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Potential Criminal Liability in the Coal Fields under the Clean Water Act: A Defense Perspective

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POTENTIAL CRIMINAL LIABILITY IN THE COAL FIELDS UNDER THE CLEAN WATER ACT: A DEFENSE PERSPECTIVE

WEBSTER J. ARCENEUX, III*

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I. INTRODUCTION

With the foregoing article¹ Scott and Bryant have unofficially sounded the clarion, announcing that the United States Attorney's Office for the Southern District of West Virginia intends to target the environmental practices of the coal industry just as it has waged its war on public corruption.² The new arrow that the United States Attorney's Office has removed from its quiver and aimed at the coal industry is the threat of criminal prosecution under the Federal Water Pollution Control Act (Clean Water Act).³ Scott and Bryant, on behalf of that office, recently unleashed the full resources of the United States government to prosecute Lewis R. Law, a small coal operator, and his company Mine Management, Inc. (MMI). On November 15, 1991, Mr. Law and MMI were found guilty on sixteen counts of knowingly discharging without a permit, in violation of the Clean Water Act.⁴ Mr. Law was personally sentenced to twenty-four months in prison and fined \$80,000 (\$5,000 per count). Defendant MMI was

1. Philip B. Scott & S. Benjamin Bryant, *Criminal Enforcement of the Clean Water Act in the Coal Fields: United States v. Law and Beyond*, 95 W. VA. L. REV. 663 (1993).

2. Between 1984 and 1988 the United States Attorney's Office obtained the convictions of 75 public officials for public corruption related offenses. Michael W. Carey et al., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One & Two*, 94 W. VA. L. REV. 301 & 989 (1991-92).

3. 33 U.S.C. §§ 1251-1387 (1988).

4. 33 U.S.C. § 1319(c)(3) (1988).

also fined \$80,000. The United States Court of Appeals for the Fourth Circuit recently upheld both convictions in a *per curiam* opinion and the Supreme Court of the United States denied certiorari.⁵

Having emerged victorious in this minor criminal prosecution, which has become a *cause celebre* in some circles,⁶ the United States Attorney's Office for the Southern District of West Virginia appears poised for its next target within the coal industry. The threat of criminal prosecution is not new in the coal industry⁷ but, given the many forums the coal industry may choose to litigate its compliance with environmental regulations, appearing as a defendant in United States District Court, under an indictment for violations of the Clean Water Act, is not one of the options a company would voluntarily select for itself or its officers.⁸ As the Scott and Bryant article illustrates, the United States Attorney's Office has selected the criminal forum to prosecute the coal industry because, that office believes, that is the best forum to achieve greater compliance with environmental regulations.⁹ Regardless of whether or not the prosecution of Mr. Law and

5. *United States v. Law*, 979 F.2d 977 (4th Cir. 1992) (*per curiam*), *cert denied*, 113 S. Ct. 1844 (1993).

6. See Peter Samuel, *Bankrupted by EPA*, NAT'L REV., Mar. 16, 1992, at 38-39.

7. The coal industry has historically been prosecuted for violations of the Federal Mine Safety and Health Act of 1969, 30 U.S.C. §§ 801-960 (1988). See, e.g., *United States v. Jones*, 735 F.2d 785 (4th Cir.), *cert. denied*, 469 U.S. 918 (1984); *United States v. Consolidation Coal Co.*, 504 F.2d 1330 (6th Cir. 1974).

8. A review of the transcript of the trial conducted in Mr. Law's case illustrates the unfriendly atmosphere an individual and company may encounter when they are called upon to defend their environmental conduct under criminal indictment. See discussion *infra* part IV. In a civil environmental case, each side will usually rely upon the testimony of expert witnesses. In Mr. Law's criminal trial, the district court entered an evidentiary ruling preventing Mr. Law's geotechnical expert, George Hall Ph.D., from testifying about the source of the water pollution emanating from the gob pile. Joint Appendix at 280-81 [hereinafter J.A.], *United States v. Law*, 979 F.2d 977 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1844 (1993). After further briefing and argument the district court allowed limited inquiry of Mr. Hall as to the source of the water pollutants, *id.* at 282-83, but when Mr. Hall renewed his testimony the district court remonstrated the government for not objecting to a line of inquiry and the district court imposed further limitations on the defendant's expert testimony. *Id.* at 288A-288D.

9. The United States Attorney's Office argues that the successful prosecution of Mr. Law and several other notable criminal prosecutions will have a substantial deterrent effect and lead to greater compliance with the Clean Water Act. See Scott & Bryant, *supra* note 1, at 665. For a contrary opinion indicating that environmental criminal prosecutions do not

his company and future criminal prosecutions of other parties in the coal industry will have any major impact on the coal industry's compliance with environmental regulations, one may predict that criminal prosecutions under the Clean Water Act and other environmental statutes will increase in the future.¹⁰

The immediate impetus of this Article is the recent criminal convictions of Mr. Law and his company. These recent convictions, along with the recent decision of the United States Court of Appeals for the Ninth Circuit¹¹ upholding the Environmental Protection Agency's (EPA) proposed storm water regulations for active and inactive coal operations,¹² have exponentially increased the potential for parties within the coal industry to be held criminally liable under the Clean Water Act. This Article will examine these recent decisions, as well as other developments in the area of environmental criminal liability, in order to fully examine the increased potential for coal companies and their officers to be held criminally liable under the Clean Water Act.

The next section of this Article will provide an overview of the Clean Water Act. The third section analyzes criminal prosecutions for

have a deterrent effect because they discourage self-policing environmental audits, see James R. Moore & Perkins Cole, *Environmental Criminal Statutes: An Effective Deferent?*, C776 ALI-ABA, 137, 139 (Sept. 1992), available in WESTLAW, ENV-TP database.

10. Recently, Martin Harell, Region III Criminal Enforcement Counsel wrote Dr. Eli McCoy, Director of the Water Resource Section, West Virginia Division of Environmental Protection, suggesting that Region III was interested in coordinating with the State of West Virginia in more criminal enforcement actions against surface and deep mine operators who either have or should have NPDES permits under the Clean Water Act. Letter from Martin Harell, Region III Criminal Enforcement Counsel to Dr. Eli McCoy, Director of the Water Resource Section, West Virginia Division of Environmental Protection (Feb. 19, 1993) (on file with author). See *More Criminal Enforcement, Bigger Penalties for Polluters Predicted in New Administration*, 23 Env't Rep. (BNA) 1867 (1992); see also *Companies' Fear of Environmental Disclosure Has No Basis, Top EPA Enforcement Official Says*, 23 Env't Rep. (BNA) 24 (1992). Another indication that criminal prosecutions will continue to grow arises from congressional demands made by "watch-dog" committees that have criticized the Department of Justice for lax enforcement of environmental laws. See *Report Alleges Justice Department Failure to Prosecute Environmental Crimes Vigorously*, 23 Env't. Rep. (BNA) 1710 (1992).

11. *American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992).

12. *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990, 48,065 (1990) (codified at 40 C.F.R. § 122.26(b)(14)(iii)).

knowing violations under the Clean Water Act and other environmental laws with an emphasis on corporate and individual liability. The fourth section examines the case of Mr. Law and MMI and the lessons to be learned from that criminal prosecution. The fifth section examines EPA's new storm water regulations and their potential impact on the coal industry. The sixth section sets forth recommendations to minimize criminal liability, and it capsulizes, in an abbreviated fashion, strategies and tactics to be considered in defending the coal industry in environmental criminal prosecutions.

II. OVERVIEW OF THE REQUIREMENTS OF THE CLEAN WATER ACT

A. *A NPDES Permit is Required for all Point Source Discharges*

Congress first enacted the Clean Water Act in 1948, but it did not become the comprehensive regulatory statute, as we now know it, until it was amended in 1972.¹³ On a national level, the EPA has the primary responsibility to enforce the Clean Water Act by establishing limitations for industrial discharges into the nation's waters and by requiring monitoring and self-reporting of those discharges¹⁴. The primary mechanism utilized by the EPA to regulate water pollution discharges is the National Pollution Discharge Elimination System (NPDES) permit process.¹⁵ Under the Clean Water Act, every discharge of pollutants into a navigable water of the United States requires a NPDES permit.¹⁶ The NPDES permit sets forth the "effluent limits," or the amount of pollution a company or individual can discharge into a stream based upon the water quality and other characteristics of that stream and various technology based standards.¹⁷

13. For a discussion of the history of the Clean Water Act and its subsequent amendments, see CLEAN WATER DESKBOOK (1988); EPA v. State Water Resources Control Bd., 426 U.S. 200, 202-09 (1975); National Resources Defense Council, Inc. v. Train, 510 F.2d 692, 695-97 (D.C. Cir. 1975).

14. 33 U.S.C. §§ 1311-18 (1988)

15. 33 U.S.C. § 1342 (1988 & Supp. 1991). This permit is commonly referred to as a NPDES permit.

16. See 33 U.S.C. § 1311(a) (1988).

17. See 33 U.S.C. §§ 1311-1317 (1988).

Under the Clean Water Act a NPDES permit must be obtained before anyone can *discharge a pollutant from a point source into a navigable water of the United States*. Each one of the italicized terms in the preceding sentence is a term of art and each term is crucial to an understanding of the legal duties under the Clean Water Act. The *discharge of a pollutant* is defined as the addition of a man made or created substance into a navigable water.¹⁸ In every day mining terminology, acid mine drainage or any other polluted drainage, (including water carrying sediments) from a mine portal, settling pond, coal refuse or gob pile, or a preparation plant, could constitute the *discharge of a pollutant* subject to regulation under the Clean Water Act. The Clean Water Act defines a *point source* as a *discrete conveyance*,¹⁹ and that definition includes metal or plastic pipes, concrete channels, or ditches eroded in the soil where water flows from a coal refuse or gob pile.²⁰ A *navigable water of the United States* is de-

18. The term "pollutant" is defined under the Clean Water Act as:

[D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(6) (1988). The term "discharge of a pollutant" is defined in the Clean Water Act as:

(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (1988).

19. "Point source" is defined under the Clean Water Act as:

[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (1988).

20. In *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980), the court of appeals defined a point source associated with mining operations under the Clean Water

fined broadly to include all waters,²¹ not just those navigable, and it

Act as follows:

Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials. A point source of pollution may also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials. The ultimate question is whether pollutants were discharged from “discernible, confined, and discrete conveyance[s]” either by gravitational or nongravitational means. Nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act.

Id. at 45; *see also* *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (“The concept of a point source was designed to further this scheme [of full pollution regulation] by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.”); *United States v. Villegas*, 784 F. Supp. 6 (E.D.N.Y. 1991) (holding that the defendant’s placement of plastic bags containing contaminated blood vials constituted a point source discharge without a NPDES permit). *But see* *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (striking down EPA’s rainwater runoff regulations for coal areas holding that even though the point source definition is broad, “it does not include unchanneled and uncollected surface waters.”).

21. “Waters of the United States” is defined in the code of federal regulations as follows:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands”;
- (c) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands”, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such water;
 - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (3) Which are used or could be used for industrial purposes by industries in interstate commerce.
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;

has been specifically held to include creeks, streams, lakes and every other type of waterway.²²

Given the broad definitional terms under the Clean Water Act, all active coal mines have historically obtained NPDES permits because "polluted" water drained from the mining operations and it inevitably flowed into streams, creeks, or rivers.²³ Despite the coal industry's historical intent to comply with the Clean Water Act, water pollution problems have persisted in the coal fields as a result of acid mine drainage from abandoned mines and other problems associated with the coal industry.²⁴ Before turning to a discussion of the potential for criminal liability in the coal fields under the Clean Water Act, a discussion of recent civil developments in West Virginia is in order to appreciate the increasing magnitude of civil liability for water pollution problems and the impact that may have on criminal liability for the coal industry.²⁵

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- (e) Tributaries of water identified in paragraphs (a) through (d) of this definition;
 - (f) The territorial sea; and
 - (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designated to meet the requirements of the Act (other than cooling ponds as defined in 40 C.F.R. 423.11(m) which also meet the criteria of this definition are not waters of the United States.

40 C.F.R. § 122.2 (1992).

22. In *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974), the court of appeals refused to strictly interpret the term "navigable waters of the United States" in part based upon the Supreme Court's holding in *United States v. Standard Oil Co.*, 384 U.S. 224, 225 (1966), that the Rivers and Harbors Act, 33 U.S.C. § 407, should not be strictly construed, but rather, construed consistent with "common sense, precedent, and legislative history." See *United States v. Cumberland Wood Chair Corp.*, 978 F.2d 1259 (6th Cir. 1992); *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975).

23. Until recently, thousands of inactive mines have discharged pollutants into waters of the United States without any requirement of obtaining a federal or state NPDES permit. Until recently, the EPA and the State had decided not to regulate inactive mines. As will be discussed in part V of this Article, EPA's new storm water regulations significantly change this historical practice.

24. Scott & Bryant go to some length in their article to discuss the problems of acid mine drainage and the fact that at least 10,000 miles of streams in Appalachia have been degraded. Scott & Bryant, *supra* note 1, at 668.

25. It should be noted that EPA and the states have the choice to proceed with either

B. Emerging Trends in Civil Liability in West Virginia

1. Successor Operator Liability

While the Clean Water Act requires a coal operator to obtain a NPDES permit for its discharges into a stream, what happens when the coal company ceases mining and a third party buys the property for commercial development unrelated to coal mining? In *Rayle Coal Co. v. Chief, Div. of Water Resources*,²⁶ the West Virginia Supreme Court of Appeals answered this question and concluded that the purchaser of a tract of land that had been previously mined had a duty to remain in compliance with the West Virginia Water Pollution Control Act (West Virginia Act)²⁷ even though the party had no intention of mining the property.²⁸

civil or criminal enforcement. *See, e.g.*, *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *United States v. Oxford Royal Mushroom Prods.*, 487 F. Supp. 852 (E.D. Pa. 1980); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975). DEPARTMENT OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY VIOLATOR (July 1, 1991) [hereinafter DOJ GUIDANCE DOCUMENT], which is discussed further in part VI, is utilized by the Department of Justice to determine when cases should be prosecuted criminally. The State of West Virginia has no similar policy document and therefore, it is entirely discretionary on the State's part to refer a case to the United States Attorney's Office for criminal prosecution.

26. 401 S.E.2d 682 (W. Va. 1990).

27. W. VA. CODE §§ 20-5A-1 to -24 (1989 & Supp. 1992). The West Virginia Act is substantially similar to the Clean Water Act. In West Virginia, since 1982, the Water Resources Section, Division of Environmental Protection [hereinafter DEP] (formerly Division of Natural Resources) has been delegated the primary authority from EPA to issue NPDES permits for all industries. 40 C.F.R. § 123.62 (1992). DEP administers the NPDES program for non-coal discharges through the regulations promulgated at 46 W. Va. C.S.R. §§ 2-1 to 18 (1992). NPDES permits for the coal industry are prepared by the Mines and Minerals Section of DEP (formerly Division of Energy) pursuant to similar regulations promulgated at 47 W. Va. C.S.R. §§ 30-1 to 15 (1992). At any point in time that the EPA is not satisfied with the State's enforcement of the West Virginia Act, EPA may step in and request modification of the State's program. *West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991).

28. It is worth noting that the facts in *Rayle Coal Company* are remarkably similar to the facts in *Law*. *See* discussion *infra* part IV. *Rayle Coal Company* was cited by the United States Attorney's Office in its brief before the United States Court of Appeals for the

Rayle Coal Co. involved Valley Camp Coal Company's previous operations of a mine and preparation plant near Tridelfia, Ohio County, West Virginia. As with all such operations, Valley Camp generated a large coal refuse or gob pile as a waste product from the operation of its preparation plant, and it placed the waste at the head of Storch's Run Hollow. A sediment pond was built at the base of the gob pile, and water from the pond was pumped over a hill to Valley Camp's water treatment facility where the water was treated for acid mine drainage. Valley Camp had a NPDES permit that allowed for the treatment and discharge of acid mine drainage from the gob pile.

Rayle Coal Company purchased the property with the intention of abandoning Valley Camp's coal mining operations and developing the property for commercial non-mining purposes. When Rayle Coal Company purchased the property it no longer had access to Valley Camp's water treatment facility, so it discontinued pumping the water over the hill and instead set up a series of ponds and ditches allowing the water/acid mine drainage to flow untreated into Storch's Run.

The Division of Water Resources found the measures taken by Rayle Coal Company were inadequate to stop the acid mine drainage and ordered Rayle Coal Company to take corrective action to treat the water pollution and apply for a state NPDES permit. The matter was litigated for a number of years, and the case ultimately landed in the Supreme court of appeals of West Virginia. The court held that the discharge of acid mine drainage into the creek required a state NPDES permit. The court specifically rejected Rayle Coal Company's argument that it did not need to obtain a state NPDES permit because it had never conducted any coal mining operations on the property and the mining operations were abandoned. In *Rayle Coal Co.* the court held:

The West Virginia Water Pollution Control Act does not require an application for a permit only for active business operations. In fact, W.Va. Code, 20-5A-11 [1969] provides in relevant part: "When such person is ordered to take remedial action and does not elect to cease operation of

Fourth Circuit, for the proposition that Mr. Law and MMI were required under the Clean Water Act to obtain a NPDES permit, although it admitted that *Rayle Coal Company* arose under the West Virginia Act not the Clean Water Act. Brief of Appellee at 34-35, *United States v. Law*, 979 F.2d 977, (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1844 (1993).

the establishment deemed to be the source of such pollution, *or when such ceasing does not stop the pollution*, he [or she] shall forthwith apply for a permit[.]” (emphasis added) Accordingly, the West Virginia Water Pollution Control Act, W.Va. Code, 20-5A-1 to 20-5A-24, as amended, *requires an application for a permit when the cessation of business operations does not stop the pollution.*²⁹

Therefore, the court recognized that the emphasis under the West Virginia Act is not on what person or company created the water pollution problem or whether or not the coal mining operations continued on the property. Rather, the inquiry is on whether or not the water pollution continues after the mining operations have ceased. *Rayle Coal Co.*, illustrates that coal operators and the purchasers of coal property have continuing legal liabilities as long as polluted water continues to discharge from the property into a stream or other regulated water way. As discussed further in part VI, in this era of increased environmental enforcement, companies need to analyze and understand environmental statutes so that they can be better prepared to address their potential environmental problem areas. The result of a failure to comply with the Clean Water and West Virginia Acts may be civil liability, as occurred in *Rayle Coal Co.*, or failure to comply may result in criminal liability as occurred in the case of Mr. Law and MMI, discussed in part IV. Most companies would prefer not to be the target of an environmental enforcement action. If it is a target, a company will generally prefer to keep its case in the civil enforcement arena rather than face criminal enforcement. By proper attention to the legal responsibilities under the Clean Water Act, a company should be able to minimize its liability exposure.

2. Third-Party Liability

One more recent development under the West Virginia Act, arising in Preston County, West Virginia, warrants additional examination as it epitomizes the changing regulatory climate regarding the Clean Water and West Virginia Acts and the expenses that can be involved in achieving compliance with environmental statutes. F&M Coal Company

29. 401 S.E.2d at 686 (emphasis added).

conducted a surface mining operation on Laurel Mountain in Preston County, between 1984 and 1991.³⁰ F&M apparently had extensive water pollution problems at the site as a result of acid mine drainage. Because of this and other problems with the operation, F&M filed for bankruptcy in October, 1990. In December, 1990, it auctioned off its assets for \$1.5 million. Those proceeds were utilized by F&M to treat acid mine drainage at the Laurel Mountain mining operations. Treatment for the acid mine drainage cost approximately \$50,000 per month, and by March, 1992, most of the company's money had dissipated.³¹

During the life of the coal mining operations, the State evidently was not satisfied with the environmental performance of F&M as it issued a total of fifty-six notices of violations of the West Virginia Surface Coal Mining and Reclamation Act (West Virginia Surface Mining Act).³² In June, 1991, a show cause hearing was set for F&M to demonstrate why its permit should not be revoked and its bonds forfeited.³³ After some negotiation, F&M decided not to challenge the State permit and bond revocation proceedings and F&M surrendered its permits and bonds in March, 1992. The West Virginia Division of Environmental Protection (DEP) took no immediate action to remediate the acid mine drainage and a citizen group brought a mandamus action against DEP to compel immediate remediation of the F&M Laurel Mountain site, in *State ex rel Laurel Mountain v. Callaghan*.³⁴ In *Laurel Mountain*, the court issued a writ of mandamus against DEP and required it to take any money collected pursuant to the bond for-

30. The background facts regarding the operations of F&M are from the West Virginia Supreme Court's opinion in *State ex rel. Laurel Mountain v. Callaghan*, 418 S.E.2d 580, 582-83 (W. Va. 1992), and the record before the Water Resources Board in *Cat Run Coal Co. v. Chief, Office of Water Resources*, Consolidated Appeal Nos. 527, 528 and 529 (1992) [hereinafter *Water Resources Board Record*].

31. Order of the Water Resources Board Record, *In Re: F&M Coal Company Limited Partnership*, No. 90-10929 (N.D. W. Va. March 13, 1992).

32. W. VA. CODE §§ 22A-3-1 to -40 (1985 & Supp. 1992) [hereinafter *West Virginia Surface Mining Act*].

33. The permit and bond forfeiture provisions under the West Virginia Surface Mining Act are codified at W. VA. CODE § 22A-3-17 (Supp. 1992).

34. 418 S.E.2d 580 (W. Va. 1992).

feiture proceedings and begin immediate remediation efforts with regard to the acid mine drainage problems.

The court's decision in *Laurel Mountain* led DEP to take the unprecedented action³⁵ of issuing orders against Donald R. Frazee, a former partner in F&M, Inter-State Lumber Company, the surface owner of the property at Laurel Mountain where F&M conducted its mining operations, and Cat Run Coal Company, the mineral owner of the property at Laurel Mountain where F&M conducted its operations. At the time DEP issued the orders, all three parties had no control over F&M's mining operations. Moreover, Cat Run Coal Company and Inter-State Lumber Company had never had any connection with the mining operations or the creation of the acid mine drainage. Nevertheless, all three parties were ordered to take corrective and remedial action to eliminate the water pollution problems at Laurel Mountain and to apply for a NPDES permit.³⁶ These matters are currently before the Water Resources Board pending appeals by Mr. Frazee and the companies.³⁷

The parties have raised several issues on appeal including: whether or not DEP has the duty to pay for the treatment of acid mine drainage in light of the court's decision in *Laurel Mountain* and whether or not the companies are "persons" covered under the West Virginia Act. Inter-State Lumber Company has raised an issue as to whether or not

35. DEP's decision to take enforcement action in the F&M matter should be juxtaposed with the different regulatory climate prevalent under the auspices of the Division of Energy (DEP's predecessor coal environmental regulatory agency) when the State stepped in and assumed all liability for the treatment of acid mine drainage at the former Upshur County, West Virginia coal operations of DLM Coal Corporation. See John R. McGhee, Jr., Note, *Environmental Liabilities Not Bankruptable: A Look at the State of West Virginia's Agreement with DLM Coal Corp.*, 90 W. VA. L. REV. 991 (1988).

