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# CRIMINAL LIABILITY FOR ENVIRONMENTAL LAW VIOLATIONS BY COAL OPERATORS

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## I. INTRODUCTION

The reawakening of America's environmental consciousness has resulted in not only the creation of new environmental programs, but

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also the discovery and implementation of heretofore (largely) ignored provisions of existing environmental regulatory schemes. The regulated community has experienced one aspect of this phenomenon in a newfound emphasis on enforcement of environmental protection laws through the imposition of criminal sanctions. Enforcement of such laws at both the state and federal levels via the use of criminal sanctions has rapidly escalated in recent years. While many of the nation's major environmental protection laws have been on the books since the early 1970's, regulatory agencies, initially focusing on implementation of the substantive requirements of those laws, ordinarily sought criminal sanctions in only a few egregious cases. Newly created regulators, and a newly regulated business community, generally tended to concentrate their attention on the major rulemaking efforts necessitated by the creation of complex environmental statutes and on the development of technology to achieve the substantial goals set by the environmental protection legislation of the 1970's. The simultaneous development of implementing rules and regulations, and judicial review of those rules and regulations, also contributed in some degree to the sparing use of existing authorized criminal sanctions. As a result, relatively little attention was given to enforcement by the use of criminal sanctions during the 1970's and early 1980's.

As an example, throughout the mid-1980's most efforts to implement the Clean Water Act were directed at the development of technology-forcing effluent guidelines, water quality standards, and permitting regimens to implement a new and complex regulatory scheme.[1] A similar evolution occurred under both the Clean Air Act of 1977[2] and the Resource Conservation and Recovery Act of 1976.[3]

Only in recent years has the regulated community had sufficient time to gain a comprehensive understanding of the regulatory programs and its obligations thereunder, and to have acted to assure compliance therewith. The public and the courts were largely tolerant of the absence of criminal enforcement during the formative years of the nation's environmental protection programs. Events of recent

1. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1319(c)(1) (1988).
2. 42 U.S.C. § 7401 (1988).
3. 42 U.S.C. § 6928(e) (1988).

years, coupled with the fact that regulatory schemes have matured, have eroded the tolerance previously enjoyed by business. Frequent news accounts of illegal dumpers, major oil spills, and other man-made environmental disasters reflect the type of stimuli that the courts and the public have received to create a heightened concern on environmental enforcement issues. Just as the business community adapted to marketplace changes that have occurred in the last decade, so too must it adapt to the changes that occurred in the enforcement of the nation's environmental protection laws. Those changes include the dramatic increase in the use of criminal sanctions against both companies and individuals.[4]

Until recently, it was unusual, if not unthinkable, that the government would use criminal prosecution for any but the most aggravated violations of environmental protection laws. The new emphasis on criminal prosecution of individuals represents a major

4. The following 1989 and 1990 decisions are representative of the significant increase in criminal fines and jail terms for violation of environmental protection laws and represent the broad spectrum of personnel at risk:

*See* Pozsgai v. United States, 897 F.2d 524 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 48 (U.S. 1990) (defendant convicted on forty-one counts of illegally filling wetlands sentenced to 3 years imprisonment and fined $200,000); United States v. Tran, No. 90-333 (E.D. Pa. Aug. 1, 1990) (supervisor at federal contractor's laboratory pled guilty to 2 counts of falsifying toxicity test results concerning Superfund sites, and, as a result, is facing ten year imprisonment and $500,000 fine); United States v. Paccione, 738 F. Supp. 691 (S.D.N.Y. 1990) (two defendants convicted for operating illegal landfill sentenced to twelve years imprisonment and ordered to pay $250,000 in fines); United States v. Davis Pipe & Metal Fabricators, Inc., No. CR-2-89-51 (E.D. Tenn. Feb. 27, 1990) (producer of stainless steel pipe fined $400,000 after pleading guilty to dumping hazardous wastes in violation of RCRA); United States v. Melle, No. C-89-142 CR (W.D. Mich. Feb. 15, 1990) (employee of industrial solvents reclamation company sentenced to 12 months at correctional facility after pleading guilty to one count of transporting hazardous waste to an unpermitted facility in violation of RCRA and CERCLA); United States v. Bogas, 731 F. Supp. 242 (N.D. Ohio 1990) (former airport commissioner sentenced to 180 days home detention, ordered to perform 1000 hours of community service, and placed on probation after pleading guilty to making false statement to EPA and failing to report release of hazardous substance pursuant to CERCLA § 103(a)); United States v. Fisher R.P.M. Electronic Motors, Inc., No. 89-234 (D.C. Or. Feb. 8, 1990) (owner of company sentenced to 3 months in-house custody, 3 years probation, and ordered to pay $2,500 fine based on negligent discharge of pollutants in violation of Clean Water Act; United States v. Brittain, No. 89-283 (W.D. Okla. Dec. 12, 1989) (former public utility department supervisor sentenced to one year of imprisonment for falsifying wastewater discharge monitoring reports; former water pollution control manager sentenced to four months imprisonment and five years probation for making false statement and discharging raw sewage); United States v. Marine Shale Processors, Inc., No. 89-60041 (W.D. La. July 24, 1989) (hazardous waste handler fined $1,000,000 after pleading guilty to felony permit violation under RCRA and two misdemeanor violations of Rivers and Harbors Act).

