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## The Clean Air Act Amendments of 1990: Enhanced Criminal Liability

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THE CLEAN AIR ACT AMENDMENTS OF 1990:  
ENHANCED CRIMINAL LIABILITY

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I. INTRODUCTION

“If you visit American city,  
You will find it very pretty,  
Just one thing of which you must beware,  
don’t drink the water and don’t breathe the air.”<sup>1</sup>

America has always been a beautiful place. Recent studies, however, indicate that cities across the United States are being crippled by a variety of ills. Ninety-six cities have failed to meet the national standards established for ozone, the prime component of smog; forty-one cities have exceeded the standards set for monoxide; and seventy-two cities do not meet the standards es-

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1. TOM LEHRER, *Pollution, on THAT WAS THE YEAR THAT WAS* (Reprise Records 1965).

tablished for particulate matter.<sup>2</sup> The failure by cities nationwide to meet these goals for the reduction of air pollution has many more far-reaching consequences besides the deterioration of the aesthetics of our metropolitan areas.

The former President of the American Public Health Association has predicted that if swift and potent action is not taken, 100,000 to 150,000 premature deaths will result yearly from exposure to toxic air pollutants.<sup>3</sup> Chronic bronchitis, lung cancer, nervous disorders and heart disease are among those ailments caused and/or aggravated by air pollution.<sup>4</sup> As urban areas are disintegrating and human health is suffering, it is painfully clear that the air pollution control programs being implemented and the policies being espoused are ineffective and potentially deleterious.

The 1990 Clean Air Act Amendments,<sup>5</sup> (Amendments), substantially rewrite and redirect the environmental protection policies of this country. Learning from previous mistakes, government agencies and congressional leaders directed over twenty years of experience into the significant and innovative reforms which comprise the Amendments.<sup>6</sup> This Comment will provide a general overview of the Amendments with a final focus on the Title VII criminal liability provisions. The Title VII criminal sanctions join similar penalty provisions in other federal environmental statutes, such as the Resource Conservation and

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2. William K. Reilly, *The New Clean Air Act: An Environmental Milestone*, 17 EPA JOURNAL 2 (Jan./Feb. 1991) [hereinafter Reilly, *The New Clean Air Act*].

3. S. REP. No. 55, 102nd Cong., 1st Sess. 19, 20 (1991). John R. Garrison, Managing Director of the American Lung Association, has commented:

EPA's own clinical laboratories found that otherwise healthy, exercising individuals show significant effects after six to eight hours of breathing ozone at levels below the threshold of the current health standard. . . . Air pollution diminishes the lives of millions of Americans and shortens the lives of tens of thousands each year. Excess deaths from air pollution are in the same range as those from breast cancer or auto accidents.

John R. Garrison, *Will the New Law Protect Public Health?*, 17 EPA JOURNAL 58 (Jan./Feb. 1991).

4. S. REP. No. 55, 102nd Cong., 1st Sess. 19, 20 (1991).

5. Clean Air Amendments of 1990, Pub. L. No. 101-549, § XXX, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C. §§ 7401-7642) (Law. Co-Op. 1989 & Supp. 1991).

6. See Pamela B. Levinson, *Cleaning Up Our Act*, 9 SUM. DEL. LAW 26 (1991) [hereinafter Levinson, *Cleaning Up Our Act*].

Recovery Act (RCRA)<sup>7</sup> and the Clean Water Act (CWA),<sup>8</sup> to supply the Environmental Protection Agency (EPA) and the Justice Department with powerful weaponry in the battle for a cleaner earth.

Traditionally, the criminal liability provisions of the major federal environmental statutes have been scarcely utilized in enforcement efforts.<sup>9</sup> During the entire decade of the 1970's, approximately twenty-five criminal environmental cases were prosecuted.<sup>10</sup> The de-emphasis on criminal enforcement was due primarily to an overall lack of financial and human resources.<sup>11</sup> Further, powerful corporations and interest groups were perceived as wielding tremendous influence on the direction of environmental policy and enforcement procedures.<sup>12</sup>

Prior to the 1980's, civil sanctions rather than criminal penalties were the essential enforcement tools of environmental laws.<sup>13</sup> However, in the last ten years, Congress, EPA and the Justice Department have forged new alliances.<sup>14</sup> The government agencies

7. The Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6987 (1988 & Supp. 1989)).

8. The Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1988 & Supp. 1989)).

9. Frederick W. Addison, III & Elizabeth E. Mack, *Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time*, 44 Sw. L.J. 1427 (1991) [hereinafter Addison, *Creating an Environmental Ethic in Corporate America*]. The authors noted that, in years past, for an individual or an organization to be convicted and/or incarcerated for an environmental offense was a rarity. *Id.* "The most egregious conduct," they wrote, garnered "no more than a slap on the wrist and a nominal fine." *Id.*

10. ROBERT G. DELGRECO, JR. & JEFFREY T. WILEY, *CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAW I* (1990) [hereinafter DELGRECO, *CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAW*].

11. Barbara H. Doerr, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. DET. L. REV. 659, 665 (1985) [hereinafter Doerr, *Prosecuting Corporate Polluters*].

12. *Id.*

13. Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 822 (1990) [hereinafter Fromm, *Commanding Respect*].

14. DELGRECO, *CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAW*, *supra* note 10, at 1. In 1981, the EPA established the Office of Criminal Enforcement. The Justice Department followed suit by establishing the Environmental Crimes Unit within the Division of Land and Natural Resources. The Unit was made a permanent division in April, 1987. Both offices were designed to focus exclusively on the investigation and prosecution of criminal violations of the environmental statutes and regulations.

The Environmental Crimes Unit receives cases referred to it by the Justice Department. The Unit "coordinates the national criminal enforcement effort from its headquarters at [the Department of Justice], spearheads the development of policies and training programs, and counsels EPA on targeting of inves-

responsible for the enforcement of the environmental regulations encouraged Congress to take action. These agencies along with congressional leaders began to realize the following:

[T]he civil penalties and modest fines that [had] been the most common sanctions levied against corporate polluters did little to stem the increase in pollution. As a result, Congress became dissatisfied with the civil remedies available for pollution violations and enacted strict criminal penalties including fines as high as one million dollars for the illegal disposal of hazardous wastes that pose an unreasonable risk of harm to human health.<sup>15</sup>

Responding to public opinion polls<sup>16</sup> which indicated that prosecution of environmental crimes was among the public's top

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tigations." Judson W. Starr, *Environmental Crimes*, C414 A.L.I.-A.B.A. 153, 156 (June 1, 1989).

In 1982, EPA hired full-time investigators which gave the EPA "a new capability to ferret out and collect evidence about violations of environmental laws." *Id.*

In 1986, EPA delineated three goals for its criminal enforcement division: "(1) [to] deter intentional environmental violations through the creation of an expectation of prosecution in the regulated community, (2) [to] provide severe punishment for egregious violators, and (3) [to] assure the integrity of all EPA regulatory programs." Robert W. Adler, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 791 (1991) (construing Consensus Work Group, EPA, *Management Review of EPA's Criminal Enforcement Program* 5 (1986)).