36. Water Resources Board Record, Office of Water Resources Order Numbers 3284, 3285 and 3286 (Aug. 4, 1992).

37. The Water Resources Board was created pursuant to and as an appellate agency to review all orders of the Office of Water Resources. See W. VA. CODE § 20-5-1 (1989). The Water Resources Board also promulgates all regulations regarding the West Virginia Act, W. VA. CODE § 20-5A-5(b)(2) (Supp. 1992), and it has the authority to review and issue permits that have been denied by the Chief of the Office of Water Resources. Director, W. Va. Dep't of Natural Resources v. Gwinn, 408 S.E.2d 21 (W. Va. 1991); 4-H Comm. Ass'n. v. Division of Water Resources, 355 S.E.2d 624 (W. Va. 1987).

the surface owner of the property may be held liable for acid mine drainage resulting from the severed mineral estate. At the time they filed the appeals, the three parties also moved for a stay of the Chief's orders. The Water Resources Board entered an interlocutory order denying the request for a stay.³⁸

Initially, a hearing was scheduled before the Water Resources Board for December 14-16, 1992. That hearing was continued by joint motion of the parties upon the grounds that another civil action, *Haggerty v. Frazee*,³⁹ could resolve the issues before the Water Resources Board. Subsequently, DEP elected to proceed solely against the Cat Run Coal Company and a hearing was conducted on April 22-23, 1993.⁴⁰

A prehearing motion to dismiss and brief was filed by Cat Run Coal Company arguing that, since DEP revoked the permits and forfeited the reclamation bonds, the West Virginia Surface Mine Act controlled and therefore DEP not Cat Run Coal Company had the

38. See Water Resources Board Record, Oct. 2, 1992, Board's Ruling on Requests to Grant suspension of Chief's Orders. Even though the request for a stay was denied, the State did not enforce its order against any of the parties and a *de facto* stay remained in place. Interview with Robert G. McLusky, counsel for Cat Run Coal Company (Dec. 29, 1992).

39. Civil Action No. 91-C-245 (Cir. Ct. Preston County, W. Va. filed _____). This action was filed by several private citizens against F&M's insurance companies seeking money from the insurance companies to pay for water pollution treatment at the Laurel Mountain site. See *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992). The Charleston Gazette reported that the *Haggerty* case had been settled for \$4 million. CHARLESTON GAZETTE, Jan 28, 1993, at 1. DEP Director David Callaghan was quoted as stating that he would still pursue Cat Run Coal Co. for "additional financial contributions because the settlement is still short of what will be required over the long term." *Id.*

40. Prior to the hearing, Cat Run Coal Company filed an injunction action in the United States District Court for the Northern District of West Virginia, challenging the ability of DEP to require Cat Run Coal Company to obtain a NPDES permit. *Cat Run Coal Company v. David C. Callaghan*, No. 93-0044-E (N.D. W. Va.). Cat Run Coal Company argued in federal court that it was entitled to enjoin the State Water Resources Board hearing on the basis of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1988 & Supp. 1991), preempting state law. The district court denied the injunction concluding that Cat Run Coal Company could advance its preemption argument with the Water Resources Board. Interview with Robert G. McLusky, counsel for Cat Run Coal Company (Apr. 29, 1993).

primary obligation to remediate the acid mine drainage problems. Cat Run Coal Company found support for this argument in the Supreme Court's *Laurel Mountain* decision wherein the court had ordered DEP to begin immediate reclamation of the acid mine drainage.⁴¹ The matter is currently pending before the Water Resources Board and it is not possible at this time to predict the ultimate outcome of the case.

Based upon the State's recent civil enforcement actions against Rayle Coal Company and Cat Run Coal Company, coal operators and purchasers of coal property need to be attentive to water pollution issues. Even if a company should run afoul of the West Virginia Act, the company still has room to negotiate with DEP to achieve some form of settlement that allows the company to comply with the law and remain profitable. However, if DEP and the company are not able to achieve a satisfactory resolution of the problem, then the enforcement matter may be referred by DEP to the United States Attorney's Office for criminal prosecution.⁴² Therefore, if a company is not careful, a civil matter can quickly become a criminal matter, and the company will have a major problem on its hands.⁴³ Against this overview, we turn to the development of environmental criminal prosecutions in general and a closer examination of prosecution under the Clean Water Act for knowing violations.

41. Cat Run Coal Company also argued in its motion to dismiss that, when a coal mine is owned by one person but another person has been contracted to mine the property, then the operator, not the owner, has the duty to obtain the NPDES permit under 40 C.F.R. § 122.21(b). *See also* 45 Fed. Reg. 33290, 33295 (May 19, 1980) (discussing that regulation and the obligations of owners and operators when the two are not the same).

42. As previously discussed, the West Virginia Act and the Clean Water Act closely mirror each other. *See supra* note 27. Therefore, an illegal discharge without a permit in violation of the West Virginia Act will also be a violation of the federal act. This overlapping set of laws allows the United States Attorney's Office to step in on a state referral and prosecute the defendant under the Clean Water Act.

43. Based on the author's personal experience, there is nothing worse than negotiations with the state breaking down in a civil enforcement matter and then at subsequently receiving a phone call from a client advising that the FBI has shown up with a warrant to investigate the same matter. At that point, any hope of resolving the matter with the state is moot as the United States Attorney's Office has taken over the case.

III. CRIMINAL PROSECUTIONS UNDER THE CLEAN WATER ACT

A. *The Emergence of Environmental Criminal Prosecutions*

Between 1972 and 1983 the government prosecuted very few criminal cases under the Clean Water Act or any other environmental statute. In those cases where the government criminally prosecuted a party, the fine was relatively minimum.⁴⁴ In 1981, the EPA reorganized its departments and established the Office of Criminal Enforcement.⁴⁵ Since that time, criminal enforcement of all environmental statutes has risen dramatically.⁴⁶ With the EPA's creation of the Office of Criminal Enforcement and the general political climate supporting environmental prosecution,⁴⁷ the Department of Justice has increased its prosecution of environmental crimes.

44. For a criticism of the prior infrequent utilization of criminal prosecutions and the history of lenient sentencing, see Barbara H. Doerr, Comment, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. DET. L. REV. 659 (1985); Michele Kuruc, Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 102-04 (1985).

45. The historical development of EPA's Office of Criminal Enforcement has been exhaustively chronicled by many commentators. See, e.g., Joseph B. Block, *Environmental Criminal Enforcement in the 1990's*, 3 VILL. ENVTL. L.J. 33 (1992); Wilson 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); Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781 (1991); Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133 (1986).

46. Between FY 1983 and FY 1991 there were 571 individuals and 267 corporations indicted for environmental crimes. Not including the cases pending, there were 409 individuals and 204 corporations convicted or guilty pleas with a conviction rate of 80%. Block, *supra*, note 45, at 34 (quoting Memorandum from Peggy Hutchin, paralegal, to Neil S. Cartusciello, Chief, Environmental Crimes Section, United States Department of Justice (Oct. 24, 1991)). More than \$74.5 million in criminal fines and penalties have been imposed and more than 173 years of imprisonment have been imposed. Not surprisingly, there are relatively few criminal prosecutions under the Clean Water Act that result in a published opinion. Attached at Appendix A is a listing of reported and unreported criminal prosecutions under the Clean Water Act.

47. McMurry & Ramsey, *supra* note 45, at 1158 n.152 (citing Bureau of Justice Statistics, U.S. Dept. of Justice, Bulletin (1984)). The public ranked environmental crimes as more severe than armed robbery and heroin smuggling. *Id.*

As Adler and Lord discuss,⁴⁸ the recent criminal prosecutions of Exxon, for the Valdez oil spill in Prudhoe Bay, Alaska, and of John Pozsgai, for filling in wetlands in violation of the Clean Water Act, both have served to heighten the media and public interest in prosecution of environmental crimes. The *Exxon Valdez* criminal prosecution has been recently chronicled in great detail.⁴⁹ A review of that criminal prosecution reveals that the government achieved a number of precedents in that case, including:

- 1) Payment by Exxon of a record criminal fine of \$125 Million (\$25 Million in federal fines, and \$100 million in criminal restitution to be split between the state and federal government);
- 2) The government proceeded on agency and enterprise liability theories to prosecute Exxon Corporation, the parent of subsidiary Exxon Shipping Company, which actually operated the Valdez;
- 3) The government chose to prosecute under 33 U.S.C. §§ 1311(a) and 1319(c)(2) of the Clean Water Act, which pertain to the discharge of pollutants from a point source rather than 33 U.S.C. § 1321 of the Clean Water Act which pertains to oil spills; and,
- 4) The government effectively utilized the Criminal Fines Improvements Act of 1987, (CFIA) 18 U.S.C. § 3571, to obtain much higher criminal fines and penalties than it heretofore would have been able to impose.⁵⁰

Certainly, neither Exxon nor Exxon Shipping intended for the Valdez to run aground and spill 10.8 million gallons of oil. This criminal

48. Adler & Lord, *supra* note 45, at 781-86.

49. Stephen Raucher, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 *ECOLOGY L.Q.* 147 (1992). Raucher notes that Exxon Shipping Company and Exxon Corporation were each indicted on five counts for violations of the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988), the Refuse Act, 33 U.S.C. §§ 401-467n (1988), the Migratory Bird Treaty Act, 16 U.S.C. §§ 701-703-711 (1988 & Supp. 1991), the Ports and Waterways Safety Act, 33 U.S.C. §§ 1221-1232a (1988 & Supp. 1991), and the Dangerous Cargo Act, 46 U.S.C. § 2106 (1988). *Id.* at 148 & n.3. Exxon Shipping Company pleaded guilty to three misdemeanor counts of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. Exxon plead guilty to a violation of the Migratory Bird Treaty Act. *Id.*

50. As Raucher points out, the maximum fine that could have been imposed against Exxon and Exxon Shipping prior to CFIA would have been \$128,000 each. CFIA allows the court to impose a fine up to twice the amount of the gross loss suffered by a person other than the defendant. *Id.* at 177-78.

prosecution, as will be discussed in more detail in part III.C, illustrates the fact that, historically, the imposition of criminal liability under the Clean Water Act has amounted to virtually strict liability for any negligent discharge into a navigable water.

Another environmental criminal prosecution that has drawn its share of public interest is the case of John Pozsgai.⁵¹ The federal district court convicted Mr. Pozsgai on forty counts of violating the Clean Water Act for filling in a wetlands area without a permit. The court sentenced him to a three year term of imprisonment, a concurrent term of twenty-seven months imprisonment, a five year term of probation, a one year term of supervised release, and a \$200,000 fine. The court also ordered Pozsgai to comply with a restoration plan for the wetland site. The third circuit upheld the conviction on appeal, and the district court rejected the defendant's motion for Reduction of Sentence and Fine.

On appeal of the Motion for Reduction of Sentence and Fine, the Third Circuit affirmed in part and reversed in part the district court's decision not to reduce the sentence or fine. The court concluded that a hearing concerning the defendant's ability to pay the fine should have been held under the sentencing guidelines.⁵² In 1992, three years after the conviction, the district court determined that the defendant was unable to pay the fine and it reduced the defendant's fine to \$5,000.

On its face, Mr. Pozsgai's criminal prosecution was a routine prosecution for filling in a wetlands area without a proper permit.⁵³ The Washington Legal Foundation however seized upon the case as an example of "enforcement overkill" as it argued that Mr. Pozsgai was merely "[p]lacing topsoil, earth, and similar clean fill on five acres of his own property which the government determined technically consti-

51. *United States v. Pozsgai*, No. Cr. 88-00450 (E.D. Pa. 1989), *aff'd mem.*, 897 F.2d 524 (3rd Cir.), *cert. denied*, 498 U.S. 812 (1990), *sentence reduction denied*, 751 F. Supp. 21 (E.D. Pa. 1991), *aff'd in part, rev'd in part*, 947 F.2d 938 (3rd Cir. 1991), *fine reduced*, 22 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20772 (E.D. Pa. 1992).

52. *See infra* note 58.

53. For similar prosecutions for filling in wetlands areas without a permit, see *United States v. Ellen*, 961 F.2d 462 (4th Cir.), *cert. denied*, 113 S. Ct. 217 (1992); *United States v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989).

tuted a wetland.”⁵⁴ As one would expect, the government argued that Mr. Pozsgai’s case was a routine one, but it insisted that a severe sanction was warranted because Mr. Pozsgai was a flagrant and stubborn criminal violator of the Clean Water Act.⁵⁵ The most significant aspect of Mr. Pozsgai’s case at the time of his sentencing were the lengthy sentence of three years and the large fine of \$200,000.⁵⁶

The *Exxon Valdez* and *Pozsgai* cases illustrate at a national level the new emphasis on the imposition of criminal liability for environmental offenses. Prior to 1981, the government was less likely to seek criminal prosecutions against a company or its agents for violation of environmental statutes, and, if the government was inclined to prosecute anyone under an environmental statute, the courts were not likely to impose severe sanctions for that conduct.⁵⁷ The current regulatory climate amounts to a one hundred and eighty degree turnabout. Today, the government is all too willing to prosecute any company or individual for a criminal violation of an environmental statute and if convicted, that entity is assured that a court will impose the maximum penalty allowed under the sentencing guidelines.⁵⁸ That trend now confronts the coal industry and other owners of coal property that may have potential water pollution problems under the Clean Water Act.

54. Adler & Lord, *supra* note 45, at 784-85 (citing Kamenar, *Environmental Protection or Enforcement Overkill*, ENVTL. F., May/June 1990, at 29-30).

55. *Id.* at 785 (quoting Thompson, *A New Cost of Business for Environmental Violators*, ENVTL. F., May/June 1990, at 33).

56. *United States v. Pozsgai*, 22 Env’tl. L. Rep. 20772, 20772 (E.D. Pa. 1992). An even higher fine of \$1 million was imposed on Mr. Paul Jones, a property owner, who pled guilty to negligently violating the Clean Water Act as a result of wetlands being filled in on his property without a permit. *United States v. Ellen*, 961 F.2d 462, 464 n.1 (1992).

57. *See supra* note 44.

58. FEDERAL SENTENCING GUIDELINES MANUAL, UNITED STATES SENTENCING COMMISSION (1991). Block observes that prior to the sentencing guidelines a defendant received only a seven day jail term for filling in a wetlands area and after the guidelines a defendant was ordered to serve three years for the same offense. Block, *supra* note 45, at 40; *see also* Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It is Hard Time*, 20 Env’tl. L. Rep. (Env’tl. L. Inst.) 10,096 (1990) (computing sentences under the sentencing guidelines to point out the disparity in fines and sentences for sentences rendered before and after to the effective date of the guidelines).

B. Criminal Prosecutions under the Clean Water Act

1. Overview of Criminal Provisions

Under section 309(c) of the Clean Water Act, four categories of criminal violations and penalties have been enacted by Congress:

- 1) *Negligent violations* - Fines of \$2,500 to \$25,000 per day and/or imprisonment up to one year for first offense, with the penalties doubled for the second offense;
- 2) *Knowing violations* - Fines of \$5,000 to \$50,000 per day and/or imprisonment for not more than three years, with the penalties doubled for the second offense;
- 3) *Knowing endangerment* - Fines of not more than \$250,000 and/or imprisonment for not more than 15 years for an individual and a fine of not more than \$1,000,000 for an organization with the penalties doubled for a second offense; and,
- 4) *False Statements* - Fines of not more than \$10,000 and/or imprisonment for not more than two years with double the penalty for the second offense.⁵⁹

To these provisions are added the enhanced penalties under the Criminal Fines Improvement Act (CFIA), 18 U.S.C. § 3571, including the draconian provision under subsection (e) which allows an alternate fine of up to double the gain or loss. One other consequence of a conviction under section 309(c) arises under section 508, 33 U.S.C. § 1368(a). This allows the EPA to suspend or debar a company from receiving federal contracts.⁶⁰

59. 33 U.S.C. § 1319(c) (1988).

60. EPA is increasing its use of this enforcement mechanism by seeking suspension and debarment from government contracts, loans, or grants under the Federal Acquisition Regulations and Executive Order No. 12,689, 54 Fed. Reg. 34,134 (1989). See also James M. Stork, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 934 (1991); Block, *supra* note 45, at 38-39 (discussing of the debarment of Valmont Industries, Inc. for a "bad corporate attitude" after a conviction for false reporting under the Clean Water Act); see also EPA Policy Regarding the Rule of Corporate Attitude, Policies, Practices, and Procedures, in Determining Whether to Remove a Facility from the EPA List of Violating Facilities Following a Criminal Conviction, 56 Fed. Reg. 64,785 (1991).

The foregoing discussion sets forth the illegal conduct and fines established by Congress under the Clean Water Act. As will be discussed in more detail in part IV, Mr. Law's conviction was for a "knowing" discharge without a permit, in violation of the Clean Water Act, and, therefore, the discussion in this section of the Article will focus on that type of criminal prosecution.⁶¹ Scott and Bryant set forth in their article the elements necessary to prosecute a defendant for a knowing discharge without a permit, in violation of the Clean Water Act, as follows:

- 1) knowingly
- 2) discharge
- 3) a pollutant
- 4) from a point source
- 5) into a navigable water of the United States
- 6) without a NPDES permit.⁶²

Elements two through six are the terms of art defined under the Clean Water Act and previously discussed above in part II.A, and are not addressed further herein, leaving only the term "knowingly" to be considered at this point.⁶³

Without citing to a single decision under the Clean Water Act, Scott and Bryant state that despite the use of the term "knowing," it

61. Criminal prosecutions under the "knowing" provision of 33 U.S.C. § 1319(c)(2) (Supp. 1991), may also be brought for discharges in violation of the NPDES permit requirements, violation of pre-treatment requirements, violations of the aquaculture requirements, disposal of sewage sludge, and oil spills prohibited under 33 U.S.C. § 1321(b)(3) (1988).

62. Scott & Bryant, *supra* note 1, at 672. This same elemental analysis of the criminal prosecution was also set forth in their brief filed with the court of appeals in Mr. Law's case and adopted by the court. See Brief of Appellee, *supra* note 28, at 25; *Law*, 979 F.2d at 978.

63. It should be noted that Scott & Bryant's elemental analysis fails to mention prosecutions for "negligent" violations of the Clean Water Act which still may be prosecuted under 33 U.S.C. § 1319(c)(1) (1988 & Supp. 1991). Examples of prosecutions for negligent violations would include the criminal prosecutions of Exxon for the Valdez oil spill, discussed in Raucher, *supra* note 49, and Ashland Oil Company for the oil spill resulting from the 1988 collapse of its storage tank, *United States v. Ashland Oil Co.*, 705 F. Supp. 270 (W.D. Pa. 1989).

was Congress' intent that this violation under the Clean Water Act be construed as only requiring a "general intent standard." Therefore:

The United States does not have to prove that a defendant had a specific intent to violate the CWA. It is sufficient to prove only that a defendant knew that he was discharging some noninnocuous effluent, regardless of whether or not that defendant was aware of the proscriptions of the CWA.⁶⁴

Other commentators also have suggested that the government has an easy burden in proving a defendant's knowing violation under the Clean Water Act and other environmental laws.⁶⁵ However, Scott and Bryant and the other commentators have not analyzed carefully the term knowing under the Clean Water Act in the context of its legislative history and the most recent case law defining that term with regard to other environmental statutes. The next two sections will analyze these two areas with regard to the Clean Water Act in an attempt to shed additional light on what the government must prove in order to obtain a conviction for a knowing discharge without a permit in violation of the Clean Water Act.

2. Legislative History of the Clean Water Act

To determine what Congress intended when it established a criminal violation for a "knowing" discharge in violation of the Clean Water Act, section 309(c)(2),⁶⁶ an examination of the legislative history of that enactment is helpful. Congress did not establish the concept of a "knowing" violation until the 1987 amendments to the Clean Water Act, at which time the "willful or negligent" violation of the Clean

64. Scott & Bryant, note 1, at 672 n.56. In support of this position, Scott & Bryant cite to *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991) and *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971). For the reasons discussed in part III.B.3, these cases do not support this position with regard to the standard of proof required under the Clean Water Act.

65. See, e.g., Block, *supra* note 45, at 42-43 (stating that the government's burden of proof is easier to meet for environmental crimes because they are public welfare offenses and general intent offenses).

66. 33 U.S.C. § 1319(c)(2) (1988).

Water Act was modified to provide for separate negligent and knowing violations.⁶⁷ The legislative history of the Clean Water Act provides some evidence of what Congress intended in 1987 when it added the provision for a knowing violation, although it does not clearly state what was meant by the creation of a knowing offense.⁶⁸ With regard to that provision, the House Committee Report provides the following interpretive discussion:

Presently the Federal Water Pollution Control Act has no provision that deals with knowing violations of major statutory or regulatory requirements. Section 22 is intended to be used primarily to address intentional violations of the Act occurring on a regular basis over an extended period of time that result in significant harm to public health or the environment. The section is intended to provide for imposition of severe penalties for such actions.⁶⁹

Therefore, from the House of Representatives perspective, the knowing violation was enacted to punish “intentional” conduct that “regularly” occurred for an “extended period of time” and that resulted in “significant harm to public health or the environment.” This House of Representatives Report indicates that Congress intended some proof of *mens rea* or intent to be shown by the government in order for the government to prosecute a defendant for a knowing violation of the Clean Water Act.

The Senate Committee Report illustrates why Congress felt it was necessary to increase the criminal penalties for a knowing violation:

The felony level penalties for knowing violations (not less than \$5,000 nor more than \$50,000 per day violation and imprisonment for up to three years) are more closely comparable to the levels provided by the 1984

67. Water Quality Act of 1987, Pub.L. 100-4, Title III, Section 312 (codified as 33 U.S.C. §§ 1251-1387 (1988)).

68. No Committee reports were prepared by the House or Senate to accompany the Water Quality Act of 1987, and therefore reference must be made to the House, Senate, and Conference Committee Reports prepared for the Clean Water Act Amendments of 1985, S. B. 1128, during the previous session of Congress. S. REP. NO. 99-50, 99th Cong., 1st Sess. (1985); H.R. REP. NO. 99-189, 99th Cong., 1st Sess. (1985); H.R. CONF. REP. NO. 99-1004, 99th Cong., 2nd Sess. (1986).

69. H.R. REP. NO. 99-189 at 31.

amendments to the Solid Waste Disposal Act RCRA and reflect the commensurately serious nature of the violations to be criminally prosecuted under the Clean Water Act. Currently, a knowing discharge onto the ground of hazardous wastes could subject discharger to felony sanctions under RCRA. However, the same discharge into a sewer system or a POTW might subject the discharger to the lesser misdemeanor provisions of the Clean Water Act. The result is an intentional incentive to dump hazardous substances into sewer systems or POTW's. The addition of these criminal sanctions will aid in protecting these sewer systems and POTW's. Substantial Federal monies are invested in many of these POTW's. Existing misdemeanor penalties are retained to address those negligent violations which merit lesser punishment.⁷⁰

This Senate Committee Report helps to explain the higher penalties added under the 1987 amendments, but it does not shed any light on the intent of Congress regarding the standard of proof. The Conference Committee Report adds nothing further to the explanation of the meaning of the term knowing, although it does state that similar language in the Senate and House Bills was merged in codifying this provision.⁷¹

In considering the meaning of the term "knowing" in section 309(c)(2), of the Clean Water Act, an examination of the "knowing endangerment" provisions that Congress also added in the 1987 amendments at section 309(c)(3), of the Clean Water Act is helpful.⁷² Such an examination of the section pertaining to "knowing endanger-

70. S. REP. NO. 99-50 at 29.

71. H.R. CONF. REP. NO. at 138.

72. This section provides as follows:

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 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 the Secretary of the Army or by a State, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person 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 fine and imprisonment.

