environment.<sup>163</sup> EPA is not on a corporate witch hunt, rather, it has developed a policy designed to "enhance protection of human health and the environment by encouraging" businesses to "voluntarily discover, disclose, correct and prevent violations" of EPA regulations.<sup>164</sup>

#### IV. PRACTICAL CONSIDERATIONS: GOOD BUSINESS AND COMMON SENSE

The purpose of this Comment is to alert CEOs and their corporations of the legitimate need to comply with EPA's new self-polic-

158. 60 Fed. Reg. at 66711. "The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvement to its environmental auditing or due diligence efforts." *Id.*

159. *Id.* The specific violation cannot have occurred within the past three years and cannot be a part of a pattern of "federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years." *Id.* EPA defines a violation under this section as:

- (a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or
- (b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

*Id.*

160. *Id.* A corporation must cooperate with EPA and provide any necessary information that EPA requests in order to determine the applicability of this new policy. *Id.* at 66712. "Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations." *Id.*

161. For a discussion of the corporate guide to avoiding criminal liability, see *supra* notes 134-60 and accompanying text, *infra* notes 161-64 and accompanying text.

162. For a discussion of the steps a corporation needs to take to comply with EPA guidelines, see *supra* notes 134-61 and accompanying text.

163. See Hodson, *supra* note 1, at 145-46 (discussing society's strong desire to punish corporate offenders in effort to protect future generations).

164. 60 Fed. Reg. 66706, 66710 (1996).

ing policy.<sup>165</sup> However, there are other practical considerations that should prompt responsible corporate officers to rethink their outlook on the corporation's role and its effect on the environment. For example, when a CEO is imprisoned for an environmental violation that could have been easily avoided, the incarceration can lead to the demise of the corporation. As a consequence, innocent employees could lose their jobs.<sup>166</sup> Moreover, the effect of the closing of a company in a small town can be economically devastating. Finally, criminal enforcement is often coupled with heavy fines which in turn must be passed on to the consumer.<sup>167</sup> Higher costs for goods hurts everyone, including CEOs.

Responsible corporate actors must implement comprehensive self-policing and self-auditing plans.<sup>168</sup> Corporations should hire an environmental specialist, preferably a former EPA employee, who is familiar with the EPA guidelines and the importance of adhering to them.<sup>169</sup> Alternatively, the corporation could hire an environmental team to spearhead the corporation's compliance effort.<sup>170</sup> Ideally, an environmental team, acting as the corporation's liaison with EPA, could approve disclosure of corporate information and strictly monitor the corporation's compliance.<sup>171</sup>

Education is another simple and practical method for avoiding criminal liability.<sup>172</sup> Not only should CEOs be educated, but they

165. Kirk F. Marty, *Moving Beyond the Body Count and Toward Compliance: Legislative Options for Encouraging Environmental Self-Analysis*, 20 VT. L. REV. 495, 515 (1995).

166. See generally, Mia Ann Mazza, *The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation*, 23 ECOLOGY L.Q. 79, 85 (1996) (stating "audit conclusions can set off a chain of reporting violations" which have detrimental effect on business productivity and in turn on sustainability of corporate workforce).

167. Stephen D. Brown & Alison M. Benders, *How to Handle a Complex Criminal Environmental Case*, 1 VILL. ENVTL. L.J. 149 (1990).

168. For a discussion of these schemes, see *supra* notes 134-67 and accompanying text.

169. See James T. Banks, *Corporate Environmental Compliance Programs: Are We Seeing an Evolution in Federal Policy?*, C964 ALI-ABA 467, 482 (1994) (describing one company's use of "internal hot line" and environmental specialist through which employees can foster compliance).

170. *Id.*

171. Terrell E. Hunt & Timothy A. Wickins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 410 (1992) (analogizing possible self-policing scheme to one in operation at Occupational Safety and Health Administration (OSHA) which is permissible for "companies that have implemented sound internal management programs").

172. See Banks, *supra* note 169, at 482; see also Kenneth A. Hodson & James D. Vieregg, *Environmental Crime Now Means Prison Time*, 29 DEC. ARIZ. ATT'Y 22, 23 (1992) (stating current or former employees may be first line of communication to investigative agencies about violations of environmental laws).

should also distribute information to all employees which emphasizes the importance of protecting the environment as well as the severe ramifications for failing to comply with EPA's standards.<sup>173</sup> Corporations should also seek legal advice when implementing such programs, because environmental lawyers are knowledgeable of the various statutes with which corporations must comply and the steps necessary for compliance with those statutes.<sup>174</sup>

In conclusion, compliance with EPA's new guidelines, in addition to an awareness and education in the harsh reality of failing to meet these guidelines, provide the basis for sound business in our new environmentally conscious world. These three factors, coupled with honesty, integrity and cooperation, while not completely insulating a CEO from criminal liability, will certainly decrease the likelihood of criminal prosecution.

*Sean J. Bellew*  
*Daniel T. Surtz*

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173. *Id.*

174. *See id.* at 482 (discussing teaming of environmental specialists with lawyers to ensure compliance network).