15. Doerr, *Prosecuting Corporate Polluters*, *supra* note 11, at 675.

16. The pollution problem became high profile in the late 1970's and early 1980's. The incident at Love Canal, New York, was a shocking eye-opener for most Americans who never before had been exposed to the evil effects of toxic pollutants. In that incident, the Hooker Chemical Company disposed of over 352 million tons of industrial wastes in the Love Canal area. FREDERICK R. ANDERSON, ET AL., *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 553 (1984). The contaminated land was eventually abandoned and razed. *Id.* However, it was later sold for one dollar by Hooker Chemical to the Niagara Falls Board of Education. *Id.* After the sale, the School Board built a new school and a playground over the contaminated site and a residential community sprouted in the area. *Id.* Residents of the community suffered from a variety of ailments related to their exposure to toxic pollutants including, "cancer, spontaneous abortion, malformed fetal organ systems, skin disorders, neurological, kidney, and liver disorders, hyperactivity and suicide." *Id.*

More recently than Love Canal, in 1989, the Exxon Valdez oil tanker spilled approximately 10.8 million gallons of crude oil off the Alaskan coast. Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 782 (1991). As a result of the Valdez incident, over 1000 sea otters and over 36,000 birds, including over 156 bald eagles, died. Moreover, much of the pristine Alaskan coastline was devastated. *Id.* at 782.

The negative publicity generated by the Love Canal incident and other incidents which have followed has raised public consciousness and has brought the pollution issue to the forefront of the American social and political scene.

priorities<sup>17</sup> and also to an overall dissatisfaction with civil penalties which were doing very little in the way of deterrence,<sup>18</sup> Congress enacted stricter criminal penalty provisions in many of the major federal environmental statutes.<sup>19</sup> Pursuant to these new provisions, EPA and the Justice Department set out with renewed fervor to prosecute and convict offenders.<sup>20</sup> Today, EPA and the Department of Justice have entirely reorganized their priorities and are committed to “both criminal investigation and criminal prosecution [in order] to protect the environment by deterring acts which threaten either environmental harm or EPA’s ability to monitor regulated industry.”<sup>21</sup>

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17. Addison, *Creating an Environmental Ethic in Corporate America*, *supra* note 9, at 1429. The public’s perception and concern for the environment and environmental issues underwent a drastic change in the 1980’s. In 1984, approximately 60,000 Americans participated in a public opinion poll which asked them to rank the severity of certain crimes. *Id.* Environmental crimes placed seventh “after murder, but ahead of heroin smuggling.” *Id.* It has been noted that “[t]he public’s perception of companies violating hazardous waste or toxic pollution rules is only slightly more favorable than the public perception of cocaine dealers and child molesters.” Elliott P. Laws & Russell V. Randle, *Enforcement and Liabilities*, in *THE ENVIRONMENTAL LAW HANDBOOK*, 53 (10th ed. 1991).

Further, between June 24, 1990 and July 1, 1990, a telephone survey was conducted of 1004 U.S. households. Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 *GEO. WASH. L. REV.* 889 n.1 (1991). The callers asked the following question: “Right now a company is usually fined if it violates state or federal pollution levels, but rarely is anyone sent 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.* Seventy-two percent of those polled responded affirmatively - only twenty-four percent opposed. *Id.*

18. Fromm, *Commanding Respect*, *supra* note 13, at 822. The government agencies that traditionally imposed only civil sanctions realized that those civil penalties were ineffective.

19. *See supra* note 15.

20. Fromm, *Commanding Respect*, *supra* note 13, at 822-23. The federal government is committed to the preservation of public health and the environment and commentators have noted the following in that regard:

[the government’s] commitment to effectuating this policy is evidenced by the increasing numbers of corporations, corporate officers, managers, and other individuals being prosecuted criminally, as well as the sentences being imposed. Incarceration, not probation, is becoming the norm for individuals convicted of environmental crimes. Cases which in the past might have been pursued civilly are increasingly being prosecuted *criminally and civilly*. Moreover, numerous environmental statutes have been amended to strengthen the existing criminal penalties and to broaden the type of conduct which may be considered criminal.

Thomas J. Kelly, Jr. & Maria H. Tildon, *Criminal Investigations: Corporate Counsel’s Plan of Attack*, C617 A.L.I.-A.B.A. 45, 47 (Apr. 11, 1991) (emphasis added).

21. Carol E. Dinkins, *Criminal Prosecution of Environmental Violations*, C640 A.L.I.-A.B.A. 23, 25 (Apr. 18, 1991) [hereinafter Dinkins, *Criminal Prosecution of Environmental Violations*].

For numerous reasons, criminal penalties are more effective enforcement tools than civil penalties.<sup>22</sup> The pursuit of criminal convictions yields a speedier resolution to environmental litigation.<sup>23</sup> Civil cases which may take years to file and complete may result in criminal convictions within a one year period.<sup>24</sup> Moreover, the deterrent effect of civil penalties is minimal at best.<sup>25</sup> The threat of criminal prosecution, however, terrorizes even the most insulated corporate executive:<sup>26</sup> “the threat of incarceration undoubtedly deters other corporate officials from engaging in or countenancing similar misconduct and causes them to become more compliance-conscious.”<sup>27</sup> The stigma of a criminal conviction stabs and tarnishes the corporate image and status within the community.<sup>28</sup> The negative publicity generated from a criminal conviction is far more damaging than that generated from an adverse holding in a civil action.<sup>29</sup> The imposition of criminal sanctions makes headlines, grabs public attention and spurs public pressure.<sup>30</sup>

Since 1983, the Justice Department has successfully indicted nearly 761 individuals and corporations<sup>31</sup> and has assessed over \$57,358,404 in criminal penalties.<sup>32</sup> In 1990, the Justice Department indicted thirty-three percent more offenders than were in-

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22. Doerr, *Prosecuting Corporate Polluters*, *supra* note 11, at 668.

23. *Id.*

24. *Id.*

25. *See supra* note 25.

26. Fromm, *Commanding Respect*, *supra* note 13, at 822.

27. 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).

28. Doerr, *Prosecuting Corporate Polluters*, *supra* note 11, at 669-71. *See also* United States v. Allied Chem. Corp., 420 F. Supp. 122 (E.D. Va. 1976). After having illegally dumped a carcinogenic substance, poisoned countless persons and severely damaged miles of river waters, Allied Chemical was convicted of violating the Rivers and Harbors Act. The court originally imposed nearly thirteen million dollars in fines. However, once Allied Chemical agreed to establish an eight million dollar clean-up fund, the court reduced the fines to only five million dollars. The donation was made in order to fund research programs directed at cleaning-up the environmental damage done by Allied Chemical's illegal dumping. *Id.*, construed in Doerr, *Prosecuting Corporate Polluters*, *supra* note 11, at 669-70.

29. *Id.*

30. *Id.*

31. Memorandum from Peggy Hutchins, paralegal, to Joseph G. Block, Environmental Crimes Section Chief, Department of Justice (Dec. 13, 1990), construed in 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, 901 n.3 (1991).