33 U.S.C. § 1319(c)(3)(A) (Supp. 1991).

ment” indicates that Congress was more precise in defining what knowledge an individual must possess in order for the government to prove a violation of that section, as compared to the mere use of the word knowing in the section pertaining to knowing violations.⁷³ In particular, Congress specified that, to prosecute an individual under the knowing endangerment section, the individual must “know at the time that he thereby places another person in imminent danger of death or serious bodily injury.” In determining what a person knew, Congress added the following parameters:

[I]n determining whether a defendant who is an individual knew his conduct placed another person in imminent danger of death or serious bodily injury—

I) the person is responsible only for actual awareness or actual belief that he possessed; and

II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant’s possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.⁷⁴

This more specific definition of knowledge has made it more difficult for the government to convict a defendant for a “knowing endanger-

73. Senate Report 99-50 sets forth the following explanation of the “knowing endangerment” provision:

This section also adds to section 309(c) enhanced felony penalties for certain life-threatening conduct. The concept of a knowing endangerment crime is found, as well, in section 3008(e) of RCRA. This new offense under the Clean Water Act is based upon violation of certain predicates in the Act. In the event of such knowing violation, the amendment subjects to greater punishment one who knows that he thereby placed another person in imminent danger of death or serious bodily injury. The criminal penalties that apply upon conviction (up to 15 years imprisonment plus fine of up to \$250,000 for individuals, a fine of up to \$1,000,000 for organizations) are equivalent to the RCRA knowing endangerment provision, as recently amended.

S. REP. NO. 99-50 at 29.

74. 33 U.S.C. § 1319(c)(3)(B)(i) (1988). An analysis of the language in this provision also reveals an intent by Congress to incorporate the concepts of “responsible corporate officer” and “willful blindness” that have developed under similar environmental enactments, discussed further in part III.B.5 of this Article.

ment” violation.⁷⁵ Unfortunately, Congress did not specify why the language regarding the “knowing endangerment” section is more precise than the language regarding the knowing violation under the Clean Water Act.

The legislative history of the 1987 amendments to the Clean Water Act pertaining to the knowing violation, provides some guidance from the House of Representatives Report to conclude that Congress intended the government to introduce some evidence to prove that the defendant intentionally violated the Clean Water Act. Congress did not express, however, to what degree the government must prove that the defendant intentionally violated the Clean Water Act and whether or not the government must prove that the defendant knew that his conduct violated the Clean Water Act in order to obtain a conviction.

To further examine this issue, the next four sections will analyze case law pertaining to the definition of the term knowledge and three other doctrines that have developed as substitutes for proof of knowledge. The doctrines of “public welfare offense,” “responsible corporate officer,” and corporate vicarious or respondeat superior criminal liability, have all developed in other areas of law, and they are now applied to environmental criminal prosecutions to either dispense with the

75. In *United States v. Villegas*, 784 F. Supp. 6 (E.D.N.Y. 1991), a co-owner of a laboratory that tested blood samples was criminally prosecuted for placing over one hundred plastic vials of blood samples, some contaminated with hepatitis B, in a bulkhead where they were washed out to sea and later washed ashore onto a Staten Island public beach. *Id.* at 7. The government’s failure to prove that the defendant was aware of the “high probability” that his conduct would cause serious bodily injury or death resulted in the vacation of the conviction on two counts of “knowing endangerment” under section 309(c)(3). *Id.* at 13-15. The government argued that “from the evidence regarding the currents and tides the jury could infer that the defendant knew or should have known that anything thrown into [the] waters would be swept out into the sea and eventually be lodged on a beach.” *Id.* at 14. The district court rejected this approach concluding that the government’s own expert’s had conceded that the danger of a serious bodily injury or death as a result of contact with the contaminated blood vials was remote. *Id.*; see also *United States v. Borowski*, 977 F.2d 27 (1st Cir. 1992) (reversing conviction for knowing endangerment under section 309(c)(3) upon the grounds that Congress did not intend that provision to protect worker safety and it concluded that the statute would apply only after a discharge into a public water system); Robert G. Schwartz, Jr., *Criminalizing Occupational Safety Violations: The Use of “Knowing Endangerment” Statutes to Punish Employers who Maintain Toxic Working Conditions*, 14 HARV. ENVTL. L.J. 487 (1990).

element of knowledge or to inferentially satisfy the element of knowledge. These next sections will analyze the Clean Water Act and the violation for a knowing discharge without a permit to determine how this prior case law relates to this offense and the government's standard of proof.

3. Definition of the Term "Knowledge"

The term "knowledge" is an ambiguous term, and what knowledge must be proven by the government in order to obtain a criminal conviction under a given statute is an elusive concept that typically will be dependent upon the court's review of legislative history and its interpretation of the statute consistent with the case law that has developed concerning the term knowledge. Set forth in the preceding section is the legislative history of the knowing violation of the Clean Water Act. This section examines how courts have defined the term knowledge under other statutes to see how that case law may aid an interpretation of the Clean Water Act.

The two seminal decisions that analyze the term knowledge and reach contrary results are *Liparota v. United States*⁷⁶ and *United States v. International Minerals & Chemical Corp.*⁷⁷ *Liparota* and *International Minerals* represent the two opposite conclusions a court can reach in determining whether or not Congress intended, by its use of the term knowing in a given statute, for the government to be required to prove that a defendant knew that his conduct violated the law.

In *International Minerals*, the Supreme Court of the United States concluded that the government could prosecute a defendant for knowingly transporting a "corrosive liquid," sulfuric and hydrofluosilicic acid, in violation of the law, by proving that the defendant knew what he was transporting.⁷⁸ More significantly, the Court held that the gov-

76. 471 U.S. 419 (1985).

77. 402 U.S. 558 (1971).

78. 18 U.S.C. § 834(a) (repealed 1979) empowered the Interstate Commerce Commission to regulate the transportation of "corrosive liquids" and subsection (f) provides criminal penalties for knowingly violating the Commission's regulations.

ernment did not have to prove that the defendant knew that his conduct constituted a violation of the law, because, given the fact that "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."⁷⁹

In *Liparota*, the Court was called upon to determine what *mens rea* or knowledge was required in order to convict a defendant for knowingly possessing food stamps in violation of the law.⁸⁰ The Court considered the statute's legislative history and other precedents and determined that the government, in order to obtain a conviction, would have to prove that the defendant knew that he possessed the food stamps and that he knew that his possession of the food stamps constituted a violation of the law.⁸¹ In so holding, the Court declared that "requiring *mens rea* is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"⁸² The Court distin-

79. *Liparota*, 402 U.S. at 565. At the same time, the Supreme Court recognized that there "may be the type of products which might raise substantial due process questions if Congress did not require, as in *Murdock*, "*mens rea*" as to each ingredient of the offense." *Id.* at 564 (citing *United States v. Murdock*, 290 U.S. 389 (1933)).

80. 7 U.S.C. § 2024(b)(1) (1988).

81. In *Liparota*, the Supreme Court quoted the following discussion concerning the difficulty in determining what the word knowledge means in a given statute:

Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who "knowingly sells a security without a permit" from the securities commission? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word "knowingly" is intended to travel—whether it modifies "sells," or "sells a security," or "sells a security without a permit."

471 U.S. at 424 n.7 (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 27 (1972)).

82. 471 U.S. at 427. It should also be noted that, although the Supreme Court did not approve the defendant's specific intent instruction, it held that it would be more useful to instruct the jury with regard to the defendant's mental state required by the statute and "eschew use of difficult legal concepts like 'specific intent' and 'general intent.'" *Id.* at 433 n.16.

guished *International Minerals* on the basis that possession of foods stamps was not the “type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”⁸³

In exploring the issue of knowledge in other environmental criminal prosecutions, the courts have examined the statutes to determine whether to apply the conclusion reached in *International Minerals* or *Liparota*. For instance, the issue of knowledge has been extensively litigated under the provisions of the Resource Conservation and Recovery Act of 1976⁸⁴ (RCRA), with varying results. Under one provision of RCRA which prohibits the knowing treatment, storage, or disposal of hazardous wastes without a permit,⁸⁵ a majority of courts have observed that there is no legislative history, and that the term knowing is missing from the beginning of subsection (d)(2)(A). Therefore, the courts have concluded that Congress did not intend the government to prove that the defendant knew that a permit was required.⁸⁶ In so

83. *Id.* at 433.

84. 42 U.S.C. §§ 6901-6987 (1988) [hereinafter RCRA].

85. 42 U.S.C. § 6928(d)(2)(A) (1988).

86. *See, e.g.*, *United States v. Dean*, 969 F.2d 187 (6th Cir. 1992) (holding that in a criminal prosecution under 42 U.S.C. § 6928(d)(2)(A), the government is only required to show knowledge of the hazardous waste and not knowledge of the RCRA permit status); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991) (holding that in a criminal prosecution under 42 U.S.C. § 6928(d)(2)(A), the government is required to prove that the defendant knew what he was doing, what was being stored, what is being stored may harm others or the environment, and that the defendant has no permit; the government is not required to prove that the defendant knew that a permit was required); *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990) (holding that in a criminal prosecution under 42 U.S.C. § 6928(d)(2)(A), the government was not required to prove the defendants were aware that violation of RCRA was a crime or that the defendants knew they were handling hazardous wastes because anyone who possesses or handles hazardous wastes is presumed to be aware of the regulations), *cert. denied*, 111 S. Ct. 1307 (1991); *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989) (holding government not required to prove that the defendant knew the facility had no permit, rather it was only required to prove that the defendant knew that chemical wastes had the potential to harm others or the environment), *cert. denied*, 493 U.S. 1083 (1990); *United States v. Laughlin*, 768 F. Supp. 957 (N.D.N.Y. 1991) (holding that in a criminal prosecution under 42 U.S.C. § 6928(d)(2)(A), the government is not required to prove that the defendant knew that a permit was required by law or that the company did not have a permit). For a further discussion of the knowledge aspects of the decision in *Dee*, see Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee*, 59 GEO. WASH.

holding, most courts have followed *International Minerals* and concluded that the government is not required to prove that the defendant also knew that what he was doing required a permit, because, given the fact that hazardous substances are involved, the defendant should have known those substances were subject to regulation.

On the other hand, courts have examined the knowledge issue under a different provision of RCRA, 42 U.S.C. § 6928(d)(1), which prohibits the knowing transportation of hazardous waste to a facility without a permit. In these instances they have applied a *Liparota* type analysis and concluded that use of the term knowing was intended by Congress to require that, in order to obtain a conviction, the government must prove that the defendant knew that the facility did not have a permit.⁸⁷ The issue of knowledge, as construed by the Court in *Liparota* and *International Minerals*, has also been considered under other environmental statutes, and the courts have concluded that the government was not required to show that the defendant knew his conduct was against the law in order to obtain a conviction.⁸⁸

L. REV. 862 (1991). *But see* *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3rd Cir. 1984) (holding that in order to be convicted under 42 U.S.C. § 6928(d)(2)(A), the government must prove that the defendant knew that a permit was required and that the facility did not have a permit), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985).

87. *See, e.g.*, *United States v. Goldsmith*, 978 F.2d 643 (11th Cir. 1992) (holding that in criminal prosecution under 42 U.S.C. § 6928(d)(1), the government is required to prove that the defendant knew that the facility he transported hazardous waste to had no permit, but the government was not required to prove that the defendant knew that he was transporting hazardous waste); *United States v. Speach*, 968 F.2d 795 (9th Cir. 1992) (holding that in criminal prosecution under 42 U.S.C. § 6928(d)(1), the government is required to prove that the defendant knew that the facility he transported hazardous waste to had no permit); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986) (in criminal prosecution under 42 U.S.C. § 6928(d)(1), the government is required to prove that the defendant knew that the facility he transported hazardous waste to had no permit).

88. *See, e.g.*, *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990) (holding that criminal prosecution under the Endangered Species Act, 16 U.S.C. § 1540(b)(1) (1988), for knowingly violating regulations, does not require the government to prove the defendants knowledge of the law in order to obtain a conviction); *United States v. Engler*, 806 F.2d 425 (3rd Cir. 1986) (holding that criminal prosecution under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703, 707(b) for knowingly selling migratory birds, does not require the government to prove *scienter* or *mens rea*), *cert. denied*, 481 U.S. 1019 (1987).

To date, no court has extensively examined the term knowledge under *International Minerals* or *Liparota* to determine whether or not the government must prove that a defendant knowingly violated each element of section 309(c). In particular, courts have not considered whether the government must prove that the defendant knew that his discharge was in violation of the Clean Water Act and that he was required to obtain a NPDES permit. Courts also have not decided whether or not it would be a defense for the defendant to show that he was not aware that he was discharging through a point source or that he was discharging into a navigable waterway. Likewise, no court has determined if a “general intent standard” or a “specific intent standard” of proof applies to the government.

In *United States v. Ellen*,⁸⁹ the Fourth Circuit discussed the element of knowledge in cursory fashion in footnote two with the following observation:

We also reject Ellen’s separate argument that the district court failed to instruct the jury that an element of the offense was that Ellen knew that a permit was required by the CWA. The district court instructed the jury that absence of a permit was an element of the offense, and it unambiguously stated that the United States had to prove that Ellen acted knowingly with regard to each element.⁹⁰

Based upon this language, the Fourth Circuit has held that, in order for the government to obtain a conviction for knowingly violating section 309(c)(2) of the Clean Water Act, it must prove that the defendant knowingly violated each element of the offense, including proof that the defendant knew that a permit was required. Whether or not this means that the government will have to prove that the defendant also knew that his conduct violated the Clean Water Act, remains to be developed in future cases.⁹¹

89. 961 F.2d 462. {CHECK}

90. *Id.* at 466. More recently, in an unpublished per curiam decision, the United States Court of Appeals for the Fourth Circuit also upheld a conviction for knowing violation of section 309(2) of the Clean Water Act and held that extensive discussion of the “scienter element . . . is unnecessary.” *United States v. Schallom*, No. 92-5157, 1993 WL 137002, at *3 (4th Cir. Mar. 30, 1993). The court also concluded that the defendant’s proffered motive instruction was unnecessary. *Id.*

91. If the government is required to prove that the defendant knowingly violated each

Courts should be encouraged to carefully examine the issue of knowledge under section 309(c)(2) and to conclude that the government is required to prove that the defendant knowingly violated each element, including proof that the defendant knew that a permit was required. In considering whether the analysis in *Liparota* or *International Minerals* should apply, courts should be encouraged to apply *Liparota* and conclude that Congress intended, by the use of the term knowing, to require the government to prove that a defendant knew that a permit was required and that the defendant knew that his conduct violated the Clean Water Act.

International Minerals may clearly be distinguished in those cases where the discharge or other activity in violation of the Clean Water Act is relatively innocuous conduct, that is, not the type of conduct a reasonable person would recognize as subject to regulation, such as allowing excessive sedimentation to fill up a stream, or placing dirt and other earthen material in a wetland without a permit. In the context of coal mining, many polluted discharges result not from any overt conduct on the part of the operator, but as a result of rain water coming into contact with coal refuse or gob piles and the gravity discharge of pollutants into the stream. Arguments can certainly be made that this type of conduct is not so "dangerous or deleterious," as those terms are used in *International Minerals*, to suggest to the average person that his conduct is subject to regulation and criminal penalties.

In arguing that a knowing violation of the Clean Water Act requires the government to prove that the defendant knew that he violated each element of the offense and that his conduct violated the law, it may be expected that the government will argue that their burden of proof with regard to the knowledge element is reduced because the

element of the knowing violation under the Clean Water Act, then it would appear to be inconsistent to also allow the government to have the jury instructed that the government does not have to prove that the defendant knew that he was violating the law. As discussed in part IV of this Article with regard to the knowledge jury instruction given in *Law*, this latter instruction seems inconsistent with the government's burden of proof and misleading to the jury. Other prosecutions for knowingly violating the Clean Water Act have not addressed this issue. *See, e.g., United States v. Villegas*, 784 F. Supp. 6 (E.D.N.Y. 1991) (conviction for two counts of knowingly discharging without a permit in violation of the Clean Water Act was upheld without a discussion of knowing).

Clean Water Act is a “public welfare offense.” The next section of this Article will examine that doctrine and delineate why that doctrine has no continuing applicability in a criminal prosecution for a knowing violation of the Clean Water Act.

4. Public Welfare Offenses

The concept of “public welfare offenses” emerged at common law as a result of various legislative enactments that did not contain an element of knowledge, intent, or *mens rea* in order for the government to criminally prosecute a defendant.⁹² For example, in *United States v. Dotterweich*,⁹³ and *United States v. Park*,⁹⁴ the Supreme Court considered criminal prosecutions under the Federal Food, Drug and Cosmetic Act⁹⁵ and concluded that Congress had enacted a statute that did not require “knowledge or intent” in order to prosecute an individual for violations of that Act.⁹⁶ The Court sanctioned this approach because “the burden of acting at hazard [is placed] upon a person otherwise innocent but standing in responsible relation to a public danger.”⁹⁷ Other courts have recognized that these decisions allow criminal liability without proof of knowledge or intent and therefore they amount to the legislative imposition of strict liability.⁹⁸

Originally, the Clean Water Act was broadly construed in the criminal context as a “public welfare offense”. This development may be attributed in part to the broad reading the United States Supreme Court gave the Rivers and Harbors Act of 1899,⁹⁹ in *United States v.*

92. For an overview of the development of “public welfare offenses” in the United States, see *Morissette v. United States*, 342 U.S. 246, 255 (1952). For a more current discussion, see Raucher, *supra* note 49, at 165-67 and Robert D. Fluharty & Robert E. Lannan, *Criminal Liability for Environmental Law Violations by Coal Operators*, 93 W. VA. L. REV. 599, 619, 623 (1991).

93. 320 U.S. 277 (1943).

94. 421 U.S. 658 (1975).

95. 21 U.S.C. §§ 301-392 (1988 & Supp. 1991)

96. *Park*, 421 U.S. at 670.

97. *Dotterweich*, 320 U.S. at 277.

98. See, e.g., *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Cir. 1991); *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986), *cert. denied*, 481 U.S. 1019 (1987).

99. 33 U.S.C. § 407 (1988) [hereinafter Refuse Act]. The permitting program under

Standard Oil Co.,¹⁰⁰ a criminal prosecution for the accidental discharge of aviation gasoline. In *Standard Oil*, the Court held that Congress had enacted the Refuse Act to remedy water pollution problems, and, therefore, the Refuse Act should be construed consistent with "common sense, precedent, and legislative history."¹⁰¹ This liberal reading of the Refuse Act was further expounded upon by the First Circuit Court of Appeals in *United States v. White Fuel Corp.*,¹⁰² wherein the court recognized that the Refuse Act was commonly referred to as a strict liability statute because the government was not required to prove *mens rea* or *scienter* to obtain a conviction. The court held that the government could obtain a conviction under the Refuse Act by proving "actual non-compliance" rather than proving an intent to violate the statute or a lack of due care.¹⁰³

The rule that "public welfare offenses" are to be construed broadly to effectuate Congressional purposes was immediately applied in some of the first criminal prosecutions for "willful or negligent" violations under the Clean Water Act¹⁰⁴ to rebut defense arguments that the Clean Water Act as a penal statute should be strictly and narrowly construed.¹⁰⁵ Courts, relying upon the "public welfare offense" doctrine, held that the government did not need to prove that a defendant specifically intended to violate the Clean Water Act in order to obtain a conviction for a willful or negligent violation of the Clean Water Act.¹⁰⁶ Those cases decided under the "willful or negligent" violation

the Refuse Act was one of the precursors to the Clean Water Act. For a review of the Refuse Act's provisions and criminal enforcement history, see Michael K. Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835 (1973).

100. 384 U.S. 224 (1966).

101. *Id.* at 255.

102. 498 F.2d 619 (1st Cir. 1974).

103. *Id.* at 623.

104. For a thorough review of the "willfully and negligent" standard, see Truxtun Hare, Comment, *Reluctant Soldiers: The Criminal Liability of Corporate Officers For Negligent Violations of the Clean Water Act*, 138 U. PA. L. REV. 935 (1990).

105. See *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975). Courts have continued to recognize that the Clean Water Act and its penal provisions should be construed "in a broad, rather than a narrow fashion." *United States v. Boldt*, 929 F.2d 35, 41 (1st Cir. 1991).

106. The willful standard was examined by the court of appeals in *United States v.*

of the Clean Water Act bordered on the imposition of strict liability, as little or no proof of a defendant's knowledge was required in order for the government to obtain a conviction.

The prior case law that discusses the "public welfare offense" doctrine for willful or negligent violations of the Clean Water Act has no applicability to criminal prosecutions today for knowing violations under section 309(c)(2) because the government has a higher burden of proof under the amended Clean Water Act. The legislative history surrounding the 1987 amendments to the Clean Water Act, and recent case law concerning the "public welfare offense" doctrine indicate that the government has a burden of proof to establish that the defendant acted intentionally and knowingly. Therefore, the public welfare offense has no continuing applicability.

With regard to the legislative history, the House Committee Report indicates that Congress intended the government to prosecute defendants for knowing violations under the Clean Water Act only when the defendants intended their conduct. Thus, by implication, the government is required to prove that the defendants knew that their conduct was in violation of the law.¹⁰⁷ Support for disregarding the "public welfare offense" doctrine for knowing violations of the Clean Water Act can also be found in criminal prosecutions under more recent environmental enactments, such as *United States v. MacDonald & Watson Waste Oil Co.*,¹⁰⁸ discussed in greater detail in part III.C.2, and *United States v. Borowski*.¹⁰⁹ In *MacDonald & Watson*, the First

Frezzo Bros., Inc., 602 F.2d 1123 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), where the court of appeals held that the evidence obtained by the government in its samples of the discharge was substantial evidence for the jury to infer that a "willful act precipitated them." More particularly the court of appeals held:

The Government did not have to present evidence of someone turning on a valve or diverting wastes in order to establish a willful violation of the Act.

602 F.2d at 1129. With regard to the negligent violations of the Clean Water Act, the court of appeals held that the government's evidence that certain discharges were caused by the inadequate capacity of the holding tank was sufficient for the jury to conclude that the holding tanks "were negligently maintained by the Frezzos and were insufficient to prevent discharges of the wastes." *Id.*

107. See H.R. REP. 99-189, 99th Cong. 1st Sess. 31 (1985).

108. 933 F.2d 35 (1st Cir. 1991).

109. 977 F.2d 27 (1st Cir. 1992).

Circuit Court of Appeals reversed the conviction of a company president, prosecuted as a responsible corporate officer, for the knowing transportation of hazardous waste to a facility without a permit in violation of RCRA, 42 U.S.C. § 6928(d)(1). The appellate court held that the district court had improperly instructed the jury that knowledge of the illegal acts could be inferred based upon the president's position within the company. In so holding, the court expressly rejected the government's arguments that the "public welfare offense" doctrine could be utilized to negate the express knowledge requirements of RCRA:

While *Dotterweich* and *Park* thus reflect what is now clear and well-established law in respect to public welfare statutes and regulations lacking an express knowledge or other *scienter* requirement, we know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute. *Park*, 421 U.S. at 674, 95 S.Ct. at 1912. Especially is that so where, as here, the crime is a felony carrying, possible imprisonment of five years and, for a second offense, ten.¹¹⁰

In *MacDonald & Watson*, the court concluded that the government must establish by direct or circumstantial proof that the defendant had actual knowledge of the transportation of hazardous waste on the dates charged in the indictment.¹¹¹

In *Borowski*, the Court of Appeals for the First Circuit reversed a conviction for "knowing endangerment" under the section 309(c)(3) of the Clean Water Act. The court concluded that, even though the defendant knowingly violated section 307¹¹² as a result of discharges in violation of the pretreatment standards, and knew that he was placing his employees in imminent danger of bodily injury as a result of their coming into contact with dangerous chemical solutions poured into

110. *MacDonald & Watson*, 933 F.2d at 51-52.