departure from this historical approach. The government's motive for this change in philosophy was described by a former Assistant Attorney General in charge of the Land and Natural Resources Division of the United States Department of Justice in an article published in 1987:

> The government's increased resort to criminal enforcement of the environmental laws has one principal, overarching goal: deterrence. The stigma that attaches to a criminal conviction and the dislocation inherent in actual incarceration combine to make the threat of criminal prosecution a major tool in obtaining greater compliance with the nation's environmental laws. The Justice Department and EPA strongly believe that members of the regulated community will be less likely to consider wilful or calculated evasion of environmental standards when they know that discovery may lead to a prison term.
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> It is no accident, therefore, that three times as many individuals have been prosecuted by the environmental crime section as corporate defendants. Corporations cannot go to prison, and they can readily pass the costs associated with a criminal fine along to consumers. On the other hand, individuals acutely feel the personal impact of imprisonment and a criminal record. This strategy and the philosophy of deterrence are not unique to environmental cases, but rather govern the Department of Justice's prosecutorial policy in all areas of criminal enforcement, including white collar and traditional crimes.[5]

Politicians, U. S. Attorneys, state attorneys general, and local prosecutors are keenly aware that prosecution of environmental crimes gains favorable media attention and increased public support, particularly to a public imbued with a newfound respect for the environment. Such public awareness creates a "win-win" situation for the criminal prosecution of environmental violators. Instances of such prosecution are therefore occurring with increasing frequency.

Criminal prosecutions for environmental violations are no longer restricted to the most serious of crimes. At the same time, the consequences of a conviction for environmental crimes have increased dramatically with the issuance of the Federal Sentencing Guidelines.[6] The guidelines impose specific limitations on federal judges making it more likely that a person convicted of an environmental felony will serve jail time.

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5. F. Henry Habicht II, "The Federal Perspective on Environmental Criminal Enforcement: How To Remain on the Civil Side," 17 ELR 10478, at 10480, December, 1987.

6. U.S.S.G. § 2Q1.1.

Knowing that even companies with advanced environmental compliance programs can unintentionally violate the myriad of complicated environmental regulatory schemes which, in many instances, can regulate virtually every aspect of business operations, the regulators look for specific criteria to select a case for criminal prosecution. Among the literature which discusses such criteria is the September 21, 1987 document entitled "Memorandum on Factors to Consider in Determining Whether a Matter Should be Referred For Criminal Investigation."[7] In the Memorandum, authored by the U. S. Environmental Protection Agency ("EPA"), the EPA identifies six factors as relevant to determining whether a matter should be referred for criminal prosecution. The factors include:

1. *Knowing or Willful Behavior* — federal environmental protection statutes and their state counterparts require some degree of intent or voluntariness to prosecute for a criminal offense.

2. *Elements of the Offense* — it is necessary to prove each of the mandated elements of environmental crime as specified by the underlying statutes.

3. *Impact on the Government's Regulatory Function* — because the EPA's programs rely on voluntary reporting from the regulated community, the government will target cases where there has been some effort to falsify, conceal or destroy documents or information that the government believes to be critical to the integrity of the regulatory system.

4. *Environmental Harm* — prosecutors may consider the duration, extent, or threat of harm to the environment in determining whether to pursue criminal sanctions. It is significant, however, that proof of harm is not a prerequisite to the prosecution.

5. *Patterns of Practice* — past environmental compliance practices, good or bad, can weigh heavily on the government's decision to exercise its prosecutorial discretion to pursue criminal sanctions.