32. *Id.*

dicted in 1989 and achieved a record high conviction rate of eighty-five percent.<sup>33</sup> Fifty-five percent of those convicted of environmental crimes were sentenced to prison.<sup>34</sup>

On November 15, 1990, President Bush, by signing into law the 1990 Amendments to the Clean Air Act ("CAA"),<sup>35</sup> was said

33. *Id.*

34. *Id.*

35. The Amendments consist of eleven titles. Among the most noteworthy are the following:

1. *Title I - Stationary Source Control and Non-Attainment:*

EPA research indicates that ninety-six cities in the United States do not meet the national health standards set for ozone, which is the prime component in smog; approximately forty-one U.S. cities do not meet the national standard established for monoxide; and seventy-two cities do not meet the national standard set for particulate matter. Reilly, *The New Clean Air Act*, *supra* note 2, at 3. Title I directly addresses these problems by dividing into categories those areas which do not meet the national standards. The categories are established based on the severity of the particular air pollution problem and each category contains a set of attainment requirements which vary and correspond to the extent of the problem. S. REP. No. 55, 102nd Cong., 1st Sess. 22 (1991).

2. *Title II - Mobile Source Control:*

The use of automobiles significantly contributes to the air pollution problem. "[M]otor vehicles account for about one-half of the hydrocarbon and nitrogen-oxide pollutants that form smog in [U.S.] . . . cities, up to 90 percent of the carbon monoxide, and over half of the toxic air pollutants." Richard D. Wilson, *Motor Vehicles and Fuels: The Strategy*, 17 EPA JOURNAL 15 (Jan./Feb. 1991).

Title II of the 1990 Amendments includes a number of measures directed at the substantial reduction of these motor vehicle pollutants. Title II calls for an expanded use of cleaner, reformulated gasoline in nine cities with the severest ozone pollution. *Id.* at 23. See also AUTHOR *Reformulated Gasoline: What Makes It Different?*, 17 EPA JOURNAL 50 (Jan./Feb. 1991).

Further, the Amendments mandate that car manufacturers reduce tailpipe emissions of hydrocarbons and oxides of nitrogen, primary components of smog, one hundred percent by 1998. S. REP. No. 55, 102nd Cong., 1st Sess. 23 (1991). Automobile manufacturers are also required to install systems to alert drivers that the emission control system in their vehicle is not functioning properly. *Id.*

Moreover, Title II contains provisions relating to standards for new transit buses, fleet vehicles and the California Pilot Program. *Id.* at 23-25. See *infra* text accompanying notes 59-61.

3. *Title III - Air Toxics Control:*

Title III introduces a list of 189 chemical pollutants i.e. typically carcinogens, mutagens and reproductive toxins which are required to be reduced by the year 2000. *Id.* at 25. See also *Highlights of the 1990 Clean Air Act Amendments*, 17 EPA JOURNAL 8-9 (Jan./Feb. 1991). Also, pursuant to Title III, EPA will be publishing a list of major source categories i.e. chemical plants and oil refineries, and will be issuing "Maximum Achievable Control Standards" for each category. S. REP. No. 55, 102nd Cong., 1st Sess. 25 (1991).

Title III also contains provisions regarding voluntary reductions, permits, accidental releases, municipal incinerators, and area source categories, i.e. dry cleaners and gas stations. *Id.* at 25-27.

4. *Title IV: Acid Rain Control:*

Acid rain "damag[es] lakes, streams, forests, and soils, decreas[es] visibility, corrod[es] monuments and tombstones, and potentially threaten[s] human health." Ned Helme & Chris Neme, *Acid Rain: The Problem*, 17 EPA JOURNAL 18



to have reaffirmed the nation's commitment to the utilization of criminal penalties in the enforcement of environmental statutes.<sup>36</sup>

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(Jan./Feb. 1991). Title IV calls for a substantial reduction in sulfur dioxide emissions by ten million tons per year. S. REP. No. 55, 102nd Cong., 1st Sess. 27 (1991). Pursuant to this title, oxides of nitrogen are also to be dramatically reduced by approximately two million tons per year. *Id.*

5. *Title V - Permits:*

Various provisions in the Amendments require air pollution sources to obtain operating permits. *Id.* at 29. The ultimate objective of the permitting program is to assure compliance with the numerous standards set throughout the Amendments. *Id.* This title addresses the administration of the permitting program, citizen review of permit actions, and other permit related issues. *Id.* at 29-30.

6. *Title VI - Stratospheric Ozone Protection:*

Experts testify that damage to the earth's ozone layer, its main shield from the sun's harmful ultraviolet rays, "will cause increased rates of skin cancer, cataracts . . . [and] suppression of the immune system." John H. Chafee, *Stratospheric Ozone: The Problem*, 17 EPA JOURNAL 34 (Jan./Feb. 1991). Title VI addresses this critical issue by providing for the "phase out" of CFC's, halons, carbon tetrachloride, methyl chloroform and HCFC's which substantially threaten the ozone layer. S. REP. No. 55, 102nd Cong., 1st Sess. 30 (1991). Title VI also contains provisions relating to motor vehicle air conditioning recycling, bans on nonessential products, warning labels, safe alternatives, methane studies, assistance to developing countries, and procurement regulations. *Id.* at 30-31.

7. *Title VII - Federal Enforcement:*

Title VII substantially amends the civil and criminal liability provisions of the CAA. Title VII civil enforcement tools include a new "administrative authority" which allows EPA to demand penalty payments of up to \$200,000 and to order that violations be remedied. Michael S. Alushin, *New Enforcement Tools Under the 1990 Amendments*, 17 EPA JOURNAL 40-41 (Jan./Feb. 1991). This title also provides for the issuance of "field citations" by EPA inspectors to environmental offenders immediately upon detecting violations of the Act. *Id.* at 40. The amendments concerning civil authorities also include provisions relating to emergency responses, citizen suits and awards. *Id.* at 40-41.

9. *Title IX - Clean Air Research:*

Title IX includes provisions for continued research into the problem of acid rain. S. REP. No. 55, 102nd Cong., 1st Sess. 33 (1991). The Amendments also provide for research into the development of new technologies for the sampling, measurement, monitoring and analysis of air pollutants. *Id.* Further, Title IX contains provisions relating to ecosystems research. *Id.*

36. Levinson, *Cleaning Up Our Act*, *supra* note 6, at 26. The Amendments were enacted in order to "strengthen a statutory and regulatory scheme to control air pollution that began in 1963 with the enactment of the Federal Clean Air Act." *Id.* The Federal Clean Air Act was also amended in 1970 and 1977. Richard E. Ayers, Senior Attorney with the Natural Resources Defense Counsel and Chair of the National Clean Air Act Coalition, wrote that "[t]he Clean Air Act, to the credit of the Bush Administration, and the congressional leaders who fashioned it, addresses all the major air pollution issues that trouble this country." Richard E. Ayers, *Viewpoints: An Environmentalist's Perspective*, 17 EPA JOURNAL 56 (Jan./Feb. 1991).