111. The issue in *MacDonald & Watson* was the jury instruction pertaining to the defendant's knowledge of illegal acts. The court of appeals indicated, without analyzing the issue, that the district court had instructed the jury that the government was also required to prove that the defendant knew or should have known that the facility did not have a permit. *Id.* at 47-48.

112. 33 U.S.C. § 1317 (1988).

sinks, the Clean Water Act was not intended by Congress to regulate worker safety. Therefore, “a knowing endangerment prosecution cannot be premised upon danger that occurs before the pollutant reaches a publicly-owned sewer or treatment works.”¹¹³ The court of appeals specifically rejected any reliance by the government upon the “public welfare offense” doctrine to justify the defendant’s prosecution for knowing endangerment:

The fact that this case involves pollution does not make the rule of lenity inapplicable. This is not a case like *United States v. Standard Oil Co.*, 384 U.S. 224, 225, 86 S.Ct. 1427, 16 L.Ed.2d 492 (1966), where “common sense, precedent, and legislative history” all argued for a result favorable to the Government. Likewise, the principle that “[p]ublic welfare statutes . . . are not to be construed narrowly but rather to effectuate the regulatory purpose,” *United States v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35, 49-50 (1st Cir. 1991), does not help the Government here, given the Clean Water Act’s regulatory purpose.¹¹⁴

The appellate court’s analysis and rejection of the “public welfare offense” doctrine in *MacDonald & Watson* turned upon the government’s jury instruction, which did not require the government to prove that the defendant knew that his company was transporting hazardous wastes in violation of the law. The court of appeals in *Borowski*, on the other hand, rejected the application of the “public welfare offense” doctrine based upon the scope of the “knowing endangerment” provisions of the Clean Water Act. That decision did not relate to the intent or state of mind of the defendant.

One may argue that the court of appeals’ renunciation of the “public welfare offense” doctrine in *MacDonald & Watson* and *Borowski* applies with equal force to criminal prosecutions for “knowing” discharges without a permit in violation of the Clean Water Act. Courts should reject any suggestion by the government that it should be able to rely upon that doctrine and dispense with proof that a defendant was aware of the specific discharges and the other elements of the offense and that conduct was in violation of the Clean Water Act.

113. *Borowski*, 977 F.2d at 32.

114. *Id.* at 32 n.9.

Since Congress amended the Clean Water Act in 1987 to provide for a “knowing” discharge in violation of the Clean Water Act under section 309(c)(2), which is separate and distinct from the negligent violation set forth in Section 309(c)(1), Congress must have intended for the “knowing” discharge violation to be prosecuted only when the government is able to prove that the defendant had actual knowledge of the alleged violation and the law.¹¹⁵

5. Responsible Corporate Officers

The “responsible corporate officer” doctrine is utilized by the government in environmental criminal prosecutions to impute the knowledge of company employees to company officials who arguably knew or should have known about the alleged polluting event.¹¹⁶

115. It may be expected that the government will rely upon the contents of S. REP. NO. 99-50, *supra* note 68, at 29, to argue that the Clean Water Act continues to be governed by the “public welfare offense” doctrine because the statute serves to protect public health and as such it should be construed in a broad fashion to place only a minimal burden of proof on the government to show that the defendant knew that he committed the illegal act and the government should not be required to prove that the defendant also specifically knew that he was violating the law.

The government has some support for this position as the “public welfare offense” doctrine was used in the context of a pre-1987 amendments criminal prosecution for the “knowingly” filing of materially false statements with the EPA (prior to the 1987 amendments to the Clean Water Act, this section was codified at 33 U.S.C. § 1319(c)(2), and it is now codified at 33 U.S.C. § 1319(c)(4) (1988)). In *United States v. Ouelette*, 11 Env’t Rep. Cas. (BNA) 1350 (E.D. Ark. 1977), the district court relied upon the “public welfare offense” doctrine and concluded that, while the government had a duty to prove knowledge on the part of the defendant, it did not have a duty to prove that the defendant acted with the specific intent to violate the Clean Water Act. *Id.* at 1352. The district court concluded that:

[T]he government will have to prove that the defendant knowingly (i.e., voluntarily and intentionally) made the false statement, but it will not have to prove that the defendant, in so doing, knowingly violated the law or purposely intended to violate the law.

Id. The *Ouelette* court also cited with approval the definition of knowing from § 14.04 of Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice and Instructions: Civil and Criminal* (3d ed. 1977). *Id.* It may be anticipated that the government will continue to argue that this type of jury instruction that does not require the government to prove that the defendant knew that he was violating the law is sufficient in a prosecution for “knowing” violations of the Clean Water Act.

116. Sixty-eight percent of all federal prosecutions for environmental crimes are against

This doctrine developed simultaneously with the “public welfare offense” doctrine in criminal prosecutions under the Federal Food, Drug, and Cosmetic Act¹¹⁷ in *United States v. Dotterweich*¹¹⁸ and *United States v. Park*.¹¹⁹ Pursuant to this doctrine, corporate officers were held liable for their “responsible share” of the illegal conduct even if the officer did not participate in, or have any knowledge of, the illegal conduct.¹²⁰

Under the “responsible corporate officer” doctrine a corporate officer or other management employee may be held criminally liable upon proof that the defendant was a corporate officer with responsibility to supervise the alleged illegal activities and knew or believed “that the illegal activity of the type alleged occurred.”¹²¹ The government

individuals, as opposed to corporations. 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.* (Envtl. L. Inst.) 10,145 n.8. (1993).

117. 21 U.S.C. §§ 301-392 (1988).

118. 320 U.S. 277 (1943).

119. 421 U.S. 658 (1975).

120. For a thorough discussion of the development of the responsible corporate officer doctrine and its application to environmental criminal prosecutions, see Hare, *supra* note 104, at 967-73; Fluharty & Lannan, *supra* note 92, at 619-28; Alan Zarky, *The Responsible Corporate Officer Doctrine*, 5 *Toxics L. Rep.* (BNA) 983 (Jan. 9, 1991).

121. This definition of the responsible corporate officer doctrine was paraphrased from a jury instruction by the court of appeals in *MacDonald & Watson*, 933 F.2d at 52. In *United States v. Dee*, the following jury instruction was given:

Among the circumstances you may consider in determining the defendant's knowledge are their positions in the organization, including their responsibilities under the regulations and under any applicable policies. Thus, you may, but need not, infer that a defendant knew facts which you find that they should have known given their positions in the organization, their relationship to other employees, or any applicable policies or regulation. Again, this is only one factor which you may consider in determining whether the government has established knowledge beyond a reasonable doubt You should consider the defendant's behavior in light of all the circumstances and instructions which I am giving you in determining whether the government has established beyond a reasonable doubt that the defendants acted knowingly.

Barrett & Clarke, *supra* note 86, at 885 (quoting Joint Appendix to Brief of the Appellee at 1154, *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990)). The district court further instructed the jury that, as managers within the munitions directorate, defendants may be found guilty of counts one, two, three, or four if you find that the government has proved each of the following beyond a reasonable doubt:

has used this doctrine to prosecute company officials who had no actual knowledge of the illegal conduct, but who arguably should have known about the illegal activity by virtue of their position within the company.

The responsible corporate officer doctrine was applied in a pre-1987 amendments "willful or negligent" criminal prosecution under the Clean Water Act in *United States v. Frezzo Bros., Inc.*,¹²² wherein the Third Circuit Court of Appeals, without extensive discussion, held that the jury had been properly instructed on the "responsible corporate officer" doctrine. More recently, in *United States v. Brittain*,¹²³ the Tenth Circuit followed *Frezzo Bros.* and concluded that the government had established by sufficient evidence that the defendant willfully or negligently caused an unpermitted discharge in violation of the Clean Water Act and, therefore, his prosecution was not based merely on his status as the director of the city public utility.¹²⁴ In *Brittain*, the court also discussed the fact that section 309(c)(3) of the Clean

First, that each defendant has a responsible relationship to the violation. That is, that it occurred under his area of authority and supervisory responsibility.

That each defendant had the power or the capacity to prevent the violation. That each defendant acted *knowingly* in failing to prevent, detect or correct the violation. And I have told you what you can consider on the question of knowingly.

Barrett & Clarke, *supra* note 86, at 885. The United States Court of Appeals for the Third Circuit has suggested, in dicta, that "those individuals who hold the requisite responsible positions with the corporate defendant" could be prosecuted for a knowing violation of RCRA. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984). While some courts have relied upon this dicta, at least one commentator has suggested that such reliance is misplaced. See Zarky, *supra* note 120, at 990-91. In that same article Mr. Zarky also criticized the above referred jury instruction on the responsible corporate officer doctrine in *Dee* because the "knowingly failed to detect" language does not comport with the knowing requirements in the statute and may amount to a simple negligence standard. *Id.*

122. 602 F.2d at 1128 n.11. The text of the instruction regarding the responsible corporate officer doctrine in *Frezzo Bros.* is reprinted in Hartman & DeMonaco, *supra* note 116, at 10,145 n.51.

123. 931 F.2d 1413 (10th Cir. 1991). *Brittain* is also a pre-1987 amendments "willful or negligent" criminal prosecution under the Clean Water Act.

124. In *Brittain*, the court of appeals also rejected the defendant's argument that a person other than the permit holder could not be criminally prosecuted under the Clean Water Act. *Id.* at 1418-19.

Water Act specifically added to the meaning of the term "person" under that section "any responsible corporate officer."¹²⁵

Approximately two weeks after the decision in *Brittain*, the First Circuit distinguished *Frezzo Bros. in United States v. MacDonald & Watson Waste Oil Co.*,¹²⁶ and concluded that the government could not utilize the "responsible corporate officer" doctrine to establish a company president's liability for a knowing transportation violation of RCRA.¹²⁷ The court of appeals concluded: "In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge."¹²⁸ The court held that a company official's position alone could not serve as the basis for a conviction of a "knowing" violation, but that position along with other circumstantial evidence, such as knowledge of illegal acts on prior occasions or willful blindness to the facts,¹²⁹ "may be sufficient to establish knowledge."¹³⁰

125. Section 309(c)(3) states, "For the purpose of this subsection, the term person means . . . any responsible corporate officer." 33 U.S.C. § 1319(c)(6) (1988).

126. 933 F.2d 35 (1st Cir. 1991).

127. 42 U.S.C. § 6928(d)(1) (1988). This provision makes it illegal to knowingly transport or cause to be transported hazardous wastes to a facility without a permit.

128. *MacDonald & Watson*, 933 F.2d at 55.

129. The court of appeals recited the district court's jury instruction on willful blindness as follows:

In determining whether a Defendant acted knowingly, you also may consider whether the Defendant deliberately closed his eyes to what otherwise would have been obvious. If so, the element of knowledge may be satisfied because a Defendant cannot avoid responsibility by purposefully avoiding learning the truth. However, mere negligence or mistake in not learning the facts is not sufficient to satisfy the element of knowledge.

Id. at 52 n.15. The court of appeals also cited to other criminal cases where the courts have recognized that deliberate ignorance or conscious avoidance of the facts would establish the element of knowledge. *See, e.g., United States v. Cincotta*, 689 F.2d 238, 243 n.2 (1st Cir.) (evidence of conscious avoidance is merely circumstantial evidence of knowledge), *cert. denied*, 459 U.S. 991 (1982); *United States v. Ciampaglia*, 628 F.2d 632 (1st Cir.) (deliberate ignorance instruction given in mail fraud case), *cert. denied*, 449 U.S. 956 (1980).

130. *MacDonald & Watson*, 933 F.2d at 55. Barrett & Clarke state that jury instructions on knowledge, responsible corporate officer, and willful blindness were given in *Dee* which was decided before *MacDonald & Watson*. Barrett & Clarke, *supra* note 86, at 881-88. They argue that the jury instructions were consistent with the requirements that the

Independent of the court of appeals' decision in *MacDonald & Watson*, the district court in *United States v. White*,¹³¹ examined the responsible corporate officer doctrine with regard to the criminal prosecution of a company official under RCRA for illegal storage, transportation, and disposal of hazardous wastes and knowing endangerment.¹³² It concluded that the government could not rely upon that doctrine because the government was required to establish the defendant's knowledge. In *White*, the government relied upon *Dotterweich* and *Park* in arguing that it could prove that the defendant was in violation of RCRA, even if he had no knowledge of the conduct alleged. The district court rejected this argument by holding

This court must recognize that the statutes involved in *Park* and *Dotterweich* require *no mental state or action*The "responsible corporate officer" doctrine would allow a conviction without showing the requisite specific intent. None of the cases cited by the government supports the theory that a conviction may be had under a state of mind requirement other than that specified by Congress. In the instant case it is "knowing," not "should have known" as the prosecution suggests.¹³³

Based upon *MacDonald & Watson* and *White*, a corporate official in future criminal prosecutions for a knowing discharge without a permit in violation of the Clean Water Act should have a defense when that official has no actual knowledge of the illegal discharge and the government prosecution is proceeding solely upon the basis of the responsible corporate officer doctrine. To establish criminal liability for a knowing violation of the Clean Water Act, the government must prove, through direct or circumstantial evidence, that the official had "actual knowledge" of the illegal acts in order to prevail in the criminal prosecution. Any continued reliance by the government upon the responsible corporate officer doctrine alone is misplaced in view of the

company officials had to knowingly violate RCRA, and the district court's jury instructions did not substitute a negligence standard. The court of appeals in *Dee* did not discuss in its decision the issue of knowledge or the responsible corporate officer doctrine as the court summarily concluded in a footnote that the jury instructions were all proper. *United States v. Dee*, 912 F.2d 741, 746 n.8 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

131. 766 F. Supp. 873 (E.D. Wash 1991).

132. 42 U.S.C. §§ 6928(d)(2)(A) & (e) (1988).

133. *White*, 766 F. Supp. at 895.

legislative history to the 1987 amendments to the Clean Water Act and the recent case law interpreting that doctrine in the context of knowing violations under other environmental enactments.¹³⁴

6. Corporate Vicarious or Respondeat Superior Liability

The “responsible corporate officer” doctrine is utilized by the government to prosecute corporate officials for the illegal actions of other company employees by virtue of their official position. The government has another arrow that it can aim at companies should it desire to prosecute a company for the actions of company agents. In the case of Mr. Law and MMI, the government pursued criminal liability against MMI under a theory of “vicarious corporate liability.”¹³⁵ In other cases, this same doctrine has been referred to as “respondeat superior” criminal liability.¹³⁶ Under both theories, the result is the same, the government seeks to impute criminal liability to the corporation as a result of a company agent’s unlawful conduct.¹³⁷

134. Hartman & DeMonaco argue that the responsible corporate officer doctrine merely defines what persons may be liable under the Clean Water Act and other environmental statutes and that the doctrine was never intended to obviate the government’s duty to prove a corporate officer’s knowledge of the offense. Hartman & DeMonaco, *supra* note 116, at 10,145.

135. Brief of Appellee, *supra* note 28, at 3. The government stated that it prosecuted MMI for “acts and failures to act” on the part of Mr. Law, and the company was prosecuted as a result of Mr. Law’s actions. *Id.* n.3. The government rejected the defendant’s argument that Mr. Law was prosecuted under the “responsible corporate officer” doctrine. From a review of the record in the case, the government’s argument is born out, as it appears that a “vicarious corporate liability” jury instruction was given but no jury instruction was given with regard to the “responsible corporate officer” doctrine in *Law*.

136. *Cincotta*, 689 F.2d at 238. *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6 (E.D. Ark. 1978). Somewhat related to this doctrine is the agency or enterprise liability theory utilized by the government to prosecute Exxon for the conduct of its agent, its wholly owned subsidiary Exxon Shipping. *See Raucher, supra* note 49, at 150-57.

137. In *Law*, the following jury instruction was given with regard to the vicarious corporate liability of MMI for the actions of Mr. Law:

A corporation may be held criminally liable for unlawful acts committed by its agents, officers or employees. A corporation is legally bound by acts and omissions of its agents that are: (1) done or made within the scope of the agent’s employment or agency relationship with the corporation; and (2) within the agent’s apparent authority to act on behalf of the corporation; and (3) if the act or omission is committed on behalf of or to the benefit of the corporation.

MMI did not challenge on appeal the validity of the "vicarious corporate liability" jury instruction. The government proffered the "vicarious corporate liability" jury instruction based upon well established case law in the Fourth Circuit and other circuits.¹³⁸ Similar jury instructions have been utilized by the government in other environmental criminal prosecutions.¹³⁹ Under the "vicarious corporate

Therefore, in order for you to find defendant, Mine Management, Inc., guilty of any count of the indictment in this case, the United States must prove, with respect to that particular count, each of the following beyond a reasonable doubt: *FIRST*—That the United States has proven each of the essential elements of the specific count, as previously explained to you, as to defendant Lewis Law; *SECOND*—That, with respect to that specific count, defendant Law was an agent, officer, or employee of defendant Mine Management, Inc.; *THIRD*—That, with respect to that specific count, Law's acts or omissions were committed within the scope of his authority or apparent authority to act on behalf of Mine Management, Inc.; and *FOURTH*—With respect to that specific count, defendant Law was acting for the benefit of the corporation.

If you find that the United States has failed to prove any one of these essential elements beyond a reasonable doubt as to any count, then you must find defendant, Mine Management, Inc. not guilty of that particular count.

(Tr. Vol VI. 157-59).

138. The government in *Law* cited to the following cases as support for the vicarious corporate liability jury instruction when it was offered in district court: *United States v. Automated Medical Lab., Inc.*, 770 F.2d 399, 406-07 (4th Cir. 1985) (false documents, conviction of corporation); *United States v. Basic Constr. Co.*, 711 F.2d 570, 572-73 (4th Cir.) (Sherman Act, anti-trust convictions) (per curiam), *cert. denied*, 464 U.S. 956 (1983); *United States v. Gold*, 743 F.2d 800, 822-23 (11th Cir. 1984) (medicare fraud, conviction of corporation), *cert. denied*, 469 U.S. 1217 (1985); *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737-38 (5th Cir. 1984) (bid rigging and mail fraud, conviction of corporation); *United States v. Richmond*, 700 F.2d 1183, 1195 (8th Cir. 1983) (false statements, conviction of corporation).

139. *See, e.g.*, *United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991) (holding that a corporation could be criminally liable for the conduct of its supervisors who acted intentionally or with plain indifference to the law in a prosecution for mail fraud and RICO resulting from the illegal operation of a landfill and transportation of medical waste), *cert. denied*, 112 S. Ct. 3029 (1992); *Little Rock Sewer Comm.*, 460 F. Supp. at 6 (affirming a conviction against the city sewer committee on five counts of "knowingly" filing a materially false statement in violation of section 309(c)(2) of the Clean Water Act since the knowledge of its agent may be imputed to the committee); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1992) (reversing the company's conviction because it may have been affected by the improper conviction of the company's agent, which it also reversed, and refusing to decide if the actions of clerical employees were sufficient to impose criminal liability on the corporation). *But see United States v. LBS Bank-New York, Inc.*, 757 F. Supp. 496 (E.D. Pa. 1990) (refusing to grant motion for acquittal for

liability” theory, to obtain a criminal conviction against a corporation, the government must prove two elements: 1) that the company agents were acting within the scope of their employment or with apparent authority; and, 2) that the company agents were acting for the benefit of the company.¹⁴⁰

With regard to the first element, “scope of employment” has been defined as those acts which a company agent has been assigned or are within the scope of the agent’s actual or apparent authority.¹⁴¹ The fact that the company agent’s acts were unlawful or contrary to company policy is not a defense.¹⁴² However, it may be a defense to a criminal prosecution of a corporation under the “vicarious corporate liability” theory that the agent was a low level functionary and, therefore, his criminal conduct should not be imputed to the company.¹⁴³

The second element requires the government to prove that the company agent was acting on behalf of the company, but this element does not require that the government actually prove that the company in fact benefitted from the illegal conduct of the company agent.¹⁴⁴ In at least one case, a corporation was able to defend itself in a criminal prosecution for knowingly violating the Connally Hot Oil Act¹⁴⁵ on the basis that the company agents committed illegal acts that were not intended to benefit the company.¹⁴⁶

bank convicted of conspiracy to defraud the government even though employee who’s conduct led to the indictment was acquitted).

140. *Automated Medical Lab.*, 770 F.2d at 406.

141. *Id.* at 407.

142. *Id.*

143. See *Little Rock Sewer Comm.*, 460 F. Supp. at 6 (stating, in dicta, that the court would have trouble with imputed criminal liability to a business on the basis of a low echelon employee). *But see* *United States v. Hanger One, Inc.*, 563 F.2d 1155 (5th Cir. 1977) (rejecting district court decision that conduct of low level employee may not be used to impute criminal liability to the company).

144. See *Automated Medical Lab.*, 770 F.2d at 407. Note also that the court of appeals in *Automated Medical Lab.* recognized that a company agent’s conduct could inure to his own benefit even though it also benefits the company. The government does not have to prove that the company agent was acting exclusively to benefit the company. *Id.* at 407; see also *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985).

145. 15 U.S.C. §§ 715-715l (1988).

146. See *Standard Oil Company v. United States*, 307 F.2d 120 (5th Cir. 1962); see

As will be discussed in part VI of this Article, one of the ways a company can minimize its criminal liability for environmental offenses is to perform an environmental audit and establish an environmental compliance program. Utilization of these types of programs may help define the scope of employment for company employees and establish protocols within the company for the handling of potential environmental violations. Establishment of this type of program may help a company minimize its criminal exposure under the corporate vicarious or respondeat superior liability doctrine and therefore avoid the dire consequences suffered by Mr. Law and MMI as a result of their noncompliance with the Clean Water Act. The next section of the Article turns to an examination of that prosecution for a knowing discharge without a permit in violation of the Clean Water Act.

IV. *UNITED STATES V. LAW*

On November 15, 1991, Mr. Lewis R. Law and MMI were found guilty on sixteen counts of violating the Clean Water Act.¹⁴⁷ Mr. Law was personally sentenced to twenty-four months in prison and fined \$80,000 (\$5,000 per count). Defendant MMI was also fined \$80,000.¹⁴⁸ Mr. Law and MMI both appealed their convictions to the United States Court of Appeals for the Fourth Circuit raising three issues: the district court improperly instructed the jury that the source of the water pollution was immaterial; the government failed to prove an essential element in the case, that is, that the water pollution emanated from the gob pile; and the district court erred in its evidentiary rulings that denied the defendants an opportunity to introduce evidence of New River Company's practice of concealing environmental problems from prospective purchasers. The court of appeals considered the first and second issues as one issue in summary fashion, and devoted one paragraph to the third argument in a per curiam opinion upholding

also *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977), *interpreted in*, Kuruc, *supra* note 44, at 107 n.124 (the district court acquitted the corporation because the individual's conduct did not benefit the corporation).

147. *United States v. Law*, 979 F.2d 977, 978 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1844 (1993).