However, certain commentators have suggested that the Bush Administration's motivations for strengthening criminal liability under the Act were not entirely noble. These authors have proposed that "[t]he Bush Administration may view stringent enforcement efforts as the cheapest way to demonstrate strong environmental commitments without supporting expensive and burdensome new regulatory programs, or increasing the size of the federal deficit with

Senator George Mitchell (D-ME), a leading proponent of the legislation, commented that the Amendments were "national in scope, comprehensive in coverage and historic in significance."<sup>37</sup> The Amendments symbolized a concerted rededication to the fundamental objectives of the Clean Air Act of 1970.<sup>38</sup>

In 1970, Congress enacted watershed clean air legislation promising cleaner air to all Americans.<sup>39</sup> While significant progress was made in certain areas,<sup>40</sup> the impact of the original bill on air pollution control fell short of expectations.<sup>41</sup> The Amend-

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public works expenditures." Elliott P. Laws & Russell V. Randle, *Enforcement and Liabilities*, in ENVIRONMENTAL LAW HANDBOOK 53 (10th ed. 1991). Nevertheless, in 1989, while addressing a Joint Session of the House and Senate, President Bush "directed the Attorney General and the Administrator of the Environmental Protection Agency to use every tool at their disposal to speed up and toughen the enforcement of our laws against toxic waste dumpers." Stephen D. Brown & Alison M. Benders, *How to Handle a Complex Criminal Environmental Case*, 1 VILL. ENVTL. L.J. 149 (1990).

37. Marianne Lavelle, *Congress Wraps It Up: The Fight Over the New Clean Air Act Was Just the Start*, NAT'L L.J., Nov. 12, 1990, at 1, 27 [hereinafter Lavelle, *Congress Wraps It Up*].

38. Reilly, *The New Clean Air Act*, *supra* note 2, at 2.

39. *Id.*

40. *Id.* at 3. Substantial reductions were achieved in emissions of pollutants such as sulfur oxides, volatile organic compounds, carbon monoxide, and particulates (especially lead). *Id.*

41. *Id.* EPA research indicates that ninety-six cities in the United States do not meet the national standards set for ozone, which is the prime component in smog; forty-one U.S. cities do not meet the national standard set for monoxide; seventy-two U.S. cities do not meet the national standard set for particulate matter. Rilly, *The New Clean Air Act*, *supra* note 2, at 3.

Further, the 102nd Congress noted at length the detrimental effects which air pollution continues to have on human health. S. REP. NO. 55, 102nd Cong., 1st Sess. 19, 20 (1991). The Report suggested that due to air pollution, non-smoking individuals in some areas of the country possess lungs as badly damaged as those of heavy smokers. *Id.* Specialists from The American Lung Association, the American Public Health Association and the American Academy of Pediatrics, testifying before the Subcommittee on Environmental Protection, decried the evil effects of exposure to air pollutants and declared a public health crisis. *Id.*

The Report also noted that air pollution "causes, contributes to, or aggravates a long list of disease and dysfunction - chronic bronchitis, lung cancer, nervous disorders and heart disease." *Id.* The past President of the American Public Health Association was quoted in the Report as having declared that [i]f further Congressional action, or voluntary action by polluters, is not taken to reduce human exposure to a broad range of toxic air pollutants, then we can expect substantial increases in the incidence of air pollution provoked disease, dysfunction, and premature deaths. A two-to three-fold (at least) increase, or 100,000 to 150,000 premature deaths per year would not be an unrealistic estimate. It is in fact a most conservative estimate.

*Id.* The Report proposed that "[r]igorous regulation of toxic air pollutants is needed to avoid the risk of serious, irreversible damage to human health." S. REP. NO. 55, 102nd Cong., 1st Sess. 19, 20 (1991).

ments made “dramatic revisions and additions to rectify what was perceived by many environmentalists as a complete failure of existing laws and regulations to adequately deal with pollutants adversely affecting human health and the environment.”<sup>42</sup> The primary directive of the 1990 legislation is the reduction of pollutants by fifty-six billion pounds per year.<sup>43</sup> The Amendments were designed to meet this goal by providing for expansive and innovative environmental policy and reform without sacrificing the nation’s economic stability.<sup>44</sup>

One of the objectives of the Amendments was to strengthen the criminal penalty provisions of the Clean Air Act.<sup>45</sup> The criminal sanctions provisions were amended to conform with similar criminal provisions in other major federal environmental statutes<sup>46</sup> including RCRA and CWA. The Amendments to section 113(c) of Title VII of the CAA fully stock the arsenal. With new weapons in hand as well as the existing inventory,<sup>47</sup> EPA and the Justice Department have a wide range of options available to them in their enforcement efforts.

After providing a general discussion of the Amendments, this Comment will focus on the criminal liability provisions of the CAA as amended in 1990 by analyzing the comparable criminal provisions in both RCRA and CWA.

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*See also* Brian J. Ferrall, *The Clean Air Act Amendments of 1990 and the Use of Market Forces to Control Sulfur Dioxide Emissions*, 28 HARV. J. ON LEGIS. 235 (1991). The author noted that “illnesses and premature deaths resulting from breathing polluted air cost \$40 to \$50 billion annually.” *Id.*

42. Levinson, *Cleaning Up Our Act*, *supra* note 6, at 26.

43. *Questions and Answers: An Interview with William G. Rosenberg*, 17 EPA JOURNAL 5 (Jan./Feb. 1991).

44. Reilly, *The New Clean Air Act*, *supra* note 2, at 3.

45. S. REP. NO. 228, 101st Cong., 2nd Sess. 6 (1990).

46. *Id.*

47. The following federal environmental statutes contain criminal liability provisions: (1) Marine Protections, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1401, 1411, 1415(b) (1988); (2) Clean Water Act (CWA), 33 U.S.C. §§ 1251, 1319(c), 1321(b)(5) (1988); (3) Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901, 6928(d) (1988); (4) Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001, 11045(b)(4) (1988); (5) Rivers and Harbors Act, 33 U.S.C. §§ 401, 406, 407, 411 (1988); (6) Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, 9603(b) (1988); (7) Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136(j), (l) (1988); (8) Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601, 2615(b) (1988); (9) Clean Air Act (CAA), 42 U.S.C. §§ 7401, 7413(c) (1990).

## II. CLEAN AIR 1990 - AN OVERVIEW OF THE AMENDMENTS

The Clean Air Act of 1970 was a document of little more than fifty pages.<sup>48</sup> In terms of its significance, however, the 1970 bill was monumental. The legislation symbolized a change in perspective and priorities marked by Congress' expressed concern for environmental issues and the preservation of air quality.<sup>49</sup> Nevertheless, for over ten years, it has been evident that significant reforms were necessary to make that landmark legislation effective.<sup>50</sup> For the reasons stated above, the Clean Air Act of 1970 fell short of its objectives.<sup>51</sup> The 1990 Amendments are designed to further the original goals of their predecessor.<sup>52</sup>

The Amendments are comprised of over eight hundred pages of innovative policies and procedures designed to balance social and economic concerns in achieving acceptable standards for environmental quality.<sup>53</sup> The legislation calls for an "unprecedented degree of cooperation between government and the private sector."<sup>54</sup> The Amendments set air quality standards and provide industries with "a great deal of latitude in deciding how to achieve these objectives."<sup>55</sup>

According to EPA, this legislation is unique for two reasons.<sup>56</sup> First, the Amendments emphasize the use of "clean fuels"<sup>57</sup> such as compressed natural gas, methanol from natural gas, ethanol from corn, and electricity to control air pollution.<sup>58</sup> Beginning in 1996, Congress has required that "hundreds of thousands" of clean-fuel automobiles be introduced in California.<sup>59</sup> Also, through a "voluntary, opt-in provision," other states may participate in the pilot program as well.<sup>60</sup> Nevertheless, in 1996, California will be the real world laboratory for testing the

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48. Reilly, *The New Clean Air Act*, *supra* note 2, at 3.

49. *Id.* at 2-3.

50. *Id.* at 3.

51. *See supra* note 2.

52. Reilly, *The New Clean Air Act*, *supra* note 2, at 3.

53. Lavelle, *Congress Wraps It Up*, *supra* note 37, at 27. The original fifty page bill was a mere "ripple compared to the 800-page tidal wave that rolled off the congressional presses." *Id.*

54. Reilly, *The New Clean Air Act*, *supra* note 2, at 3.

55. *Id.*

56. *Id.* at 3-4.

57. *Id.* at 3.

58. *Id.*

59. Reilly, *The New Clean Air Act*, *supra* note 2, at 3.

60. *Id.*

real world effectiveness of these new technologies.<sup>61</sup>

Second, the Amendments place an emphasis on economics - cleaning the environment without bankrupting the economy.<sup>62</sup> The legislation provides for the new programs to be implemented in increments with most of the policies in effect by the year 2005.<sup>63</sup> Further, the Amendments include provisions for certain market-based incentive programs to induce industry to comply with environmental regulations.<sup>64</sup> These incentive programs include: (1) performance-based standards for hazardous pollutants; (2) credits for companies which respond quickly to the new requirements or which do more than they are required to do by statute; and (3) "tradable emission credits" for producers of certain types of reformulated fuels, manufacturers of clean fuel cars or performance targets for reformulated fuels.<sup>65</sup>

The policies and regulations promulgated under the Amendments promise to bring now deficient U.S. cities within acceptable standards of air quality.<sup>66</sup> According to William G. Rosenberg, EPA's Assistant Administrator for Air and Radiation, there will be notable reductions in acid rain, urban smog, chlorofluorocarbons and the substances known as "air toxics" which are associated with a variety of health risks.<sup>67</sup>

While promising to all Americans the clean air which the 1970 legislation failed to provide, the Amendments call for unprecedented cooperation between government and industry. At an estimated cost to American businesses of approximately \$30 billion,<sup>68</sup> the Amendments' programs which are noted for their cost-effective policies, nevertheless, will be met with resistance. One commentator noted:

[the Amendments] will descend upon industrial giants and corner dry cleaners alike—requiring them to compile records, meet new standards, install state-of-the-art technology and monitor chemicals never before regulated. If they fail to meet any of these new mandates,

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61. *Id.*

62. *Id.*

63. *Questions and Answers: An Interview with William G. Rosenberg*, 17 EPA JOURNAL 5 (Jan./Feb. 1991).

64. Reilly, *The New Clean Air Act*, *supra* note 2, at 4.

65. *Id.*

66. Reilly, *The New Clean Air Act*, *supra* note 2, at 3.

67. *Questions and Answers: An Interview with William G. Rosenberg*, 17 EPA JOURNAL 5 (Jan./Feb. 1991).

68. Lavelle, *Congress Wraps It Up*, *supra* note 37, at 27.

they could face the stiffest punishments ever established for the crime of pollution.<sup>69</sup>

The remainder of this Comment will focus on the penalties drafted for the failure to comply with the new 1990 requirements. These provisions, in many respects, mirror similar provisions in both RCRA and CWA. An analysis of the criminal sanctions contained in the Amendments necessarily begins with an analysis of those comparable provisions in RCRA and CWA.

### III. MODELS OF CRIMINAL LIABILITY

#### A. Criminal Liability Imposed Under RCRA Section 3008

RCRA was enacted in 1976 as an amendment to the Solid Waste Disposal Act.<sup>70</sup> The main purpose behind RCRA was to establish a hazardous waste management system to deal with the three to four billion tons of "discarded" materials, i.e. industrial, municipal and post-consumer waste, which were being generated annually.<sup>71</sup> The Act provides for a broad range of liability and its sanctions are among the most severe criminal penalties in any of the major federal environmental statutes.<sup>72</sup>

##### 1. *Knowing Violations*

Under RCRA, criminal liability is imposed for a number of "knowing" violations of the Act.<sup>73</sup> For example, a person who "knowingly" transports or directs the transportation of any hazardous waste substance to a facility which does not have a required permit may be subjected to criminal liability.<sup>74</sup> Further,

69. *Id.* at 1.

70. Fromm, *Commanding Respect*, *supra* note 13, at 825.

71. H. REP. No. 1491, 91st Cong., 2nd Sess. 2 (1976).

72. Fromm, *Commanding Respect*, *supra* note 13, at 826.

73. The courts have had some difficulty defining "knowledge" under the Act. Fromm, *Commanding Respect*, *supra* note 13, at 828. *See also* United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986) (lack of knowledge that paint waste was hazardous waste within meaning of EPA regulation not defense - unnecessary for prosecution to prove that defendant was aware that waste material was hazardous); United States v. Hoffin, 880 F.2d 1033 (9th Cir. 1989) (prosecution need not prove that defendant was aware that waste material was hazardous but prosecution must demonstrate that such waste material was, in fact, hazardous); United States v. Greer, 850 F.2d 1447, *reh'g denied* 860 F.2d 1092 (11th Cir. 1988) (prosecution need not demonstrate that defendant was aware that the waste material was hazardous waste listed with or identified by EPA); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3rd Cir. 1984) (prosecution must prove that defendant was aware that facility did not have proper permit but such awareness may be inferred if person is responsible corporate officer).

74. 42 U.S.C. § 6928(d)(1).

the Act imposes criminal penalties on any person who “knowingly” treats, stores or disposes of hazardous waste without a permit, in violation of any permit requirement or in violation of any other interim status standards.<sup>75</sup>

Also, a person is criminally liable, under RCRA, for the “knowing” omission of material information or the “knowing” making of false statements on any application or similar document required to be filed under the Act.<sup>76</sup> In addition, any person who “knowingly” generates, stores, treats, transports, disposes of, exports or otherwise handles any hazardous waste or used oil and who “knowingly” destroys, alters, conceals or fails to file any record, application or other such document is subjected to criminal penalties.<sup>77</sup> Finally, any person who “knowingly” transports without a manifest any hazardous waste which is required to be accompanied by a manifest is criminally liable,<sup>78</sup> as is any person who exports a hazardous waste without the consent of the receiving country or in violation of an international agreement between such country and the United States.<sup>79</sup>

The penalties for a conviction of any of the above noted violations include a maximum fine of \$50,000 for each day of violation and imprisonment for a maximum of five years.<sup>80</sup> Maximum fines are doubled for subsequent convictions.<sup>81</sup>

## 2. *Knowing Endangerment*

RCRA also includes a “knowing endangerment” provision.<sup>82</sup> Such provision attaches criminal liability to any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste *and* who knows at that time that he thereby is placing another person in imminent danger of death or serious bodily injury.<sup>83</sup> Upon conviction, penalties include a maximum fine of \$250,000 for an individual and \$1,000,000 for an organization and a maximum prison term of fifteen years or both.<sup>84</sup> These strict penalties are “part of the message from Congress to EPA

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75. 42 U.S.C. § 6928(d)(2)(A).