148. *Id.*

the conviction.¹⁴⁹ Scott and Bryant have more than adequately set forth the facts underlying the convictions of Mr. Law and MMI and they will not be repeated here.¹⁵⁰

In their brief, Mr. Law and MMI relied upon *National Wildlife Federation v. Consumers Power Co.*,¹⁵¹ *National Wildlife Federation v. Gorsuch*,¹⁵² and *Appalachian Power Co. v. Train*,¹⁵³ in support of their argument that under section 502(12) of the Clean Water Act, they could be found criminally liable only if the government proved that they had added a substance to the waters which resulted in a discharge of pollutants into the creeks.¹⁵⁴ In support of this assertion, Mr. Law and MMI argued that: the New River Company, not MMI, created the gob pile, the ponds, and the water pollution discharges at the site; the New River Company concealed the discharges from Mr. Law at the time of sale; and, based upon real property law, the New River Company still owned the gob pile, and therefore, the New River Company, not MMI, was liable for the water pollution discharges.¹⁵⁵ Alternatively, Mr. Law and MMI argued that the water pollution discharging into the creeks did not emanate from the gob pile on the Summerlee property. Rather, it resulted from a discharge of water from

149. *Id.*

150. See Scott & Bryant, *supra* note 1, at 673-77.

151. 862 F.2d 580 (6th Cir. 1988).

152. 693 F.2d 156 (D.C. Cir. 1982).

153. 545 F.2d 1351 (4th Cir. 1976).

154. Brief of Appellants at 23-31, *United States v. Law*, 979 F.2d 977 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1844 (1993).

155. Mr. Law and MMI introduced evidence to show that New River Company, a subsidiary company of Chesapeake & Ohio Railway Company, had operated several mines, a coal preparation plant, and rail siding on the Summerlee property since the 1930s. J.A., *supra* note 8, at 57, 214. As a part of the operations, New River created a seventy acre refuse or gob pile, which rose to a height of one hundred feet in some parts. *Id.* at 57, 65-66, 212, 255. New River Company concealed the water treatment problem from Mr. Law at the time of purchase based on company policy at the time and the fact that the treatment ponds were not illustrated on a map. *Id.* at 256-57, 84-87. Mr. Law specifically denied that New River Company or anyone with the State ever advised him about the water treatment problems prior to his purchase of the property. *Id.* at 328-33. With regard to the real property issue, Mr. Law and MMI offered jury instruction number 15 which would have instructed the jury that even if the gob pile was the source of the pollutants, the defendants would not be liable because the defendants only owned the surface of the property. Brief of Appellants, *supra* note 154, at 32.

mining in the Eagle coal seam, a known acid producing seam, on adjacent property that flowed under the gob piles, through the ponds on this property and into the creeks.¹⁵⁶ The defense in this case may be summarized as “finger pointing”, that is, the defendants were not responsible for the problem, someone else was responsible.¹⁵⁷ It should be noted that Mr. Law and MMI, in their appellate brief, conceded that the discharge of water from the ponds was polluted within the definitions of the Clean Water Act, and, therefore, they did not attempt to rebut the government’s evidence that the discharge required a NPDES permit.¹⁵⁸

Finally Mr. Law and MMI argued that the district court erred in several evidentiary rulings including its refusal to allow cross-examination of Mr. Briguglio, New River Company’s Director of Engineering, and direct testimony of Don Reedy, a former employee of New River Company, concerning New River Company’s practice of concealing environmental problems at various sites when the company attempted to sell those properties.¹⁵⁹ Mr. Law and MMI argued that the government spent “considerable time and effort trying to prove what defendant knew in 1980” and, therefore, they should be allowed to rebut

156. Mr. Law had two expert witnesses, George Hall, Ph. D., a geo-technical engineer, and John James, another geo-technical engineer, who both studied the gob pile on the Summerlee property and offered testimony that the acid mine drainage discharging into Wolf and Arbuckle Creeks was not resulting from the gob pile on the Summerlee property; rather it resulted from a discharge of water from mining in the Eagle coal seam on adjacent property that flowed under the gob piles and into the creeks. J.A., *supra* note 8, at 275-86, 289-90. Based upon this testimony, the defendants offered instructions numbers 9A, 10, and 11 which would have instructed the jury that in order to be liable, the jury had to find that the defendants generated the pollutants in the water. *Id.* at 491-93. These instructions were all refused by the district court.

157. This defense is not entirely without merit. The State of West Virginia and the town of Fayetteville currently have four consolidated civil actions pending in the Circuit Court of Fayette County against Mr. Law and MMI, as well as against Mr Law’s predecessor in title, the New River Company, now known as the Mountain Laurel Resources Company and its parent company, Cox Minerals, Inc. *Town of Fayetteville v. Mine Management, Inc.*, Nos. 93-C-323-H, 91-C-194, 88-C-261, 84-C-162 (Cir. Ct. Fayette County, W. Va.). The plaintiffs argue that, as a matter of law, parties in addition to Mr. Law and MMI are liable for the acid mine drainage properties at the site. *Id.*

158. Brief of Appellants, *supra* note 154, at 11.

159. Brief of Appellants, *supra* note 154, at 36-37.

that testimony through evidence of New River Company's policy of concealment.

To counter the defendants' arguments on appeal, the government argued that the evidence presented at trial supported the fact that MMI owned the surface of the property which included the ponds that discharged into the creeks, and, therefore, the ownership of the gob pile at the Summerlee site was irrelevant.¹⁶⁰ The government further distinguished *Consumers Power Co.*, *Gorsuch*, and *Train* by arguing that unlike those cases, where courts properly concluded that no pollutant had been added to the water, in the defendants' case it was indisputable that pollutants had been added to the water and the water treatment system consisting of settlement ponds, pumps, and a mechanism to dispense soda ash, was specifically designed to treat the water for this pollution.¹⁶¹ The government also defended the district court's decision to instruct the jury that the source of the water pollution was not a defense because there was clearly an illegal point source discharge of pollutants into the creeks that occurred from the ponds on the defendants' property.¹⁶²

The government countered the defendants' expert testimony concerning the origination of the pond's polluted discharge through its

160. Brief of Appellee, *supra* note 28, at 39-41. In its statement of facts, the government did set forth the testimony of New River Company's Mr. Briguglio that the deed included the conveyance of the gob pile, as the major purpose of the transaction was to convey the gob pile to MMI so that Mr. Law could reprocess the coal in the gob pile. *Id.* at 11-12.

161. Brief of Appellee, *supra* note 28, at 27-39. The government also argued that to accept the defendants' generator argument could lead to absurd results such as the conclusion that a sewage treatment plant would not need a NPDES permit because it was merely discharging polluted water generated by others. *Id.* at 28.

162. The district court instructed the jury regarding the source of the water pollutants as follows:

If you so find, you are further instructed that it is not a defense to the charge that the water discharged from the point source came from some other place or places before its discharge from the point source. It is not a defense to this action that some or all of the pollutants discharged from a point source originated at places not on the defendants' property. This is so because the offense consists of the knowing discharge of a pollutant from a point source into a water of the United States.

J.A., *supra* note 8, at 490.

own expert, John Michalovic, a chemist with Calspan Corporation in Buffalo, New York, who studied the refuse pile under contract with the United States Department of Interior, Office of Surface Mining. Mr. Michalovic testified that it was his conclusion that the gob pile did produce acid mine drainage with high levels of iron and manganese.¹⁶³ Based upon this expert testimony, the government argued that the gob pile on the property, and not some foreign source, caused the polluted discharge from the ponds on the property.

To dispel the defendants' arguments that Mr. Law was not aware of the discharges at the site, the government went to great lengths at the trial to prove that Mr. Law was indeed aware of the water pollution discharges at the time he acquired the property in April, 1980, and at subsequent times thereafter.¹⁶⁴ The government's evidence of Mr. Law's knowledge may be summarized as follows:

- 1) Mr. Law, through Mine Management, Inc. leased the Summerlee property from New River Company in 1977 to collect coal fines from slurry ponds, and, therefore, he was aware of the water treatment problems at the site prior to his purchase of the property;
- 2) In April, 1980 Mine Management, Inc. purchased the Summerlee property constituting 241 acres of surface, including a gob pile, on Wolf Creek, from New River Company;
- 3) While New River Company owned the property it had a NPDES permit and it pumped water from one pond on Wolf Creek to another pond on Arbuckle Creek, treated the water/acid mine drainage with soda ash and then discharged the water into Arbuckle Creek;
- 4) Louis Briguglio, the former Director of Engineering with New River Company, testified at trial that he warned Mr. Law prior to Mine Management, Inc. purchasing the property that there was severe acid mine drainage problems at the site and that the company paid \$5,000.00 per week to treat the discharge. He further testified that Mr. Law was aware of the water treatment problems and that Mr. Law had advised him that he believed that he could find a lower costing method of treatment;

163. *Id.* at 190-92. Mr. Michalovic's study was unrelated to the defendants' criminal prosecution as it was published in 1983. *Id.* His conclusions were based upon samples taken from seeps in the gob pile and a laboratory test that he developed to replicate the leaching conditions of the gob pile. *Id.* at 202-210.

164. This testimony was summarized in the government's statement of facts. Brief of Appellee, *supra* note 28, at 3-23.

5) DNR officials testified that they advised Mr. Law that the Summerlee property had severe water problems on the site immediately after he purchased the property. Mr. Law met with inspectors on the site, and he stated that he would get an operator on the site who would get a NPDES permit;

6) Several operators on the property for the next few years applied for and obtained NPDES permits. In 1984, the State requested that Mine Management, Inc. include its name with the operator on the application for a NPDES permit. Mine Management, Inc. declined this invitation;

7) After 1984, no NPDES permit was ever obtained for the Summerlee property and the State took a number of civil and criminal enforcement measures: a consent order was entered into; it obtained criminal warrants in magistrate court; it applied for an injunction; and, it filed an action seeking daily fines.¹⁶⁵

Based upon this overwhelming testimony, the government argued that Mr. Law was aware of the discharges from the ponds on MMI's property. It argued this testimony had been properly admitted concerning the defendants' knowledge and the jury had been properly instructed concerning the defendants' liability for those "knowing" discharges. Finally, the government argued that the evidentiary rulings, holding as irrelevant the cross-examination of Mr. Briguglio and the direct testimony of Mr. Don Reedy concerning New River Company's alleged policy of concealing environmental problems, were proper under the Federal Rules of Evidence, and it argued that these rulings should not serve as a basis for a reversal.¹⁶⁶

With regard to the first and second issues raised in the defendants' appeal, the source of the pollutants and whether or not they emanated from the gob pile, the court of appeals agreed with the defendants that the source of the pollution may be relevant and that "the trial court's jury instructions did not state the law with strict accuracy."¹⁶⁷ However, the court went on to conclude that the error was harmless because the "proper focus is upon the discharge from the ponds into

165. J.A., *supra* note 8, at 69-71, 72-73, 111-19, 127-29, 183-85, 297, 303, 311-12, 502-09, 514, 528-30, 535.

166. Brief of Appellee, *supra* note 28, at 41-43.

167. *Law*, 979 F.2d at 979.

Wolf and Arbuckle Creeks.”¹⁶⁸ The court specifically rejected the defendants’ arguments that only the generator of the pollutants may be held criminally liable under the Clean Water Act because the defendants had on their property a “water treatment system [that] collected runoff and leachate subject to an NPDES permit under the CWA”¹⁶⁹

Since the court of appeals decided as a matter of law that Mr. Law and MMI were required to obtain a NPDES permit for their point source discharges into Arbuckle and Wolf Creeks, it ultimately concluded that the “origin of pollutants in the treatment and collection ponds is therefore irrelevant.”¹⁷⁰ Finally, the court concluded that the defendants’ arguments that they should have been allowed to introduce evidence to show the New River Company’s policy of concealing environmental pollution from prospective purchasers was irrelevant because “the relevant *mens rea* issue was Law’s knowledge as of March, 1987, that the ponds were discharging pollutants into the creeks without, or in violation of, a NPDES permit.”¹⁷¹ Without so stating, the court obviously concluded that the government had met its burden of proof to establish knowledge in this case.

It is not surprising that the court upheld the convictions of Mr. Law and MMI, given the fact that the defendants’ brief conceded that a point source discharge of acid mine drainage occurred at the Summerlee property, and given the government’s clear evidence that the defendants knew of the discharges as alleged in the indictment. The court of appeal’s statement that “the relevant *mens rea* issue was Law’s knowledge as of March, 1987 . . . “ reflects on the knowledge issue discussed above in part III.B.3. of this Article. However, the issue of the defendants’ knowledge was not raised or resolved in *Law*. The court’s *mens rea* statement in *Law*, coupled with the decision in *United States v. Ellen*,¹⁷² indicates that the Fourth Circuit recognizes

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 980. This holding is consistent with the knowledge instruction given by the district court.

172. 961 F.2d 462 (4th Cir. 1992).

that a “knowing” discharge in violation of section 309(c)(2) requires some *mens rea* or proof that the defendant knew that the discharge was done without a permit in violation of the Clean Water Act.

In this case, the district court’s jury instruction concerning knowledge addressed the issue as follows:

For the purpose of the Clean Water Act, all the Government must prove is that the defendants knew the general character and nature of the materials they were discharging. The Government does not have to prove that the defendants knew the legal status of the materials or the status of the receiving waters. The Government does not have to prove that the defendants knew that they were violating the law.

Further, to satisfy the element of the offense that the defendant acted knowingly, all that the United States must prove is that the defendant knew at the times of the discharges alleged in the indictment is that he was doing so without a permit. You are instructed that the defendants’ knowledge of discharges at the time the property was purchased is simply not relevant.¹⁷³

The district court instructed the jury that the government was required to prove the defendants knew that the discharges were done without permits, but it also instructed the jury that the government did not have “to prove that the defendants knew that they were violating the law.” In light of the foregoing discussion of the knowledge component of the Clean Water Act in part III.B.3., it may be questioned whether this jury instruction is internally inconsistent, or at a minimum would be improper, as it may confuse the jury since the government must prove that the defendant knowingly violated each element of the offense. Furthermore, if the analysis under *Liparota* applies to criminal prosecutions for knowing discharges in violation of the Clean Water Act, then this portion of the instruction would appear to be erroneous. Unfortunately, the issue was not raised at trial or on appeal and, therefore, the court of appeals was not called upon to consider that issue. It will remain for future cases to definitively resolve the government’s burden of proof in this regard.

173. J.A., *supra* note 8, at 490.

Also problematic in the decision is the issue of the source of the pollutants. The court of appeals was troubled by the jury instruction concerning the source of the pollutants offered in Mr. Law's case, but it ultimately concluded the error was harmless in this case.¹⁷⁴ This issue has the potential to repeat itself under myriad factual patterns and pose many legal problems for coal operators and owners of coal property in the future. For instance, imagine that an abandoned underground mine bursts open and acid mine drainage is released across two tracts of land onto a third tract where the polluted water discharges into a creek? Within a matter of days the water forms a channel in the ground and an illegal point source discharge exists. Would the State begin civil or criminal enforcement actions against the owner of the third tract of property who owns the point source discharge but who has no control or ownership of the abandoned coal mine? Would it make a difference if the owner of the third tract was an out of state corporation that owned thousands of acres within West Virginia and had no knowledge of the unexpected discharge on its property? Could the United States Attorney's Office indict and convict the owner of the property under this scenario?

Under the jury instructions given in the case of Mr. Law and MMI, the law would appear to be that the owner of the third tract could be indicted and convicted under the above referred hypothetical, given the irrelevance of the source of pollutants. Such an anomalous result defies common sense, however, and one would hope that the state and federal governments would not prosecute an innocent owner of property under this type of factual circumstance.¹⁷⁵

This hypothetical also serves to illustrate the oversimplification of the Fourth Circuit's decision in *Law* as indicated in Scott and Bryant's

174. The jury instruction on the irrelevance of the origin of pollutants is set forth *supra* note 162.

175. The author raised this question with Mr. Bryant of the United States Attorney's Office for the Southern District of West Virginia and he advised that similar questions were raised by the panel when Mr. Law's case was argued before the court of appeals. Mr. Bryant responded that while a criminal prosecution was possible under the Clean Water Act, such a criminal prosecution was doubtful given prosecutorial discretion. Interview with S. Benjamin Bryant, Assistant United States Attorney, Southern District of West Virginia (July 1992).

article. In the coal industry, with regard to an individual coal mining operation, it is not uncommon to have a variety of competing legal interests regarding the ownership and control of a given tract of land. In many cases, the mineral and surface estates have been severed, the owner of the mineral interest has leased or subcontracted to an operator the right to mine the property, and the surface owner may have leased or contracted with a party to timber the land. Who is liable for a surface discharge without a permit resulting from an underground coal mining operation when there are four companies that have some legal interest and control regarding the property? In the Preston County case regarding F&M, the State apparently decided to follow a simplified understanding of *Law* and initially attempted to order all parties that had some control over the surface to remediate the water pollution.

In *Law*, it was fortuitous for the government that MMI was the surface owner of the property, and arguably, the water pollution was generated as a result of water leaching through the gob pile on the surface of the property. The underlying facts of the case made for a simple criminal prosecution. In Scott and Bryant's article, the authors recognize that the surface and mineral estate may have been severed and suggest that an underground operator can be prosecuted along with the surface owner as an aider and abettor.¹⁷⁶ To the extent that the United States Attorney's Office attempts to enforce the criminal provisions of the Clean Water Act against innocent parties who have no knowledge or control over the discharges, it may be predicted that they will be met with numerous objections that the Clean Water Act was not intended by Congress to prosecute such innocent property owners.

Finally, one defense that may have been available to Mr. Law and MMI that was not asserted by the defendants was whether or not the Abandoned Mine Lands (AML) program under SMCRA¹⁷⁷ negated

176. See Scott & Bryant, *supra* note 1, at 679-80 (24-25).

177. The Abandoned Mine Lands program (hereinafter AML) was enacted as a part of SMCRA, 30 U.S.C. §§ 1231-1243 (1988 & Supp. 1991), to finance the restoration and clean-up of abandoned coal mine sites. Under the AML program, coal operators are required to pay per ton reclamation fees. 30 U.S.C. § 1232 (1988). The monies are administered

any of the defendant's liabilities under the Clean Water Act. The AML program was designed to reclaim inactive coal mining operations when there is no "continuing reclamation responsibility under state or other federal laws."¹⁷⁸ Prior to the trial of Mr. Law and MMI, the State had evaluated the Summerlee site and determined that it was eligible for AML funds because no one had operated on the property since New River Coal Company in 1978.¹⁷⁹ Pursuant to that determination, the State requested \$4.2 Million from the Office of Surface Mining to remediate the Summerlee site. After the conviction of Mr. Law and MMI, the Office of Surface Mining requested the State to address the convictions and whether or not they had any bearing on the Summerlee site's eligibility for AML monies. By letter dated August 4, 1992, the West Virginia Attorney General's Office stated that the criminal convictions did not alter their opinion that the site was eligible for AML monies because: "Inasmuch as there is no continuing reclamation responsibility under the Federal Water Pollution Control Act, I am still of the opinion that funds from the State AML program may be utilized to reclaim the refuse pile near Summerlee."¹⁸⁰ By letter dated August 16, 1992, the Office of Surface Mining approved inclusion of the Summerlee site in West Virginia's Eleventh AML Construction Grant and allocated \$4.2 Million for remediation of the site.

On the one hand, the United States Attorney's Office prosecuted Mr. Law and MMI for water pollution at the Summerlee site, claiming

through the Secretary of Interior, Office of Surface Mining, and distributed to the states through a grant program. 30 U.S.C. § 1235 (1988). Pursuant to the AML program, monies are only available to reclaim property on those sites where there is no "continuing reclamation responsibility under State or other Federal laws." 30 U.S.C. § 1234 (1988).

178. 30 U.S.C. § 1234 (1988).

179. It should be noted that the AML program was originally established to only expend funds to remediate mining operations that had ceased prior to Aug. 3, 1977. Pub. L. No. 101-508, 104 Stat. 1388 (1990) amended the AML program effective Oct. 1, 1991 to allow monies to be expended on sites that became inactive between Aug. 3, 1977 and Jan. 21, 1981. 30 U.S.C. § 1232(g)(4)(B)(i) (1988). Furthermore, the AML program was amended to allow the expenditure of monies to replace water supplies if the adverse effect on the water supplies was a result of mining operations that occurred predominantly prior to Aug. 3, 1977. 30 U.S.C. § 1233(b)(2) (Supp. 1991).

180. Letter from Joseph A. Lazell, Senior Assistant Attorney General, to Richard Darnell, Abandoned Mine Lands and Reclamation, West Virginia Division of Environmental Protection (Aug. 4, 1992) (on file with author).

they were criminally liable for the acid mine drainage. On the other hand, another branch of the federal government, the Office of Surface Mining, determined that no one is liable for remediation of the site and therefore AML funds may be used at that site. Obviously these positions are inconsistent and perhaps Mr. Law and MMI, had they been aware of the state and federal governments' position that AML funds were available to remediate the site, could have defended their prosecution under the Clean Water Act on the basis that the State had determined that the site was eligible for AML funds and therefore *a fortiori*, the defendants had no liability as alleged in the indictment.

On more than one occasion it has been suggested that Mr. Law was criminally prosecuted because he did not take his potential liabilities under the Clean Water Act seriously. As will be discussed in part VI of this Article, a company that takes its environmental liabilities seriously and attempts to comply in good faith, should not ordinarily be faced with a criminal indictment under the Clean Water Act or other environmental statutes. The facts in *Law* indicate that the defendants had ample opportunity to work with the State and come into compliance with their obligations under the Clean Water Act. Unfortunately, the defendants did not work with the State and now they are paying a rather severe price. Before turning to the development of strategies to minimize criminal liability in the coal fields, the next section examines a recent decision that could have tremendous impact on civil liability, and ultimately criminal liability, within the coal fields.

V. *AMERICAN MINING CONGRESS V. EPA*

On November 16, 1990, the EPA published its final NPDES Permit Application Regulations for Storm Water Discharges.¹⁸¹ These storm water regulations arose out of 1987 amendments to the Clean Water Act that required EPA to promulgate regulations to control storm water run-off associated with industrial activity.¹⁸² The storm

181. 55 Fed. Reg. 47,990 (1990) (to be codified at 40 C.F.R. § 122.26).

182. Section 402(p)(4)(A) of the Clean Water Act required EPA to promulgate storm water discharge regulations before Feb. 4, 1989. 33 U.S.C. § 1342(p)(4)(A) (1988). For fur-

water regulations are very broad in their scope, and, for the first time, EPA or the equivalent state enforcement agency will have jurisdiction to regulate water discharges associated with inactive or abandoned coal mining operations.¹⁸³

The coal industry challenged the storm water regulations on several grounds. However, the United States Court of Appeals for the Ninth Circuit upheld EPA's regulatory decision to include active and inactive coal mines within the definition of industrial activity subject to the new storm water regulations.¹⁸⁴ The storm water regulations for inactive coal mining operations became effective on October 1, 1992, and therefore, the decision in *American Mining Congress* will have an immediate impact on the regulation of abandoned coal mining operations in West Virginia and other states, and it may be anticipated that the impact of this decision will be felt in the criminal arena in the years to come as EPA and the states develop enforcement strategies.¹⁸⁵

For years, environmentalists have complained that the EPA was not doing enough to regulate water pollution, and more particularly, acid mine drainage, that was commonly associated with abandoned coal mining operations.¹⁸⁶ One of their primary concerns was EPA's

ther discussion of the background of these regulations, see Stephen G. Allen, *Special Legal Problems with other Environmental Laws under SMCRA*, 7 J. MIN. L. & POL'Y 129 (1991-1992); Thomas C. Reed, *Some Recent Developments in the Water Resource Protection Obligations of the Coal Industry: Can Coal and Water Mix?*, 12 E. MIN. L. INST. 13-1 (1991).