76. 42 U.S.C. § 6928(d)(3).

77. 42 U.S.C. § 6928(d)(4).

78. 42 U.S.C. § 6928(d)(5).

79. 42 U.S.C. § 6928(d)(6).

80. 42 U.S.C. § 6928(d)(7)(B).

81. *Id.*

82. 42 U.S.C. § 6928(e).

83. *Id.*

84. *Id.*

and the Justice Department that more rigorous enforcement of the nation's hazardous waste laws is the federal policy."<sup>85</sup>

The Act provides that with respect to the "knowing endangerment" provision, a person is deemed to be "knowing" if he is aware of the nature of his conduct, if he is aware or believes that the circumstance exists or if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.<sup>86</sup> An individual is responsible only for his actual awareness or the actual belief which he possessed.<sup>87</sup>

Under the Act the term "organization" means a "legal entity, other than government, established or organized for any purpose including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union or any other association of persons."<sup>88</sup> Further, the Act defines "serious bodily injury" as bodily injury which involves "a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty."<sup>89</sup>

### 3. *Criminal Prosecutions Under § 3008*

The Justice Department has been very successful in pursuing and bringing to justice those who have violated RCRA. For instance, in August 1990, the Justice Department obtained a seventeen count indictment for criminal violations of RCRA and CWA in a case which the U.S. Attorney for the Eastern District of Pennsylvania labeled "the most egregious criminal offense in years."<sup>90</sup> In *United States v. Levy*, the Justice Department indicted Metro Container Corp., a drum recycling company, Metro-Enterprise Container Corp., its affiliate, Sidney Levy, its president/owner and Stephen Zubrin, an employee, charging numerous criminal violations of RCRA and CWA.<sup>91</sup> Levy and Zubrin allegedly dumped hazardous waste and discharged polluted water from their drum recycling business into a tributary of the Delaware

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85. David R. Case, *Resource Conservation and Recovery Act in THE ENVIRONMENTAL LAW HANDBOOK* 600 (10th ed. 1991).

86. 42 U.S.C. § 6928(f)(1)(A),(B),(C).

87. 42 U.S.C. § 6928(f)(2)(A),(B).

88. 42 U.S.C. § 6928(f)(5).

89. 42 U.S.C. § 6928(f)(6).

90. *United States v. Levy*, 21 Env't Rep. (BNA) 824 (E.D. Pa. 1990).

91. *Id.*



River.<sup>92</sup> The defendants were also charged under RCRA's "knowing endangerment" provision.<sup>93</sup> If convicted, Metro Container potentially could receive a maximum fine of over \$9 million and, its affiliate, Metro-Enterprise Container Corp. may face a maximum fine of \$4 million.<sup>94</sup> Both Levy and Zubrin face possible imprisonment for up to ninety-five years and fines amounting to \$3.8 million.<sup>95</sup>

In *United States v. Protex Industries, Inc.*,<sup>96</sup> the Justice Department convicted a corporation under RCRA's "knowing endangerment" provision.<sup>97</sup> Protex Industries was found to have provided inadequate protection for employees who were working in its drum recycling facility and thereby knowingly placed those employees in imminent danger of death and/or serious bodily injury.<sup>98</sup> Protex originally received a fine of over \$7 million but after agreeing to pay \$950,000 in restitution and \$2.1 million in clean-up costs, Protex's fine was reduced to \$440,000.<sup>99</sup>

#### B. Criminal Liability Imposed Under CWA Section 309

The Federal Water Pollution Control Act,<sup>100</sup> (FWPCA), was enacted in 1972 to regulate ocean dumping.<sup>101</sup> Congress renamed FWPCA in 1977 and the Clean Water Act, as it is now commonly referred to, was enacted to control toxic water pollutants and preserve water quality.<sup>102</sup> The criminal liability provisions contained in CWA are also considered to be among the strictest of all such provisions in other environmental statutes.<sup>103</sup> Criminal sanctions are imposed for a negligent and/or a knowing violation of any of a number of the Act's provisions.<sup>104</sup>

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92. *Id.*

93. *Id.*

94. *Id.* at 824-25.

95. Levy, 21 Env't Rep. (BNA) at 825.

96. 874 F.2d 740 (10th Cir. 1989).

97. *Id.* at 741.

98. *Id.* at 742.

99. Dinkins, *Criminal Prosecution of Environmental Violations*, *supra* note 21, at 34.

100. 33 U.S.C. §§ 1251-1376, Pub. L. No. 92-500, 86 Stat. 816 (1972).

101. J. Gordon Arbuckle, et al., *Water Pollution Control*, in THE ENVIRONMENTAL LAW HANDBOOK 177 (10th ed. 1991) [hereinafter Arbuckle, *Water Pollution Control*].

102. *Id.*

103. Fromm, *Commanding Respect*, *supra* note 13, at 842.

104. 33 U.S.C. § 1319(c)(1)(A), (2)(A).

1. *Negligent Violations*

Any person who negligently introduces into a sewer system or into a publicly owned treatment works, any pollutant which such person knew or reasonably should have known could cause personal injury or property damage or which causes the treatment works to violate any effluent limitation or permit requirement may be punished by a maximum fine of \$25,000 per day of violation and by a maximum prison term of up to one year or both.<sup>105</sup> Subsequent convictions yield enhanced penalties.<sup>106</sup>

2. *Knowing Violations*

Any person convicted of a knowing violation of the above may be penalized with a maximum fine of \$50,000 and a maximum prison term of up to three years or both.<sup>107</sup> Penalties are likewise enhanced for subsequent convictions.<sup>108</sup>

Similar to RCRA, CWA provides for a knowing violation of certain reporting and filing requirements.<sup>109</sup> For example, any person who knowingly makes any false material statement in any document required to be filed or who knowingly falsifies, tampers with or renders inaccurate any monitoring device may be subject to criminal liability.<sup>110</sup> Sanctions for violating the above provisions include fines of up to \$10,000 and/or imprisonment of up to two years with subsequent convictions yielding enhanced penalties.<sup>111</sup>

3. *Knowing Endangerment*

CWA, like RCRA, also contains a "knowing endangerment" provision.<sup>112</sup> Such provision provides that any person who knowingly violates any of a number of the Act's provisions and who knows at the time that he thereby is placing another person in imminent danger of death or serious bodily injury shall be subject to criminal sanctions.<sup>113</sup> If convicted under the "knowing endangerment" provision, a person could be subjected to identical pen-

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105. 33 U.S.C. § 1319(c)(1)(B).

106. *Id.*

107. 33 U.S.C. § 1319(c)(2)(B).

108. 33 U.S.C. § 1319(c)(1)(B), (2)(B).

109. 33 U.S.C. § 1319(c)(4).

110. *Id.*

111. *Id.*

112. 33 U.S.C. § 1319(c)(3)(A).

113. *Id.*

alties as those imposed under RCRA - a maximum fine of \$250,000 and/or imprisonment of up to fifteen years.<sup>114</sup> An organization convicted under the above provision may be liable for up to \$1,000,000.<sup>115</sup> Again, maximum penalties are doubled for subsequent convictions.<sup>116</sup>

In the context of the Clean Water Act, the "knowing endangerment" provision "becomes an issue where water supplies are contaminated, where pretreatment requirements for toxics are deliberately violated, or where hazardous substances are deliberately dumped in sewers or waterways instead of being sent to a proper treatment, storage, and disposal facility (TSDF) under RCRA."<sup>117</sup>

For the purposes of the "knowing endangerment" provision, CWA, like RCRA, provides that an individual is deemed to have known that his conduct placed another person in imminent danger of death or serious bodily injury only if he was actually aware of same or possessed actual belief to that effect.<sup>118</sup> Also, the definitions of the terms "organization"<sup>119</sup> and "serious bodily injury"<sup>120</sup> are comparable to the definitions for such terms as contained in RCRA.

#### 4. Criminal Prosecutions Under § 309

As with RCRA, the Justice Department has eagerly pursued convictions for violators of CWA. For example, in *United States v. Villegas*,<sup>121</sup> the Justice Department convicted a New Jersey doctor on four felony counts for illegally dumping medical waste into the Hudson River.<sup>122</sup> The defendant was successfully prosecuted for dumping and/or ordering the dumping of the following: two plastic containers of blood vials, one ziplock bag containing eighteen blood vials and one urine vial, one plastic bag containing twenty-seven blood vials and one loose container containing five vials of blood contaminated with hepatitis.<sup>123</sup> The doctor was

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114. *Id.*

115. *Id.*

116. *Id.*

117. Arbuckle, *Water Pollution Control*, *supra* note 101, at 228.

118. 33 U.S.C. § 1319(c)(3)(B)(i)(I).

119. 33 U.S.C. § 1319(c)(3)(B)(iii).

120. 33 U.S.C. § 1319(c)(3)(B)(iv).

121. *United States v. Villegas*, 21 Env't Rep. (BNA) 1812 (E.D.N.Y. 1991).

122. *Id.*

123. *Id.* at 1813.

also convicted under the “knowing endangerment” provision.<sup>124</sup>

In *United States v. Ocean Spray Cranberries, Inc.*,<sup>125</sup> the defendant pled guilty to twenty-one misdemeanor counts charging numerous violations of CWA.<sup>126</sup> Ocean Spray Cranberries, Inc. was convicted for negligently and willfully violating CWA after discharging highly acidic waste water and cranberry peeling into a local sewer system and nearby river.<sup>127</sup>

### C. The Clean Air Act Amendments of 1990

The Amendments greatly enhance the criminal liability provisions of section 113(c),<sup>128</sup> and thereby further “illustrate the legislative commitment to increasing both the number of criminally punishable environmental offenses and the severity of the criminal sanctions.”<sup>129</sup> The Amendments modernize these provisions by conforming them to their respective counterparts in RCRA and CWA.<sup>130</sup> Prior to 1990, the authorized criminal penalties under the Act were shallow and limited. For example, the pre-1990 criminal liability provisions of section 113(c) provided only for misdemeanor-level sanctions.<sup>131</sup> The Amendments add depth to the original provisions.<sup>132</sup> Violators convicted under the Amendments may now be subjected to felony-level sanctions for certain violations of the Act that prior to the Amendments were punishable only by misdemeanor level sanctions.<sup>133</sup> By increasing the severity of the sanctions, Congress intended that the threat of stricter penalties would provide a more useful deterrent against violators of the Act.<sup>134</sup>

#### 1. *Knowing Violations*

The Act imposes criminal liability for a knowing violation of

124. *Id.* at 1812.

125. *United States v. Ocean Spray Cranberries, Inc.*, 19 Env't Rep. (BNA) 1781 (D. Mass. 1988).

126. *Id.*

127. *Id.*

128. Levinson, *Cleaning Up Our Act*, *supra* note 6, at 46. The amendments to the criminal sanctions provisions were among “the most significant expansions and additions” to the Act. *Id.*

129. Dinkins, *Criminal Prosecution of Environmental Violations*, *supra* note 21, at 25.

130. S. REP. NO. 228, 101st Cong., 2nd Sess. 6 (1990).

131. Levinson, *Cleaning Up Our Act*, *supra* note 6, at 46.

132. *Id.*

133. *Id.*

134. S. REP. NO. 228, 101st Cong., 2nd Sess. 6 (1990).

many of its numerous sections including provisions pertaining to implementation plans,<sup>135</sup> new source performance standards,<sup>136</sup> inspections,<sup>137</sup> solid waste combustion,<sup>138</sup> preconstruction requirements,<sup>139</sup> emergency orders,<sup>140</sup> permits,<sup>141</sup> and stratospheric ozone control.<sup>142</sup> The Amendments modify the penalty provision for these violations by raising the sanction level from that of misdemeanor to felony.<sup>143</sup> If convicted of any of the above, the violator may be subjected to fines pursuant to Title 18<sup>144</sup> of the United States Code and/or imprisonment of up to five years.<sup>145</sup> Like RCRA and CWA, under the CAA, fines and imprisonment terms are doubled for subsequent convictions.<sup>146</sup>

The CAA Amendments also contain recordkeeping and document filing criminal liability provisions. These provisions impose further criminal sanctions upon any person who (1) knowingly makes any false material statement, representation or false certification in and/or (2) knowingly omits material information from, alters, conceals, fails to file or maintain any notice, application, record, report, plan or other document required to be filed or maintained under the Act.<sup>147</sup> The Amendments also levy criminal sanctions on any person who knowingly fails to notify, report or take required actions<sup>148</sup> and any person who knowingly falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under the Act.<sup>149</sup>

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135. 42 U.S.C. § 7413(c)(1). Note also that the Amendments modify sections 113(a) and (c) of the Act so that EPA need not give notice before initiating a criminal enforcement action for violations of an implementation plan. S. REP. No. 228, 101st Cong., 2nd Sess. 6 (1990). The thirty day notice provision which is applicable to civil and administrative actions no longer extends to criminal enforcement activities. *Id.*

136. 42 U.S.C. § 7411(e).

137. 42 U.S.C. §§ 7412, 7414.

138. 42 U.S.C. § 7429.

139. 42 U.S.C. §§ 7475(a), 7477.

140. 42 U.S.C. § 7603.

141. 42 U.S.C. §§ 7661a(a), 7661b(c).

142. 42 U.S.C. §§ 7671 et seq.

143. 42 U.S.C. § 7413(c)(1).

144. Under Title 18 of the United States Code, "violators of any environmental law can also be subject[ed] to alternative fines." Fromm, *Commanding Respect*, *supra* note 13, at 827. Title 18 provides for higher fines under certain circumstances. *Id.*

145. *Id.*

146. *Id.*

147. 42 U.S.C. § 7413(c)(2)(A).

148. 42 U.S.C. § 7413(c)(2)(B).

149. 42 U.S.C. § 7413(c)(2)(C).