183. The regulations will also have some impact on active operations in areas not currently regulated by SMCRA. For instance, haul roads are currently exempt under the definition of disturbed area for the collection and treatment of surface water. 30 C.F.R. § 816.46(a)(2)(i) (1992). EPA's new regulatory program may require active operations to collect and treat surface water runoff from haul roads and other areas currently not regulated under SMCRA.

184. *American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992).

185. Dr. Eli McCoy, Chief of DEP's Water Resources Section was quoted as stating that the Ninth Circuit's decision in *American Mining Congress* "could be the most significant development for West Virginia streams in a long time." He also stated that he intended to use the decision "to require permits from owners of old gob piles and poorly reclaimed mines that are creating storm runoff pollution problems." Rich Steelhammer, *Opinion May Assist in Cleanup of Streams*, CHARLESTON GAZETTE, Nov. 12, 1992, at 1B, 1B. Finally, Dr. McCoy stated that he did not envision his agency moving against current landowners who had no role in problem-causing mining activity. *Id.* at 5B.

186. See, e.g., Patrick C. McGinley & Thomas Sweet, *Acid Coal Mine Drainage: Past*

decision not to regulate point source discharges associated with inactive or abandoned coal mining operations.¹⁸⁷ The environmentalists were equally concerned about the lack of regulation of non-point source discharges associated with inactive or abandoned coal mining operations, but, prior to 1987, the regulation of non-point source discharges was primarily left to the states.¹⁸⁸ While it is indisputable that water drainage from abandoned coal mining operations creates water pollution problems,¹⁸⁹ it may be questioned whether it is appropriate to expect coal operators and property owners of abandoned coal mining operations to remediate those sites several decades after the problems were created. It seems particularly onerous to require parties to remediate the problems under the threat of civil or criminal liability. To fully understand this issue, an examination of EPA's storm water regulations and the Ninth Circuit decision upholding that decision is in order.

EPA's definition of "storm water discharge associated with industrial activity" contains the following critical elements:

- 1) both active and inactive mining operations are included;
- 2) coal mining operations that have had their performance bond released under SMCRA are excluded;
- 3) inactive coal mining operations that were reclaimed under SMCRA's Initial Program Regulations or state regulations are included;
- 4) inactive coal mining operations are included only if storm water actually comes into contact with material or waste products associated with coal mining operations; and,
- 5) inactive coal mining operations are included only if there is an identifiable owner/operator.¹⁹⁰

Pollution and Current Regulation, 17 DUQ. L. REV. 67 (1978-79); Michael D. Bryan, Note, *Toward Strict Liability for Abandoned Mine Drainage*, 71 KY. L.J. 193 (1982-83); Dorinda G. Dallmeyer, Note, *A New Legislative Approach for the Control of Acid Mine Drainage*, 17 GA. L. REV. 969 (1983).

187. See, e.g., 40 C.F.R. §§ 434.30, 434.40, 434.50 (1992).

188. 33 U.S.C. § 1288 (1988).

189. In Aug. 1989, the Division of Water Resources prepared a Non-point Source Assessment for West Virginia that identified 3,973 abandoned mine land problem areas that had created problems in 96 watersheds, affecting the water quality in 484 streams. See Scott & Bryant, *supra* note 1, at 670 n.41.

190. "Storm water discharge associated with industrial activity" is defined as follows:

Under this regulation, every active and inactive coal mining site that has storm water that comes into contact with any overburden, coal, slag, gob pile, or any other waste products will have to obtain a storm water permit. The only exception will be for those coal mines that have received bond release under SMCRA or a state equivalent program.

The court of appeals in *American Mining Congress*, quickly dispensed with the coal industry's objections to EPA's storm water regulations and their effect on inactive or abandoned coal mining operations. The coal industry raised several objections to EPA's storm water regulations of inactive coal mining operations including: 1) the regulations were inconsistent with the Clean Water Act and its legislative history; 2) the regulations were inconsistent with SMCRA and the AML program; 3) the regulations were inconsistent with EPA's past practice; 4) EPA was arbitrary in failing to exclude coal mining operations under SMCRA's interim regulatory program and pre-SMCRA state laws; 5) EPA's regulations apply in an illegal retroactive manner; and, 6) EPA's promulgation of the regulations was improper and unlawful.¹⁹¹

Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 C.F.R. 434.11(l) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, by-products or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim).

40 C.F.R. § 122.26(b)(14)(iii) (1992).

191. *American Mining Congress v. EPA*, 965 F.2d 759, 764-72 (9th Cir. 1992).

The court of appeals reviewed the industry's objections based upon the Clean Water Act's legislative history and found the argument lacking since nothing expressly indicated that Congress intended inactive coal mining operations to be exempt.¹⁹² Given the lack of legislative history, the court determined that EPA's decision to regulate inactive coal mining operations was reasonable and consistent with the Clean Water Act and, therefore, the regulatory action was upheld.

The coal industry also objected to the storm water regulations on the basis that they were inconsistent with the AML program under SMCRA.¹⁹³ The court of appeals dispensed with this argument by stating that the AML program does not require permits, nor does the AML program regulate discharges from coal mining operations. Therefore, the court saw no inconsistency between the AML program under SMCRA and EPA's storm water regulatory program and EPA's decision to regulate inactive coal mining operations.¹⁹⁴ Contrary to the court's ruling, the AML program and EPA's storm water regulatory program do seem to be at cross purposes with regard to inactive coal mining operations. The AML program was designed to reclaim inactive coal mining operations when there is no "continuing reclamation responsibility under State or other Federal laws."¹⁹⁵ EPA's storm water regulations establish a new legal responsibility on the part of property owners or coal operators who own inactive coal mining operations to take action under the Clean Water Act to eliminate surface run-off. That liability may be perceived as a liability that precludes eligibility for AML funds.¹⁹⁶

192. *Id.* at 765.

193. For a discussion of the AML program, see *supra* note 177.

194. *American Mining Congress*, 965 F.2d at 767.

195. 30 U.S.C. § 1234 (1988).

196. As discussed in part IV, the fact that Mr. Law and MMI were held liable under the Clean Water Act did not preclude the Attorney General's office from issuing its opinion that there were no continuing reclamation responsibilities at the Summerlee site and therefore the site was declared eligible under the AML program. Mr. Law and MMI were prosecuted in advance of the storm water regulatory program becoming effective. It will remain to be seen whether this new legal obligation will block some properties from being declared eligible under the AML program.

The court of appeals also dismissed the coal industry's argument that the regulations were invalid because they imposed a retroactive obligation on coal operators or owners of coal lands. The court concluded that the regulations did not act in a retroactive manner because they regulate future discharges of contaminated storm water.¹⁹⁷ The court did concede that: "[t]he rule may frustrate the economic expectations of some inactive mine owners, who may need to install treatment systems or implement storm water management practices in order to comply with the permit requirements. But regulations are not retroactive merely because they require a change in existing practices."¹⁹⁸ The court also noted that the regulations "may reduce the financial attractiveness of mine ownership."¹⁹⁹ This statement seems a matter of understatement as it comes too late for an owner or operator of inactive coal mining operations to divest himself of the property now that the storm water regulations are in effect.

In West Virginia, DEP has worked with the coal industry to fashion a permit application to register inactive coal mining operations under the storm water regulations. Many questions now face DEP and the coal industry as EPA and the State proceed for the first time to regulate storm water discharges from inactive mining operations. One of the first practical problems arose as owners of large tracts of land attempted to file an application for several thousands of acres, and they were unable to identify with specificity all of the inactive mines on their property and all storm water discharges. It may be expected that the regulation of storm water discharges of inactive coal mining operations will continue to develop in the future.

Inactive mine sites at several locations may be in for major changes, however, because for the first time coal operators and owners of coal property will have some direct responsibility to develop pollution prevention plans for storm water that comes into contact with contaminated material. That means every gob pile, abandoned deep mine, and abandoned surface mine will have to be analyzed to determine the potential water pollution problems and what corrective action may be

197. *American Mining Congress*, 965 F.2d at 796.

198. *Id.* at 770.

199. *Id.* at 769.

necessary. As the storm water permit process develops, extensive documentation will have to be submitted to the State along with periodic water monitoring reports. It may be anticipated that significant sums of money will have to be spent by some coal operators and owners of coal property to come into compliance with the storm water regulations. Furthermore, this will all be done under the threat of civil and criminal enforcement action for violating the Clean Water Act. While it may be premature at this date for the state or federal government to take criminal enforcement action on the basis of noncompliance with the storm water regulatory program, it may be anticipated that at some point in the future, criminal enforcement action will be taken against coal operators or owners of coal property for noncompliance. This potential for future civil and criminal enforcement actions should motivate coal operators and owners of coal property to become more aware of their potential liabilities under the Clean Water Act. The next section focuses on what a company can do to better understand and minimize its potential liabilities in this regard.

VI. RECOMMENDATIONS FOR COMPLIANCE WITH THE CLEAN WATER ACT AND OTHER TACTICS TO MINIMIZE CRIMINAL LIABILITY IN THE COAL FIELDS

This final section will focus on what operators and owners of coal property within the coal industry can do to ensure compliance with the Clean Water Act. In addition, recommendations are made regarding what action a company may want to take in the event that it finds itself the target of a criminal investigation for violations of the Clean Water Act. Unfortunately, many companies still have the attitude that they have no need to be concerned with the criminal provisions of environmental statutes as the government only prosecutes the truly bad actors such as the “midnight dumpers.” In fact, a review of the defendants prosecuted criminally by the government reads like a “who’s who” of Fortune 500 companies, and their prosecutions have been for a wide variety of activities.²⁰⁰ While relatively few criminal prosecu-

200. See *infra* app. A; see also Block, *supra* note 45, at 36 (listing major corporations prosecuted for environmental violations).

tions for environmental violations have been filed by the government against the coal industry, the clear message in Scott and Bryant's article is that the prosecutions of Mr. Law and MMI are but the first in a series. Therefore, the coal industry needs to recognize the wake up call and realize that coal operators and owners of coal property will not be immune from criminal prosecutions in the future.

The first recommendation regarding compliance with the Clean Water Act, other environmental statutes, and the new storm water regulations is for a company to become familiar with those statutes and attempt to understand their requirements. It has been estimated that less than five percent of the Fortune 500 companies have an adequate understanding of environmental, health, and safety laws.²⁰¹ To achieve this goal, management can meet with state regulatory agencies and attend environmental seminars which are oriented to helping management become better aware of its legal responsibilities under the myriad of environmental enactments. Had Mr. Law and MMI become more familiar with the Clean Water Act and the AML program, they might have arranged in advance of their criminal prosecution for the State to take action to remediate the Summerlee property and never have been indicted for the acid mine drainage problems.²⁰²

The recent civil prosecutions by the State against Rayle Coal Company, Cat Run Coal Company, Donald Frazee, and Inter-State Lumber Company should also indicate that had those companies been more aware of the relevant environmental statutes, they may have not been targeted for enforcement action. For instance, Rayle Coal Company could have made an inquiry into the types of liabilities on the ground at the Ohio County site prior to purchasing the property from Valley Camp Coal Company. Had Rayle Coal company been fully aware of the water pollution problems at the site, that liability could

201. *Roundtable-Managing the Environmental Risks in Acquisition*, MERGERS & ACQUISITIONS, July/Aug. 1989, at 28, 40, quoted in Stephen M. Wheeler & Edward Z. Fox, *Avoiding Environmental Liabilities: A Primer for Business*, 23 ARIZ. ST. L.J. 483, 495 (1991).

202. It was recently announced that AML monies were going to be earmarked specifically for acid mine drainage remediation projects. Coal operators and owners of coal property would be wise to investigate their own property to determine if AML funds may be expended to remediate their water pollution problems.

have been taken into account during the acquisition process. Likewise, Cat Run Coal Company and other lessors or contractors of coal mining property are now on notice, in light of DEP's enforcement action in Preston County, that third parties may be held accountable for water pollution problems at a given site. Prudent coal operators and owners of coal property who are knowledgeable of this fact may want to add additional language in their contracts or leases to require bonding and other indemnification for water pollution problems.²⁰³

The second recommendation to minimize future liability is to conduct an environmental audit²⁰⁴ of the company's operations to determine the full ramifications of the Clean Water Act, other environmental statutes and the new storm water regulations on its operations. Once an environmental audit has been completed, a company can begin to assess the full ramifications of the Clean Water Act, other environmental statutes, and the storm water regulatory program, and determine what, if any, further action it may need to take to ensure compliance with those laws. In addition to performing an environmental audit, it is recommended that each company develop an environmental compliance program. The parameters of the environmental audit and compliance program need to be further examined to determine how those efforts can help avoid civil and criminal liability and minimize exposure once a company becomes targeted in a criminal investigation.

203. The suggestion that coal operators and owners of coal property need to take some affirmative action to minimize their environmental liabilities is dictated not only by increased enforcement of the Clean Water Act, but also increased enforcement of the Surface Mining and Reclamation Act and the creation of the Applicant Violator System (AVS) which has been utilized by DEP and the Office of Surface Mining to prohibit coal operators and owners of coal property from receiving new surface mining permits or permit modifications as a result of permit violations committed by independent contractors. See Chauncey S.R. Curtz & Karen J. Greenwell, *The Applicant Violator System Under SMCRA: Ownership and Control Regulations*, 6 J. MIN. L. & POL'Y 143 (1990-91).

204. There are two main forms of environmental audits: compliance audits which utilize in-house or outside consultants to investigate compliance with environmental laws and regulations; and, management audits which review management risk-control systems and procedures utilized by the company to detect and remedy environmental violations. See generally Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365 (1992).

In considering an environmental audit, the company needs to be aware of the positive and negative aspects of that audit. In the positive column are the following factors:

- 1) Performance of an environmental audit may bring a company into compliance with environmental laws and regulations;
- 2) Performance of an environmental audit may assist a company in developing corporate detection systems and improve communication between layers of management within the company concerning potential violations;
- 3) Performance of an environmental audit may be considered by the Department of Justice in determining whether or not it prosecutes a company;²⁰⁵ and,
- 4) Performance of an environmental audit may facilitate a company in receiving a downward departure under the sentencing guidelines.²⁰⁶

On the negative side of the column are the following factors that must be considered:

205. See DOJ GUIDANCE DOCUMENT, *supra* note 25. The DOJ Guidance Document sets forth several factors that the Department of Justice will consider in weighing whether or not to take criminal enforcement action, including whether the violator has: 1) made a voluntary disclosure; 2) cooperated in providing all relevant information concerning the violation; 3) taken preventative measures and adopted an environmental compliance program to prevent future noncompliance; 4) engaged in pervasive noncompliance; 5) undertaken internal disciplinary actions against the individual employee violators; and, 6) taken sufficient action in remedying any ongoing noncompliance.

206. FEDERAL SENTENCING GUIDELINES MANUAL, UNITED STATES SENTENCING COMMISSION (1991). Section 8A1.2, comment 3(k) encourages organizations to develop an "effective program to prevent and detect violations of law," although it should be noted that at the present time the sentencing guidelines for organizations do not apply to environmental violations. *Id.* § 8C2.1(a).

On Mar. 5, 1993, the Advisory Working Group on Environmental Sanctions to the United States Sentencing Commission requested public comments on proposed sentencing guidelines for organizations convicted of federal environmental crimes. At step II(i), the proposed commentary suggests a percentage increase in the basic fine if the organization had no program to achieve compliance with environmental requirements. Draft of Corporate Sentencing Guidelines by Advisory Group for Public Review, 23 *Env't. Rep.* (BNA) 2944 (Mar. 12, 1993); Angus Macbeth, *Making Environmental Punishment Fit the Crime: Problems in Sentencing Organizations for Environmental Offenses*, 7 *Toxics L. Rep.* (BNA) 1313 (1993).

- 1) Performance of an environmental audit may be expensive with regard to the hiring of consultants and disruption of the company's operations;
- 2) The environmental audit may later be disclosed and that disclosure could lead to increased civil and criminal liability by establishing the actual knowledge of company officials;²⁰⁷ and,
- 3) The environmental audit may lead to the discovery of reportable environmental problems and that will require the company to immediately grapple with whether or not to report the violation to government agencies and develop a remediation program.

In conducting an environmental audit, a company will typically hire outside consultants to inspect, evaluate, and report on the company's operations and their environmental compliance. Consideration should be given to the selection of a consultant who can properly evaluate the company's operations and its environmental concerns. A written contract should be entered into setting forth the costs and expenses to be reimbursed and the scope of the audit.²⁰⁸ Sometimes, the company may want to coordinate the environmental audit through its legal division or outside counsel to shield any final report under the claim of privilege.²⁰⁹

In creating an environmental compliance program, a company may also hire an outside consultant or designate a member of management

207. Pursuant to EPA's Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007 (1986), EPA has a policy of not "routinely request[ing] environmental audit reports," but this policy does not prohibit EPA from requesting a copy of an environmental audit in a given situation. On the other hand, DOJ's Guidance Document contemplates that environmental audits will be disclosed to the government. DOJ GUIDANCE DOCUMENT, *supra* note 25, at 4-5.

208. Environmental consultants typically perform environmental audits in three phases: Phase I consists of a site reconnaissance, a review of relevant permit files, and other historical documents and interviews with knowledgeable persons; Phase II consists of more invasive inspection techniques such as soil borings and samplings, water samplings, and laboratory analyses; Phase III consists of remediation design and clean-up oversight. A company needs to clearly define for the environmental consultant exactly what type of environmental audit it wants performed and what budget it has available for the project.

209. The attorney-client privilege, the work-product doctrine, and the critical self-analysis privilege have not met with a great deal of success in preventing the disclosure of an environmental audit to government agencies. See Hunt & Wilkins, *supra* note 204, at 376-92.

to review existing company procedures to detect environmental violations and make new recommendations for the compliance program. The environmental compliance program must be drafted carefully to ensure that the company meets its legal duties under the statutes and that it does not create any new standards of liability not already required by law. The components of an environmental compliance program include: development of corporate environmental principles and standards; dedication of management at a sufficient level to ensure implementation; the commitment of adequate funding, personnel and resources to the project; a formal training program developed for all employees; routine auditing programs developed to maintain compliance; development of response procedures for violations detected; and, internal disciplinary procedures to be taken after violations are detected.²¹⁰ The company may also wish to include as a part of its environmental compliance program the procedures that a company will follow in the event of a catastrophic environmental event.

Use of company environmental compliance programs is greatly increasing, and reports reflect that almost sixty percent of respondents in a recent survey indicated that they had adopted such a policy.²¹¹ In considering whether or not a company should adopt an environmental compliance program, one should note that it is often the case that a company is prosecuted criminally, not because its conduct was more outrageous than another company's conduct, but because it is perceived as having a bad attitude with regard to compliance with environmental laws.²¹² It has also been observed that government agencies may be more willing to overlook minor legal violations if they believe that a company is making a good faith effort to comply with the law and it

210. For a complete discussion concerning the establishment of an environmental compliance program, see James T. Banks et al., *Developing and Implementing an Environmental Corporate Compliance Program*, C776 ALI-ABA 107, Sept. 1992, at 109, available in WESTLAW, ENV-TP database. The elements of the environmental compliance program are designed to meet the six factors established in the DOJ GUIDANCE DOCUMENT, *supra* note 25.

211. STANFORD UNIVERSITY GRADUATE SCHOOL OF BUSINESS, *THE ENVIRONMENTAL TRANSFORMATION OF U.S. INDUSTRY: A SURVEY OF U.S. INDUSTRIAL CORPORATIONS* (1990), *quoted in* Wheeler & Fox, *supra* note 201, at 497.

212. See Benjamin S. Sharp, *Environmental Enforcement Excesses: Overcriminalization and Too Severe Punishment*, 21 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,658, 10,662 (1991).

has adopted policies to ensure compliance with environmental laws.²¹³ Governmental agencies prefer to be taken seriously and the company's adoption of an environmental compliance program serves to demonstrate to the government that a company is sensitive to the legal ramifications of the environmental statutes.

Despite the company's best efforts at minimizing its exposure to criminal liability, there may come a time that the company runs afoul of some environmental law and finds itself the target of a criminal investigation. In the event that a company finds itself in that precarious position, it needs immediately to assemble its defense team of key management personnel and outside criminal counsel.²¹⁴ That team needs to respond to the government's investigation as it proceeds, it needs to coordinate its own internal investigation within the company, and it needs to handle inquiries from the media. After the defense team completes its internal investigation, it needs to report its findings to management. Then the company must determine if it will cooperate with the government's investigation or if it will defend its conduct and resist the investigation.

The company may chose to cooperate with the government, but at the same time persuade the government that further criminal action is not necessary on the government's part as other civil enforcement action may be more appropriate. In following this scenario, a company should be mindful of the following factors which are typically considered by the government in determining whether or not it will proceed with a criminal prosecution:

1. Nature of the misconduct.

- a. Was there actual injury to the environment or to people—if so, how serious?

213. Wheeler & Fox, *supra* note 201, at 498.

214. For a thorough discussion of how to handle a government investigation in the context of an environmental violation, see Henry W. Killeen, III & Nelson Perel, *Facing the Cavalry: Advising the Corporate Client*, C776 ALI-ABA 53, Sept. 1992, at 54, available in WESTLAW, ENV-TP database; Robert S. Bennett et al., *The Role of Internal Investigation in Defending against Charges of Corporate Misconduct*, C496 ALI-ABA 207, Apr. 1990, at 125. available in WESTLAW, ENV-TO database.

- b. Did the misconduct relate only to record keeping or some other ministerial violation?
- c. Is this an aberration or an isolated transaction, in contrast to ongoing and repetitive unlawful behavior?
- d. Was the violation knowingly and deliberately committed, or was it the result of an accident or a mistake?
- e. Did management personnel know about the violation—if so, what did they know; when did they learn about it and what did they do?
- f. Was the misconduct contrary to published corporate policy or express instructions?

2. Corporation's compliance record.

- a. Did the company cooperate with the government's investigation, or did it try to conceal facts and deceive the government?
- b. Does the company have an environmental audit program or other compliance policies?
- c. Has the company made voluntary disclosures in the past, and, if so, how promptly has the company made such disclosures after learning of a violation?
- d. What measures has the company implemented to eliminate the possibility of additional violations?
- e. Will punishment serve any useful purpose?²¹⁵

A review of these factors indicates that those companies that have already implemented an environmental compliance program should be in a better position to convince the government that it has handled and will continue to handle properly its environmental problems, and therefore, a company that has already implemented an environmental compliance program should be in a better position to derail the criminal investigation.

One of the functions of the defense team in advising management in an ongoing environmental investigation is to help devise creative settlement alternatives. The settlement in the *Exxon Valdez* matter has been cited to as an example of how a company can act responsibly and creatively to minimize liability exposure.²¹⁶ Because of Exxon's

215. Thomas C. Green & Keith E. Welks, *Management of a Response to an Environmental Criminal Investigation*, 776 ALI-ABA 77, Sept. 1992, at 85-86, available in WEST-LAW, ENV-TP database.

216. Thomas J. Kelly, Jr. & Nancy A. Voisin, *Enforcement Trends*, 776 ALI-ABA 21,

cooperation, the government allowed Exxon to remit \$125 million in criminal fines and to remit one dollar for every twenty dollars spent by Exxon in remediating the oil spill.²¹⁷ The Exxon plea agreement also sets forth over \$100 million in payments by Exxon to be used for restoration projects within Alaska.²¹⁸ This type of plea agreement indicates what the government will accept if a company is willing to admit responsibility for its actions and expend the necessary money to remediate the violations.²¹⁹

At the same time that the defense team is attempting to secure a satisfactory resolution of the case with the government, it needs to prepare for trial in an expeditious manner. Discussion of the many steps a defense team must follow in order to prepare for the trial of a complex environmental criminal prosecution is beyond the scope of this Article, but some of the more obvious points merit some discussion.²²⁰ One of the first issues that the defense team will have to resolve is whether or not separate counsel needs to be retained for the company and any of the targeted employees.²²¹ While representation of the company employees and the company by one counsel has many advantages, including the presentation to the government of a case with a united front, many issues may develop into conflicts of interest

(Sept. 1992) at 32, available in WESTLAW, JLR database.

217. *Id.* at 33-34.

218. *Id.* at 34.

219. Of course the amounts paid by Exxon were quite high given the magnitude of the oil spill. It should not be expected that voluntary compliance for most companies will be near as expensive. It should be noted that creative negotiations and settlements with EPA in civil cases has led to satisfactory results for many companies. See Steven C. Jones, *Creativity Helps Companies Cut Penalties*, NAT'L L.J., Aug. 17, 1992, at 18-21. It should also be noted that if a company is not able to derail a criminal investigation and it finds itself convicted of an environmental offense, the company should attempt to negotiate a creative sentence through "alternative sentencing" on the basis of its cooperation and good faith in handling the environmental violation. McMurry & Ramsey, *supra* note 45, at 1167.

220. One of the best articles that sets forth how to handle an environmental criminal prosecution from the defense perspective is Stephen D. Brown & Alison M. Benders, *How to Handle a Complex Criminal Environmental Case*, 1 VILL. ENVTL. L.J. 149 (1990); see also Killeen & Perel, *supra* note 214.

221. For a thorough discussion of the conflicts of interest that can arise between a company and its employees, see David M. Zornow, *Representation of The Corporation and its Employees in an Environmental Criminal Case*, C496 ALI-ABA 207, 209 (Apr. 1990), available in WESTLAW, JLR database; McMurry & Ramsey, *supra* note 45, at 1166.

between the company and the employee. For instance, the company may want to argue that it is not liable for the conduct of its employee because his acts were not within the scope of his employment and his acts were not for the benefit of the company. Problems can also arise if the government is willing to plea bargain with an individual defendant but not with the company. This conflict of interest issue needs to be evaluated early by the defense team and a decision upon the appropriate course of action in this regard should be made as soon as possible.

Another issue that needs to be focused upon quickly by the defense team is a response to any government search warrants. Sometimes, a company is not aware that it has been targeted for an environmental criminal investigation until the FBI and EPA show up with a search warrant. In that situation, a company will have to respond as best as it is able with in-house personnel. If a company is aware that it has been targeted for an environmental criminal investigation, it may arrange for the retention of outside experts to be prepared and on hand when the government executes its search warrant. A company that has in-house or retained experts on hand is better prepared to respond to the government's search warrant because its expert will be able to observe and monitor all of the government's actions and take samples in the same manner and at the same time as the government. This defense move allows the company to have its own set of samples that can be evaluated independently of the government and provide the company with information that will be necessary for the defense.

The outside consultant that is retained by the company to observe the government's search will be a key member of the defense team. As with any environmental case, the issues often boil down to a battle of expert opinions at trial. The defense team needs to make sure that it retains a knowledgeable expert consultant that will be able to assist the defense team in reviewing: the relevant statutes and regulations; the analytical data that is generated by the defense sampling program; and, the results of the government's sampling program. The consultant also needs to be selected on the basis of how well he will be able to present complex information in a simple manner, given the fact that any trial will be conducted before a jury.

With regard to this latter point, environmental counsel in criminal cases need to be reminded to keep their case as simple as possible for the benefit of the court and the jury. Most environmental counsel are used to trying cases in an administrative hearing context, and in that setting it does not matter if the case is complex. At the district court level, most courts are not used to trying complex criminal cases and defense counsel should be mindful of their duty to educate the court and the jury. An environmental criminal case will also differ from an administrative proceeding in that the case will be prosecuted by the United States Attorney's Office which has at its disposal the full resources of the United States Government, including the Department of Justice in Washington, D.C., the EPA, and the FBI. These are certainly significant resources that the defense team will have to match to properly defend their client.

Finally, in discussing strategies for trial, it should be mentioned that presenting a responsible company position is key to a good defense. From a review of the transcript in *Law*, it is apparent that the court did not believe that the defendants had acted with responsibility in regard to their environmental liabilities. Once a district court concludes that a company has not acted responsibly under the law, it may be predicted that the court will be less willing to rule with the company on critical evidentiary points and other legal issues, including jury instruction disputes.²²² The loss of the district court's respect in this manner can obviously have devastating consequences for the defendants in an environmental criminal prosecution.

Currently the government's conviction rate is greater than eighty percent in environmental criminal prosecutions.²²³ Coupled with this statistic is the fact that district courts are now willing to hand out record sentences and fines in environmental criminal prosecutions. Environmental counsel representing companies and individuals in feder-

222. The record in *Law* is replete with examples of the district court's demeanor towards the defendants which suggest that the court was not satisfied with the defendants conduct in that case. See *supra* note 8 for one such example.

223. Block, *supra* note 45, at 34. The United States Attorney's Office for the Southern District of West Virginia advised the author that this figure is relatively low as the average prosecution rate for drug offenses is above ninety percent. Conversation with Phillip B. Scott, Assistant United States Attorney, Southern District of West Virginia (Jan. 11, 1993).

al court needs to be fluent not only with the intricacies of environmental statutes, but must also be familiar and advise their client with regard to the federal sentencing guidelines.²²⁴ A review of several of the recent reported Clean Water Act cases, set forth in Appendix A, indicates that it is very common for the issue on to be an allegation that the sentencing guidelines were not applied properly by the district court rather than an appeal of the substantive violation of the Clean Water Act.²²⁵ The sentencing guidelines bring a whole new dynamic to the representation of parties in federal court, and resolution of an environmental criminal prosecution can often turn to negotiations over when a defendant should receive a downward departure or an enhancement, and, when the government fails to keep its commitment regarding the plea agreement, as occurred in *Goldfaden*, the defendant will have an ability to appeal on that basis alone.

VII. CONCLUSION

The decisions in *Law* and *Rayle Coal Co.*, and the recent civil enforcement action involving Cat Run Coal Company should serve as notice to coal operators and the owners of coal property that the state and federal governments plan to increase their enforcement of all environmental statutes, including the Clean Water Act. Each coal operator and owner of coal property needs to be prepared to defend its conduct under the level of scrutiny that may be applied to a defendant in federal district court. The time is ripe for coal operators and owners of coal property to focus on their potential liabilities under the Clean Water Act, other environmental statutes and EPA's storm water regula-

224. See *supra* note 58. For a discussion and criticism of the application of the sentencing guidelines to environmental violations, see Benjamin S. Sharp, *The (Mis)Application of the Sentencing Guidelines to Environmental Crimes*, C496 ALI-ABA 291, Apr. 1990, at 291, available in WESTLAW, ENV-IP database and Starr & Kelly, *supra* note 58. The United States Sentencing Commission is currently evaluating the application of the sentencing guidelines in the environmental context, particularly with regard to their application to organizations. 57 Fed. Reg. 32,246 (1992). The Advisory Working Group on Environmental Sanctions recently proposed new sentencing guidelines for corporations. See *supra* note 206.

225. See, e.g., *United States v. Goldfaden*, 959 F.2d 1324 (5th Cir. 1992); *United States v. Rutana*, 932 F.2d 1155 (6th Cir.), cert. denied, 112 S. Ct. 300 (1991); *United States v. Wells Metal Finishing, Inc.*, 922 F.2d 54 (1st Cir. 1991).

tory program. With proper attention to the legal liabilities imposed by these statutes and regulations, the coal industry should be able to continue to operate in a cost effective manner with some modifications to their manor of operations. Owners of property with abandoned or inactive coal mining operations that have water discharge problems will to make the biggest adjustment as heretofore those inactive operations have not been regulated under the Clean Water Act.

The recent conviction of Mr. Law and MMI is intended to serve as a warning by the United States Attorney's Office for the Southern District of West Virginia that it intends to use the Clean Water Act to monitor the environmental practices of the coal industry and step in and prosecute those companies that are in noncompliance. In order for a company to avoid the same fate as Mr. Law and MMI, a company should review its existing environmental practices through an environmental audit and, the company should further consider the implementation of an environmental compliance program. As the new sentencing guidelines for organizational defendants are promulgated, this proposal will become virtually mandatory.

Should a coal company find itself a defendant in the United States District Court, it needs to be prepared to marshal its resources and adequately defend it and its employees conduct. As suggested in this article, there are still areas such as the requisite knowledge of the defendant, the public welfare doctrine and the responsible corporate officer doctrine that may be exploited as potential defenses. The United States Attorney's Office for the Southern District of West Virginia has unofficially sounded the charge and the coal industry needs to rise to the occasion and be prepared to meet an era of increased civil and criminal environmental enforcement.

APPENDIX A

CLEAN WATER ACT CRIMINAL CASES—REPORTED

1. *United States v. Curtis*, 988 F.2d 946 (9th Cir. 1993).

A federal employee who worked at a Naval Air Station in Alaska challenged his conviction on one count of knowingly discharging a pollutant and two counts of negligently discharging a pollutant in violation of the Clean Water Act under Section 309(c)(2) alleging that he was not a person subject to the enforcement provisions of the law. The defendant was sentenced by the district court to serve ten months on each count to be served concurrently. The court of appeals summarily rejected the defendant's argument ruling that a federal employee was a person covered by the Clean Water Act.

2. *United States v. Law*, 979 F.2d 977 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1844 (1993).

Prosecution under section 309(c)(2) of the CWA, 33 U.S.C. § 1319(c)(2), against Mr. Law and his company Mine Management, Inc. Mr. Law was convicted and sentenced to two years in prison. He and his company were each fined \$80,000. The court of appeals rejected the defendant's argument that they did not add a pollutant and therefore the discharge was not in violation of the Clean Water Act. The court also rejected the defendant's jury instruction and evidentiary arguments.

3. *United States v. Cumberland Wood & Chair Corp.*, 978 F.2d 1259 (6th Cir. 1992) (table, text available in WESTLAW).

The company and two individual defendants conditionally pled guilty to a four count indictment for knowingly discharging pollutants into waters of the United States in violation of section 309(c)(2). The defendants' appeal was based upon their Motion to Dismiss on the grounds that their discharge through a pipe into a nearby pond was not a navigable water of the United States covered under the Clean Water Act. The court of appeals considered prior case law with regard to the definition of navigable waters of the United States and upheld the district court's denial of the defendants' Motion to Dismiss.

4. *United States v. Borowski*, 977 F.2d 27 (1st Cir. 1992).

In a prosecution for “knowing endangerment” under the Clean Water Act, section 309(c)(3), the court of appeals reversed a conviction upon concluding that even though the defendant knowingly violated Section 307, 33 U.S.C. § 1317, as a result of discharges in violation of the pretreatment standards, and the defendant knew that he was placing his employees in imminent danger of bodily injury as a result of his employees coming into contact with dangerous chemical solutions poured into sinks, the Clean Water Act was not intended by Congress to regulate worker safety and therefore, “a knowing endangerment prosecution cannot be premised upon danger that occurs before the pollutant reaches a publicly-owned sewer or treatment works.” The court of appeals specifically rejected any reliance by the government upon the “public welfare offense” doctrine to justify the defendant’s prosecution for knowing endangerment.

5. *United States v. Ellen*, 961 F.2d 462 (4th Cir.), *cert. denied*, 113 S. Ct. 217 (1992).

Prosecution under section 309(c)(2), against Mr. Ellen, an environmental consultant, for knowingly filling in wetlands without a permit. Mr. Ellen was convicted and the district court imposed a sentence of six months imprisonment and one year of supervised release with the latter conditioned upon four months home detention and sixty hours of community service. Mr. Ellen defended upon the grounds that the government did not prove that he knew that the areas where he was working were wetlands and that permits were required. The Fourth Circuit rejected Mr. Ellen’s argument as it determined that the definitions contained within the wetlands manuals in question were merely an interpretive guide and there had been no change in the law. The Fourth Circuit also rejected Mr. Ellen’s argument that the sentencing guidelines were applied improperly in his case and it affirmed the conviction.

In a related criminal prosecution discussed at footnote 1, the court of appeals noted that Mr. Paul Jones, the owner of the property and the person who hired Mr. Ellen as a consultant, pleaded guilty to one

count of negligently filling wetlands. Mr. Jones was placed on probation for eighteen months and ordered to: pay a million dollar criminal fine; pay a million dollars for restoration of the property to its original condition; and, place twenty-five hundred acres of property in a conservation trust.

6. *United States v. Goldfaden*, 959 F.2d 1324 (5th Cir. 1992).

In September 1990 Mr. Goldfaden and his company were indicted for violating the Clean Water Act by discharging hazardous and industrial waste into the Dallas sewer system without a permit. Mr. Goldfaden pleaded guilty to one count of a superseding indictment for discharge of industrial waste into the Dallas sewer system, a violation of 33 U.S.C. § 1319(c)(2)(a) and in return the government agreed to dismiss the remaining counts of the indictment and to make no recommendation as to Mr. Goldfaden's sentence. Under the sentencing guidelines, Mr. Goldfaden was sentenced to the maximum for his offense, 36 months. Mr. Goldfaden appealed the application of the sentencing guidelines and the Fifth Circuit remanded the case because the government had violated its pledge to remain silent.

7. *United States v. Mitchell*, 966 F.2d 92 (2d Cir. 1992).

Mr. Mitchell and Mr. Brouillette operated a town water system on a part time basis and they were indicted on 34 counts of violating 18 U.S.C. §§ 371 & 1001 for making false statements and filing false reports concerning the results of monthly turbidity reports. The court of appeals, on an interlocutory appeal, reversed the district court's decision to suppress certain statements made to EPA Special Agents from the Criminal Investigation division upon the grounds that the defendants had not been given their *Miranda* warnings. The court of appeals did note however, that the district court may have suppressed the statements because of its view that prosecution overkill had occurred, and the court of appeals expressed its view that the prosecution should proceed in a "common sense" manner upon remand.

8. *United States v. Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991).

A thirty-seven count indictment was filed against two corporations and nineteen individuals for violations of RCRA, CERCLA, and the Clean Water Act in the operation of a bulk liquid chemical transfer and storage facility. At the conclusion of the government's case the district court granted all of the defendants' judgments of acquittal on all but eleven counts of the indictment which left remaining one company and three individuals. The jury returned a guilty verdict as to the remaining eleven counts and the district court struck the guilty verdicts with regard to the individual defendants and it struck all but two of the convictions for the company and ordered new trials.

The Clean Water Act counts of the indictment pertained to the willful or negligent discharge of pollutants in waste water from a Baytank out-fall into Galveston Bay's Bayport Turning Basin in violation of a NPDES permit on numerous occasions over various stated periods of time and one count of the indictment charged negligent or willful failure to file discharge monitoring reports as required by the NPDES permit.

The court of appeals, in examining the pre-1987 amended Clean Water Act, held that specific intent was not required to establish negligent or willful violations. The court of appeals went on to hold however, that in order to convict someone as an aider or abetter for a record keeping violation, there must be a specific intent shown. The court of appeals affirmed the company's two convictions and remanded the case for a new trial as to the three individuals.

9. *United States v. Rutana*, 932 F.2d 1155 (6th Cir.), *cert. denied*, 112 S. Ct. 300 (1991).

The defendant pled guilty to eighteen counts of knowingly discharging pollutants into a public sewer system in violation of section 309(c)(2). He was sentenced to five years probation, one thousand hours of community service and fined \$90,000. The government appealed the sentence and argued that the district court had improperly applied the sentencing guidelines in giving a downward departure. The

court of appeals agreed that the sentencing guidelines had not been properly followed and remanded the matter to the district court. The court of appeals found that the defendant's other business was not a ground for downward departure. The court of appeals also held that the district court did not have to impose a mandatory minimum fine of \$5,000 per count because the minimum is not mandatory under the Clean Water Act since imprisonment or a fine or both is appropriate.

10. *United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991).

Mr. Brittain was convicted of eighteen felony counts of falsely reporting a material fact to a government agency under 18 U.S.C. § 1001 and two misdemeanor counts of discharging pollutants into the waters of the United States in violation of Section 309(c)(1). Mr. Brittain on appeal argued that the government did not establish materiality as required by § 1001; he is not a "person" who discharged pollutants as contemplated by the Clean Water Act; and the evidence was insufficient to prove that he discharged pollutants in violation of the Clean Water Act. The court of appeals upheld the convictions under § 1001 because it concluded the government showed that the defendant was clearly aware of his conduct. The court of appeals also upheld the defendant's convictions under the Clean Water Act finding that the defendant was a person subject to the Clean Water Act, even though he was not the permittee and the evidence was sufficient to uphold his conviction.

11. *United States v. Boldt*, 929 F.2d 35 (1st Cir. 1991).

Mr. Boldt was one of four defendants named in a fifty-two count indictment charging numerous violations of the Clean Water Act, including six counts for knowingly discharging into a municipal sewer in violation of section 309(c)(2). Mr. Boldt worked for Astro Circuit Corporation, which was in the business of making circuit boards, and that process resulted in the discharge of industrial waste with toxic metals. The violations in this case were associated with the company's failure to comply with pretreatment standards and causing injury to persons at the waste water treatment plant operated by the city. The two counts that Mr. Boldt was found guilty of pertained to a violation

of the pretreatment standards and bypassing the company's pretreatment facility on particular dates. Mr. Boldt defended on the grounds of impossibility and necessity. The court of appeals affirmed the conviction and held that the jury instruction objected to by the defendant properly took away any defense of economic or business necessity but, it did not eliminate Mr. Boldt's necessity or impossibility defense.

12. *United States v. Wells Metal Finishing, Inc.*, 922 F.2d 54 (1st Cir. 1991).

The defendant and his company were convicted on nineteen counts of knowingly discharging excessive amounts of zinc and cyanide into a city sewer system in violation of section 309(c)(2). The defendant was sentenced to fifteen months in custody to be served concurrently on each count and one year of supervisory release conditioned on payment of a \$60,000 fine which had previously been levied against the defendant by the city for his violations. On appeal the defendant did not challenge his conviction rather he challenged the sentence that was imposed by the district court. The court of appeals affirmed finding that the trial court was justified in enhancing the offense level for disruption of a public utility and that the city's \$60,000 fine against the defendant for violating his sewer permit was reasonably related to the offense and payment of that fine was an appropriate condition of the defendant's term of supervisory release.

13. *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

Mr. Hoflin was the director of a public works department when he was indicted on two RCRA counts, 42 U.S.C. § 6928(d)(2)(A) for improper disposal of hazardous waste and one misdemeanor count under the Clean Water Act, section 309(c)(2), for improperly disposing of kitchen sludge in violation of a NPDES permit. Mr. Hoflin was found guilty on one count of RCRA and the misdemeanor count related to the Clean Water Act. The district court suspended the imposition of sentence and placed Mr. Hoflin on two years probation and the court of appeals affirmed. Mr. Hoflin raised several arguments with regard to the jury instructions on the misdemeanor counts involving

the Clean Water Act and the court of appeals rejected all of the defendant's arguments regarding the court's jury instructions.

14. *United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989).

Marathon Development Corporation and its senior vice president were indicted on twenty-five counts of violating section 309(c), with regard to filling in approximately five acres of wetlands without the proper permit. The defendants attempted to defend by stating that their conduct was permitted pursuant to a "head waters nationwide permit" set forth in the Army Corp's of Engineers Regulations. The district court granted a motion in limine precluding the defense and the defendants entered a conditional plea of guilty preserving the issue for appeal. The district court fined the company \$100,000 and imposed on the company officer a suspended six month sentence, one year of probation, and a \$10,000 fine. The court of appeals upheld the district court's decision that a defense based on a nationwide permit was not applicable.

15. *United States v. Distler*, 671 F.2d 954 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981).

Mr. Distler was prosecuted under section 309(c)(1), as the sole shareholder of Kentucky Liquid Recycling Corporation, a company that had been contracted with by Chem-Dyne Corporation to dispose of Velsicol Chemical Corporation PCL bottoms. The court of appeals upheld the defendant's criminal prosecution, rejecting the defendant's evidentiary objections based on grand jury and expert witness testimony. The court held that the defendant was properly prosecuted as the "alter ego" of the corporation. As reported in Richard M. Carter, Note, *Federal Enforcement of Individual and Corporate Criminal Liability for Water Pollution*, 10 MEM. ST. U. L. REV. 576, 607 (1980), the defendant was sentenced to two years imprisonment and fined \$50,000.

16. *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), *petition to vacate sentence denied*, 491 F. Supp. 1339 (E.D. Pa. 1980), *rev'd*, 642 F.2d 59 (3rd Cir. 1981), *petition to vacate sentence denied*, 546 F. Supp. 713 (E.D. Pa. 1982), *aff'd*, 703 F.2d 62 (3rd Cir. 1983), *cert. denied*, 464 U.S. 829 (1983).

The two Frezzo Brothers and their company, Frezzo Brothers, Inc., were found guilty on six counts of an indictment charging them with willfully or negligently discharging pollutants into a navigable waterway in violation of section 309(c)(1). The corporation was fined \$50,000 and the individual defendants were each fined \$25,000 and sentenced to 30 days in jail. The defendants' convictions were based on the discharge of waste waters from mushroom compost manufacturing operations into the waters of a navigable waterway without having a permit. The court of appeals rejected the defendants' arguments that: the EPA director had to proceed civilly in advance of seeking a criminal indictment; the indictment should have been dismissed because the EPA had failed to promulgate specific regulations for effluents for the compost manufacturing business; the evidence failed to support the convictions of negligent and willful violations of the Act; and, the district court erred in not allowing a special verdict go to the jury to determine which counts were willful violations and which were negligent violations.

On a post conviction motion to set aside the conviction the defendants argue that they were exempt from prosecution under EPA regulations. The district court initially rejected these arguments and on appeal the court of appeals reversed and remanded for further consideration of EPA's agricultural exemption. On remand the district court again rejected the defendants arguments that EPA's regulations created a defense.

17. *United State v. Hamel*, 551 F.2d 107 (6th Cir. 1977).

The defendant was tried for violations of 33 U.S.C. § 1362(6) for spilling 200 to 300 gallons of gasoline into Lake St. Clair, Michigan. The defendant argued that he should not have been prosecuted under

the Clean Water Act, which imposed greater penalties than the Refuse Act and other statutes that he could have been prosecuted under. The court of appeals concluded that gasoline is a pollutant under § 1362 and therefore it upheld the conviction. The court also rejected the defendant's argument that the Clean Water Act should be narrowly construed as a penal statute. As reported in Michele Kuruc, Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 103 (1985), the defendant received the minimum fine of \$2,500.

18. *Apex Oil Co. v. United States*, 530 F.2d 1291 (8th Cir.), cert. denied, 429 U.S. 827 (1976).