In the event of conviction for any of the above mentioned violations, the Amendments provide for penalties pursuant to Title 18 and/or imprisonment for a term of up to two years.<sup>150</sup> Congress was prompted to strengthen these particular provisions because liability thereunder is “especially important for self-monitoring statutes like the Clean Air Act. EPA’s ability to oversee the regulated community . . . is dependent to a large degree upon compliance by each source with reporting, recordkeeping and monitoring requirements.”<sup>151</sup> These provisions apply only to acts and omissions which are both knowing and material.<sup>152</sup> Such acts and omissions are those which would either prompt the EPA to act or influence the EPA not to act.<sup>153</sup> Congress did not intend this section to apply to incidental or insignificant omissions, good faith mistakes, accidents, or inadvertence.<sup>154</sup>

Moreover, the Amendments add a new section which provides that knowing violations of the fee requirements provisions constitute misdemeanors.<sup>155</sup> Such violations are punishable by fines pursuant to Title 18 and/or imprisonment for up to one year with enhanced sanctions for subsequent convictions.<sup>156</sup>

## 2. *Knowing Endangerment*

Furthermore, the Amendments create the new crime of “knowing endangerment,” thus further conforming CAA to RCRA and CWA.<sup>157</sup> The knowing endangerment provision levies sanctions on a person who knowingly releases a hazardous air pollutant or any extremely hazardous substance into the air and who knows at the time that he thereby is placing another person in imminent danger of death or serious bodily injury.<sup>158</sup> In the event of conviction, the Amendments allow for fines pursuant to Title 18 and/or prison terms of up to fifteen years with enhanced penalties for subsequent convictions.<sup>159</sup> Any organization convicted under the above provision may be subject to fines of up to

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150. *Id.*

151. S. REP. No. 228, 101st Cong., 2nd Sess. 6 (1990).

152. *Id.*

153. *Id.*

154. *Id.*

155. 42 U.S.C. § 7413(c)(3).

156. *Id.*

157. 42 U.S.C. § 7413(c)(5)(A).

158. *Id.*

159. *Id.*

\$1,000,000 for each violation.<sup>160</sup>

A person may be found to have known that his/her violation of the Act placed another in imminent danger of death or of serious bodily injury if he/she was actually aware or possessed actual belief that such was the circumstance.<sup>161</sup> As under RCRA and CWA, the defendant may not be held responsible for the knowledge possessed by another person.<sup>162</sup> The Amendments provide that circumstantial evidence including evidence that the defendant took affirmative steps to be shielded from relevant information may be used in establishing whether or not the defendant actually knew or possessed actual belief.<sup>163</sup>

Furthermore, the requisite state of mind for a violation under the Amendments varies depending on the characterization of the person involved.<sup>164</sup> For instance, if an employee is performing his normal activities and acting under orders from his superiors, his mental state necessarily would have to be "knowing and willful" to successfully convict that individual.<sup>165</sup> However, other persons need only know that they are committing the acts or omissions that are the subject of the criminal prosecution, i.e. they only must be "knowing," in order to fulfill the mens rea requirement.<sup>166</sup>

### 3. *Negligent Endangerment*

The Amendments also add a new "negligent endangerment" provision. This provision imposes misdemeanor-level sanctions on any person who negligently releases a hazardous air pollutant or extremely hazardous substance into the air thereby negligently placing another person in imminent danger of death or serious bodily injury.<sup>167</sup> If convicted of a violation of the negligent endangerment provision, a violator may be subject to fines pursuant to Title 18 and/or a prison term of up to one year with enhanced penalties for subsequent convictions.<sup>168</sup>

Under the Act, "organization" and "serious bodily injury"

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160. *Id.*

161. 42 U.S.C. § 7413(c)(5)(B)(i), (ii).

162. 42 U.S.C. § 7413(c)(5)(B)(ii).

163. *Id.*

164. PAUL G. WALLACH & KENNETH R. MEADE, THE NEW ENFORCEMENT PROVISIONS OF THE 1990 CLEAN AIR ACT AMENDMENTS 4-5 (1990).

165. *Id.*

166. *Id.*

167. 42 U.S.C. § 7413(c)(4).

168. *Id.*

are defined identically to the terms found in RCRA and CWA.<sup>169</sup> A "person" is defined under the Act to include "any responsible corporate officer."<sup>170</sup>

#### IV. CONCLUSION

The 1990 Amendments to the Clean Air Act substantially renovate existing environmental policies regarding air pollution. Heightened public awareness, as well as congressional dissatisfaction with existing policies, prompted the enactment of this expansive and innovative legislation. Although the Amendments hold great promise, the reforms encompassed in their provisions present a monumental labor for the government agencies charged with their implementation and regulation.<sup>171</sup> Further, the legislation calls for an unprecedented degree of cooperation between industry and the government. Giving such latitude to industry in the drafting and implementation of policies geared to meet EPA standards is rather like leaving criminal justice reform up to organized crime syndicates.

Nonetheless, Congress has provided for stringent penalties should industry fail to comply with the new regulations. One commentator has noted that EPA's message for the 1990's is "[e]nvironmental crime does not pay!"<sup>172</sup> Modelling the criminal liability provisions of the Amendments after similar provisions in

169. 42 U.S.C. § 7413(c)(5)(E), (F).

170. S. REP. NO. 228, 101st Cong., 2nd Sess. 6 (1990). The criminal liability provisions were amended to target specifically high level management and corporate officers. Levinson, *Cleaning Up Our Act*, *supra* note 6, at 46. Corporate officials should take the following preventive steps in order to protect themselves and their companies from liability: (1) Discover which pollutants are being emitted at the officer's respective facility; (2) Research applicable standards for such pollutants being emitted; (3) Conduct actual emissions testing to ensure the accuracy of emission control technology; (4) Conduct an inventory of existing emission control technology; (5) Market research alternative methods for emission control; and (6) Devise compliance strategies with an eye to increased capital expenditures and operating costs. *Id.* See also Gregory A. Bibler, *Counseling the Client on Environmental Crimes*, 37 PRAC. LAW. 7 (1991) (checklist for preparation of ongoing environmental compliance program for practitioner to utilize in counseling corporate client on environmental crimes).

171. EPA faces "one of the most daunting regulatory tests" with which it has ever been confronted. Reilly, *The New Clean Air Act*, *supra* note 2, at 3. As a result of the Amendments, EPA is required to promulgate approximately one hundred and seventy-five regulations, thirty guidance documents and twenty-two reports. David A. Wollin, *Strict Rules on Horizon: Air-Toxics Laws Force Industries to Plan Ahead*, NAT'L L.J., May 13, 1991, at 25. In the past, EPA has issued, at most, seven or eight regulations annually. Lavelle, *Congress Wraps It Up*, *supra* note 37, at 27.

172. James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990's*, 59 GEO. WASH. L. REV. 916 (1991).



RCRA and CWA, Congress has given EPA and the Justice Department a broad range of sanctions to choose from in their enforcement efforts. Stiffer penalties and added crimes make the criminal sanctions under CAA among the strictest found in any of the major federal environmental statutes. Whether these Amendments will fulfill Congress' promise of cleaner air to all Americans is contingent upon many independent forces. As one commentator noted, "[b]y and large, the air doesn't get clean by passing this law . . . . It gets clean by the [EPA] and the states carrying out the new law."<sup>173</sup> Too little too late or too early to tell, the 1990 Amendments to the Clean Air Act symbolize the far-reaching response to the widespread problem of air pollution.

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173. Lavelle, *Congress Wraps It Up*, *supra* note 37, at 27 (quoting David D. Doniger, lawyer-lobbyist, Natural Resources Defense Council).