The company was convicted of failing to report an oil spill in violation of 33 U.S.C. § 1321(b)(5) and it was fined \$20,000 and placed on three years probation. \$15,000 of the fine was stayed pending successful completion of the probation period. On appeal the company argued that it was not a "person in charge" required to report under the Clean Water Act and that the evidence was insufficient in this regard. The court of appeals rejected the company's arguments that "person in charge" can only refer to an individual and held that the term person is defined to include corporations.

19. *United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974).

Ashland Oil was indicted under 33 U.S.C. § 1321(b)(5) for failing to immediately report the discharge of 3,200 gallons of oil into Little Cyprus Creek. The case was tried before the court and Ashland Oil was found guilty and on recommendation of the United States Attorney was fined \$500. On appeal Ashland Oil claimed that Congress did not have the Constitutional power to control pollution on non-navigable tributaries of navigable streams; that the statutes being criminal in nature should be strictly construed against the government; and, the fact that Little Cyprus Creek was non-navigable exonerated Ashland from any requirement to report its oil spill immediately. The court of appeals held that Congress was within its constitutional authority to

regulate pollution in the manner that it had in the Clean Water Act and it rejected all arguments of the defendants.

20. *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993).

The district court denied the defendants' motion to vacate their sentences for five counts of violating the Clean Water Act, section 309(c), as a result of filling in wetlands without a permit. The district court found that most of the defendants alleged grounds were resolved on the direct appeal. The district court does go to some length to review the defendants arguments that the ability of the Army Corps of Engineers to promulgate the definition of navigable waters under 33 C.F.R. § 328.3(b) is an impermissible delegation of authority by Congress. The district court suggests that it is sympathetic to several of the defendants arguments but ultimately concludes that the state of the law is such that Congress has permissibly delegated its authority to EPA and the Army Corps of Engineers.

21. *Hartford Associates v. United States*, 792 F. Supp. 358 (D.N.J.), *appeal dismissed*, 981 F.2d 1247 (3d Cir. 1992).

A company and its principals sought a preliminary injunction to prevent the government from investigating and bringing a 'criminal action against them for violations of section 404 of the Clean Water Act regarding the filling of wetlands the parties also sought the return of documents seized during a search of plaintiff and plaintiffs' counsel's office. The district court denied the injunction finding: any non-compliance with the wetlands delineation manuals and the Johnston Amendment may be raised as defenses to any criminal prosecution; the parties had failed to allege a case or controversy; the search was not overbroad and the issue of attorney client privilege will be preserved by a *in camera* review of the documents seized to determine if any of them are privileged.

22. *United States v. Villegas*, 784 F. Supp. 6 (E.D.N.Y. 1991).

Mr. Villegas was indicted under sections 309(c)(2) and (3), and found guilty on four counts of violating the Clean Water Act for a knowing discharge of pollutants into a navigable water from a point

source. In a post-trial Motion for Judgment of Acquittal the district court reversed the conviction on the two counts pertaining to knowing endangerment and upheld the conviction with regard to the other two counts for a knowing discharge without a permit.

23. *United States v. Pozsgai*, No. Cr. 88-00450 (E.D. Pa. 1989), *aff'd mem.*, 897 F.2d 524 (3rd Cir. 1990), *cert. denied*, 498 U.S. 812, *sentence reduction denied*, 757 F. Supp. 21 (E.D. Pa. 1991), *aff'd in part, rev'd in part*, 947 F.2d 938 (3rd Cir. 1991), *fine reduced*, 22 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,772 (E.D. Pa. 1992).

Mr. Pozsgai was convicted on forty counts of violating the Clean Water Act for filling in wetlands. He was sentenced to a three year term of imprisonment, a concurrent term of twenty-seven months imprisonment, a five year term of probation and a one year term of supervised release and a \$200,000 fine for filling in wetlands without a permit. The conviction was upheld on appeal and, on a motion for reduction of sentence, the district court rejected the defendant's motion. The defendant was also ordered to comply with the restoration plan for the wetland site. On appeal of the motion to reduce the sentence, the Third Circuit affirmed in part and reversed in part and concluded that a hearing should have been held under the guidelines and the defendant's ability to pay the fine was a matter to be considered at the hearing. In 1992, three years after the conviction, the district court determined that the defendant was unable to pay the fine and reduced the fine to \$5,000.

24. *United States v. Alley*, 755 F. Supp. 771 (N.D. Ill. 1990).

Mr. Robert Alley was the president and owner of U.S. Plating Corporation and Pioneer Plating Company, Inc. Mr Alley and his two companies were all indicted on eighty-one counts of violating the Clean Water Act for waste water discharges in excess of the permitted levels for various metals under the pre-treatment standard promulgated by EPA. The indictments were for the willful and negligent discharge of waste water and knowing discharge of illegal waste water. The district court denied a motion to dismiss finding that the indictment adequately alleged the necessary elements of the offense; that the

defendants could not challenge the ability of EPA to promulgate regulatory pre-treatment standards; and, the indictment does not allege facts indicating that the Clean Water Act would be unconstitutional as applied to the defendants.

25. *United States v. Ashland Oil Inc.*, 705 F. Supp. 270 (W.D. Pa. 1989).

The district court refused to dismiss an indictment against the company for violation of the Refuse Act, 33 U.S.C. §§ 407,411 and the Clean Water Act, 33 U.S.C. §1319(c)(1), as a result of the 1988 oil storage tank collapse and oil spill into the Monongahela River. As noted in a related case, at footnote 1, “ Ashland Oil pleaded no contest to the charge and was fined approximately \$2.25 million by Judge Diamond on March 9, 1989.” *United States v. Ashland Oil*, 30 Env't Rep. Cas. (BNA) 1439 (W.D. Pa. 1989).

26. *United States v. Olin Corp.*, 465 F. Supp. 1120 (W.D.N.Y. 1979).

The company and three individual defendants were indicted on 28 counts for conspiring to defraud the United States government by submitting false statements in violation of 18 U.S.C. § 1001 and 33 U.S.C. §1319(c)(2). The defendants moved to dismiss the indictments on several grounds including: prosecutorial vindictiveness and misconduct, improper joinder of the parties, the indictment was duplicitous and multiplicitous, and improper conduct regarding the grand jury. The district court denied the motion to dismiss.

27. *United States v. Little Rock Sewer Committee*, 460 F. Supp. 6 (E.D. Ark. 1978).

The Little Rock Sewer Committee and Roland Ouelette were indicted on five counts of submitting false statements to EPA in violation of 33 U.S.C. § 1319(c)(2). The jury returned a guilty verdict against the defendant Ouelette and the district court, by request of the Sewer Committee, considered the liability of the Sewer Committee. The district court applied the principle of *respondeat superior* and held that the Sewer Committee was equally liable.

28. *United States v. Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852 (E.D. Pa. 1980).

Several individuals and the company moved to dismiss their indictments for violations of the Clean Water Act as the result of unpermitted discharges into a stream. The district court noted that uncollected surface run-off may, but does not necessarily constitute a discharge from a point source, and it found that Oxford's Spray Irrigation System could constitute a point source discharge of water. The court also rejected the defendant's argument that the stream in question was not a navigable waterway and refused to find that provision unconstitutional as void for vagueness. The court also rejected an argument that the criminal prosecution of the defendants without referral to the EPA Administrator violates fundamental fairness.

29. *United States v. Hudson Farms, Inc.*, 12 Env't Rep. Cas. (BNA) 1444 (E.D.Pa. 1978).

The defendants moved to dismiss the indictment on the basis that the EPA Administrator did not issue an order under 33 U.S.C. § 1319(a) in advance of the criminal prosecution. The district court found that there was nothing inherently wrong with a statute providing both civil and criminal penalties and EPA civil action was not a prerequisite. The court next rejected a duplicity argument on the basis that the defendants were charged with willful and negligent discharge of pollutants.

30. *United States v. Ouelette*, 11 Env't Rep. Cas. (BNA) 1350 (E.D. Ark. 1977)

This case is a companion case to the *Little Rock Sewer Committee* case discussed above. Prior to the trial the defendant had made a motion to have the court require the government to prove specific intent in proving the defendant's violation of 33 U.S.C. § 1319(c)(2), making false statements to EPA in violation of the Clean Water Act. The district court required the government to prove that the defendant acted knowingly, but it did not require the government to prove that the defendant purposely intended to violate the law.

31. *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975).

The U.S. Attorney filed an information charging the defendant with polluting navigable waterways. The defendant moved to dismiss the information on two grounds: 1) that the term “waters of the United States” under the Clean Water Act was so vague that it violated the due process clause; and, 2) the failure of the EPA Administrator to give a mandatory abatement order pursuant to 33 U.S.C. § 1319(a) precluded the criminal prosecution in this case. The district court reviewed the discretion of the EPA administrator to act and determined that the administrator has the option to act either civilly or criminally. The district court finally analyzed the term “waters of the United States” and determined that Congress has given fair warning of what conduct that is criminal.

APPENDIX B

CLEAN WATER ACT CRIMINAL CASES—UNREPORTED

1. *United States v. Schallom*, No. 92-5157, 1993 WL 137002 (4th Cir. 1993).

Mr. Schallom was prosecuted for four counts of unlawful disposal, storage, and transportation under RCRA, 42 § U.S.C. 6928(d)(2)(A) and (d)(5) and knowingly discharging pollutants without a permit in violation of Section 309(c)(2) of the Clean Water Act. He was convicted on the Clean Water Act violation only and he appealed on the basis that the evidence was insufficient to uphold the conviction, that the court improperly instructed the jury and that the district court improperly failed to allow downward departures under the sentencing guidelines for admitting responsibility and an imperfect defense. The court of appeals rejected the defendants arguments and upheld the conviction. The court specifically held that the jury had properly been instructed on the knowledge component of the offense and that it was unnecessary for the jury to be given the defendant's proposed motive instruction.

2. *United States v. Saroni*, 23 Env't Rep. (BNA) 2585 (N.D. Cal. Jan. 14, 1993).

Mr. Saroni, the president, and two of his companies were indicted on five counts of violating the Clean Water Act by discharging 126,000 gallons of food process water into a storm drain over a three month period in 1991. The waste water was allegedly dumped after two sanitary districts and another disposal site refused to accept the waste water. Mr. Saroni entered a guilty plea to two counts of knowingly discharging pollutants without a permit and one of the companies pled guilty to one felony violation. The government recommended a 24 month sentence and it was accepted by the court. Fines are to be set by the court at a later date.

3. *United States v. Girdich*, 23 Env't Rep. (BNA) 2266 (W.D. Pa. Dec. 30, 1992).

A retired officer of a municipal sewage treatment agency pled guilty to making false statements in reports required under the Clean Water Act. He faces a maximum sentence of two years and a fine of \$250,000.

4. *United States v. Donco Industries*, 23 Env't Rep. (BNA) 1315 (N.D. Cal. Aug. 28, 1992)

The company was indicted on 15 counts of violating the Clean Water Act by dredging a channel at its marine repair facility without a permit.

5. *United States v. Chevron USA*, 23 Env't Rep. (BNA) 404 (C.D. Cal. May 18, 1992)

Chevron pleaded guilty to 65 counts of violating the Clean Water Act as a result of discharges at an oil and gas platform in the Santa Barbara Channel. The company agreed to pay a fine of \$6.5 million in criminal penalties and \$1.5 million in civil penalties. The company was indicted for knowing violations of the Clean Water Act because it exceeded its oil and gas discharge limits on its NPDES permit between 1982 and 1987.

6. *United States v. Bristol Myers Squibb Co.*, 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,512 (N.D.N.Y. Apr. 24, 1992).

The pharmaceutical company pled guilty to illegally discharging pollutants from its Syracuse, New York facility into a county waste water treatment plant and discharging chemical solvents without a state permit required under Clean Water Act. The company agreed to pay a \$3.5 million dollar fine as follows: \$1.75 million into the enforcement account of New York's Department of Environmental Conservation; \$1.25 million will fund the state's clean-up of Onondaga Lake near Syracuse; and, \$500,000 will be paid as a criminal penalty. The government agreed to suspend \$3 million of the original \$3.5 million sought in criminal penalties in exchange for the company paying resti-

tution to the State. In addition the company agreed to construct a waste water treatment plant at its Syracuse facility which was estimated to cost between \$10 and 20 million.

7. *United States v. Jordan*, 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,422 (D. Or. Mar. 24, 1992).

A former environmental control supervisor for Ore-Ida Foods pled guilty to ordering lab technicians to take inaccurate water samples required under the company's NPDES permit which resulted in discharges into the Snake River in excess of the BOD and total suspended solid standards. The employee faces up to \$250,000 in fines and two years imprisonment. The employee had been indicted on five counts of knowingly discharging pollutants into the Snake River, two counts of falsifying discharge reports, and one count of altering waste water monitoring equipment required under the NPDES permit. The judge who accepted the plea had previously denied the employee's argument that he was not subject to criminal prosecution due to his corporate employee status.

8. *United States v. Mills*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,742 (M.D. Fla. Oct. 8, 1991), 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,422 (M.D. Fla. Mar. 11, 1992).

Mr. Holm, an employee of a consulting engineering firm, pled guilty to two counts of an indictment charging him with Clean Water Act violations and falsifying material information within the jurisdiction of federal agencies. The indictment alleged that Mr. Holm and others conspired to defraud the federal government to obtain financing for a self contained secondary treatment plant from the Farmers Home Administration of the Department of Agriculture by attempting to conceal the inadequacy of the effluent spray shield component of the facility by installing a system of pipes, swells and culverts around the field to eliminate excess waste water and storm water runoff. The pipes and swells caused unauthorized discharges into navigable waters in violation of the Clean Water Act.

Mr. Mills was sentenced to ten months imprisonment followed by five and one half years of supervised probation, and was ordered to

pay \$72,000 in restitution to the Farmers Home Administration and the town of Zolfo Springs, Florida for Clean Water Act violations as set forth above. In addition, the consulting firm which was hired to design and construct the waste water treatment plant was sentenced to five years probation and ordered to pay \$72,000 in restitution.

9. *United States v. Floyd*, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,495 (D.S.C. May 22, 1991), 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,358 (D.S.C. Jan. 30, 1992).

The superintendent and captain of a dredge were indicted on seven counts of Clean Water Act violations for discharging tons of dredged spoil into the Cooper River in South Carolina without a permit. The indictments charged the defendants with conspiracy to violate the Clean Water Act, violating the Act, and perjury. The indictments alleged that the two men conspired to illegally discharge dredged spoils into the river without a permit from the Army Corps of Engineers. A permit had been issued by the Corps authorizing the discharge of dredged spoils onto a designated on-land disposal site, but not into the Cooper River. The dredging company was fined \$100,000 and placed on probation for a year for this same offense.

10. *United States v. Ruetz*, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,742 (E.D. Wis. Oct. 4, 1991), 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,150 (E.D. Wis. Dec. 10, 1991).

Enviro-Analysis, Inc. and its president were each found guilty of three felony counts of mail fraud, nine felony counts of making false statements under RCRA, one misdemeanor count of filing a false statement under the Clean Water Act and one felony count of causing the filing of a false statement in a discharge monitoring report with a government agency. It is reported that this is one of the first federal criminal trials focusing on an environmental laboratory submission of false reports. The president was sentenced to four years probation, a \$14,000 fine and 200 hours of community service. The company was fined \$14,000.

11. *United States v. Pleasant*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,692 (E.D. Tenn. Aug. 21, 1991), 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,080 (E.D. Tenn. Aug. 30, 1991).

Two company officials pled guilty to violations of the Clean Water Act and the Migratory Bird Treaty Act. The defendants pumped water contaminated with diesel fuel from underground storage tanks in an excavated pit into a storm sewer that emptied into Holstein River. The Court ordered each defendant to pay a \$3,000 fine and one defendant was ordered to pay \$3,800 in restitution to the City and State.

12. *United States v. Brightleaf Sewage Treatment, Inc.*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,742 (E.D. Ky. Nov. 9, 1991).

A company that operated a private sewage treatment plant pled guilty to a felony violation of the Clean Water Act and was ordered to pay a \$350,000 fine and convey ownership of the plant to a corporation owned by local homeowners. The company was charged with willfully discharging into a tributary of the Salt River in violation of its NPDES permit. The company president was also a defendant, and he was additionally required to publish a public apology and was permanently barred from taking part in the operation of sewage treatment facilities.

13. *United States v. Alt*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,742 (W.D. Tenn. Sept. 16, 1991).

Mr. Alt was indicted for knowingly discharging solvent washes and water washes generated during the ink formulation process into McKellar Lake without a permit. He plead guilty to one count of a felony indictment under the Clean Water Act. The company, Croda, Inc., plead guilty in June, 1991 to the negligent discharge of chemical waste and it was ordered to pay a \$200,000 fine, perform remedial action at the facility site and issue a public apology. Two other employees plead guilty to concealing an environmental crime in connection with the investigation of the violations at the site and on October 4, 1991 all three employees were sentenced to one year of probation.

14. *United States v. Strandquist*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,692 (D. Md. Aug. 16, 1991).

A Maryland marina and its manager were indicted on three counts of violating the Clean Water Act by discharging raw sewage into a tributary of the Chesapeake Bay. The indictment alleged that the defendants periodically discharged raw sewage removed from a camp site holding tanks into a culvert on marina property and the culvert discharged into a boat basin into a tributary of the Chesapeake Bay.

15. *United States v. New York Bus Service*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,494 (S.D.N.Y. May 29, 1991).

A bus service was fined \$25,000 for violations of the Clean Water Act arising from the discharge of ethylene glycol from bus radiators directly into the ground. The discharge then drained into the Hutchinson River in Bronx, New York.

16. *United States v. Airolight Chrome Plating*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,443 (D. Nev. Apr. 5, 1991).

A shift supervisor at a chrome plating facility in Reno, Nevada was sentenced to three years probation, \$1,000 fine and twenty-fifty hours of community service for a knowing violation of the Clean Water Act's pretreatment standards. The plant manager dumped low PH material into the local publicly owned treatment works during 1987 and 1988. The corporation was previously convicted although the jury acquitted the company president.

17. *United States v. Saunders Asbestos Service*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,443 (D. Mass. Apr. 1, 1991).

An asbestos removal company and its foreman were sentenced for illegally discharging asbestos laden waste into the Charles River. The district court sentenced the foreman to two months in jail for directing his employees to wet down asbestos and dispose of the waste by pumping it into a street in Brookline, Mass. The corporation was fined \$5,000 and given two years probation.

18. *United States v. Ramagosa*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,443 (N.D. Pa. Apr. 23, 1991).

Two real estate developers and their companies were indicted for illegally filling wetlands in violation of the Clean Water Act. The indictment charges the developer with filling fifty-four acres of wetlands in adjacent waterways during construction work between 1982 and 1989 at their twenty-five hundred acre property.

19. *United States v. Pond*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,444 (D.Md. Apr. 17, 1991).

A former waste water treatment supervisor was given an eight month jail term for falsifying discharge monitoring reports and for stealing government property. The supervisor was convicted on eight counts of falsifying discharge monitoring reports, one count of violating a permit condition and one count of stealing waste water treatment supplies.

20. *United States v. Lambert*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,658, 10,661 (D.N.H. 1990).

Mr. Lambert pled guilty to filling in wetlands and agreed to restore his property, deed five acres of woodlands to the state, pay a \$5,000 fine and he was placed on probation.

21. *United States v. Exxon*, No. CR A90-015, (D. Alaska Feb. 27, 1990), reported in Stephen Raucher, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 *ECOLOGY L.Q.* 147, 179 (1992).

Exxon Shipping Company and Exxon Corporation were indicted on five counts each for violations of the Clean Water Act, the Refuse Act, the Migratory Bird Treaty Act, the Ports and Waterways Safety Act and the Dangerous Cargoes Act. Exxon Shipping Company pleaded guilty to three misdemeanor counts of the Clean Water Act, Refuse Act, and the Migratory Bird Treaty Act. Exxon plead guilty to a violation of the Migratory Bird Treaty Act. The parties agreed to payment

of a \$125 million fine (\$25 million in fines to the federal government and \$100 million as restitution to the state and federal government.

22. *United States v. Ballard Shipping Co.*, No. 89-01251 (D.R.I. 1989), reported in Stephen Raucher, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 *ECOLOGY L.Q.* 147, 179 (1992) and Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 *GEO. WASH. L. REV.* 781 (1991).

The company was indicted and pled guilty to one count of negligently violating the Clean Water act as a result of the World Prodigy oil spill. The company was fined \$500,000 and was ordered to pay restitution to Rhode Island in the amount of \$500,000. The Captain of the ship also pled guilty to one violation of the Clean Water Act and was fined \$10,000.

23. *United States v. McKiel*, 20 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,096 (D. Mass. June 29, 1989).

Mr. McKiel, the president of the company, pleaded guilty to violations of the Clean Water Act and RCRA as a result of discharging 48,000 gallons a day of waste water containing copper, lead, and nickel into city sewers. He was ordered to serve four months of his one year jail sentence.

24. *United States v. Pennwalt Corp.*, No. CR-88-55T (W.D. Wash 1989), reported in Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 *GEO. WASH. L. REV.* 781 (1991).

The company and four individuals were indicted for violations of the Clean Water Act as a result of a discharge of 75,000 gallons of sodium dichromate into the Hylebos Waterway and Puget Sound. The company entered into a plea agreement and it agreed to pay a \$500,000 fine and \$600,000 into a trust fund for the United States Coast Guard. The charges against all of the individuals except one were dismissed and that individual was fined \$5,000.

25. *United States v. Schwitters*, 17 Env't Rep. (BNA) 607 (W.D. Wash. 1986).

A Seattle ship-cleaning company and its president were convicted of three counts of unlawful discharges of spent abrasive blasting grit and paint materials, into Lake Union. The defendants were acquitted on one of the counts of the indictment.

26. *United States v. Woeck*, No. CR86-128W (W.D. Wash. Dec. 1, 1986), reported in Nittoly, *Current Trends in the Prosecution of Environmental Offenses*, ALI-ABA Criminal Enforcement of Environmental Laws (Apr. 1990).

Three company officials with Marine Power & Equipment Co. pled guilty to violations of the Clean Water Act as a result of dumping toxic waste into a lake and river in Washington. The officials received a sentence of five days in jail, three years on probation, and 300 hours of community service.

27. *United States v. Ralston Purina*, 12 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,257 (W.D. Ky. 1982)

The defendant pled guilty to violations of the Refuse Act, the Clean water Act and CERCLA as a result of a discharge of 18,000 gallons of hexane into the sewer system which caused explosions within the Louisville sewer system and the diversion of untreated water into the Ohio River. The defendant was fined \$62,500.

28. *United States v. Manfred DeRewal*, No. 77-287 (E.D. Pa. 1978), reported in Richard M. Carter, Note, *Federal Enforcement of Individual and Corporate Criminal Liability for Water Pollution*, 10 MEM. ST. U. L. REV. 576, 606 (1980).

The owner manager of a company and four employees were convicted of violating 33 U.S.C. § 1319(c)(1) of the Clean Water Act as a result of pouring liquid wastes into a storm sewer. DeRewal was fined \$20,000, sentenced to six months in jail and placed on four and one-half years probation, and the four employees received three years probation.

29. *United States v. Blue Lagoon Marina*, No. 75-80824 (E.D. Mich. Dec. 12, 1975), reported in Michele Kuruc, Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 103 (1985).

This criminal prosecution against the corporation grew out of the same facts set forth in *United States v. Hamel*, digest no. 17, Appendix A. The corporation was acquitted by the jury.