6. *Deterrence* — a central purpose of criminal prosecution under the nation's environmental laws is to deter others from committing similar acts. This may cause the government to pursue a high profile case over one that may gain fewer headlines.

Clearly, the certainty of increased enforcement of environmental protection laws via criminal sanctions will assume that a regulated community, already attuned to dealing with the complexities of the various environmental regulatory programs, will become increasingly sensitized to the importance of compliance. Everyone from executive

7. *See* EPA Memorandum, "Environmental Criminal Conduct Coming to the Attention of Agency Officials and Employees," issued by Thomas L. Adams, Jr., Assistant Administrator, Office of Enforcement and Compliance Monitoring (September 21, 1987).

management to hourly workers must have an adequate appreciation of the import of the laws and of the consequences of enforcement through criminal sanctions. Compliance audits, training programs, and effectively communicated compliance policies are critical to avoiding criminal sanctions.

## II. Potential Effects on the Coal Industry

With the likelihood of more frequent use of criminal sanctions for the enforcement of environmental laws, the coal industry must realize that it will not be immune from potential exposure to the threat of criminal enforcement. In fact, like other sectors of the regulated community, future regulation of coal industry practices will certainly reflect the trend towards criminal sanctions for violations of environmental law. The likelihood of criminal enforcement will increase, not only under laws with which the coal industry is commonly familiar, such as the Surface Mining Control and Reclamation Act of 1977 and its state counterparts, but also under other environmental laws with which the industry may not be so familiar. In the sections which follow, the criminal provisions of relevant environmental laws to the coal industry will be discussed.

### *A. Surface Mining Control and Reclamation Act*

As state regulators with limited resources attempt to heighten enforcement of the environmental protection standards contained in the Surface Mining Control and Reclamation Act of 1977 (SMCRA),[8] environmentalists and others are calling for a more systematic and frequent use of criminal sanctions as a just and efficient means of deterrence.[9] Indeed, many industry representatives believe that the use of criminal penalty provisions contained in SMCRA should be enhanced. Presumably, a credible threat of criminal liability under SMCRA would help control or eliminate unscrupulous operators, and would obviate administrative schemes now employed to link those

8. 30 U.S.C. § 1201-1328 (1988) [hereinafter "SMCRA"].

9. For a general discussion of certain violations of the Act which are reported to be widespread, many of which evince a criminal intent to violate the Act, *see* Galloway & FitzGerald, *Abuse of the Surface Mining Act: A Continuing Story*, 87 W. Va. L. Rev. 627 (1985).

who own or control coal properties with violations left by inept or unscrupulous operators.[10] As a result of this trend, coal operators face an enhanced risk of criminal liability, including imprisonment, for violations previously considered by some to result from excusable ignorance.

While the Federal Mine Safety and Health Act of 1977[11] is not per se considered an environmental statute by practictioners, a recently publicized $500,000 fine — reportedly the second-highest criminal penalty ever assessed under that statute — illustrates the new emphasis by federal enforcement agencies on investigating and pursuing criminal violations in the coal fields. In announcing that fine, U.S. Attorney Michael Carey of the Southern District of West Virginia indicated that investigations of other coal operators were continuing and could include facilities and operations located in other jurisdictions.[12] This action signals increased criminal enforcement of safety and health laws, under which prosecutions have been pursued in appropriate cases for quite some time.[13] The routine consideration of criminal sanctions for purely environmental violations, however, adds a new dimension to the regulation of coal operations on both the federal and state levels.[14]

Criminal penalties are authorized under SMCRA[15] for three distinct types of violations: (1) making false or misleading statements

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10. *See* Means, *The Applicant Violator System: A Critical Evaluation*, 10 EAST. MIN. L. INST. § 6.08 (1989).

11. 30 U.S.C. § 801 (1988).

12. *The Charleston Gazette*, January 18, 1991.

13. *See, e.g.*, Ryan & Schell, *Criminal Sanctions Under The Federal Mine Safety and Health Act of 1977*, 85 W. VA. L. REV. 757 (1983).

14. For example, on October 1, 1990 the West Virginia Division of Energy announced the establishment of a new "Office of Environmental Enforcement" which will reportedly work closely with the U.S. Attorney's office and the West Virginia Attorney General in prosecuting coal miners who intentionally operate outside the law. The office was to be staffed with personnel with backgrounds in criminal investigation and surveillance experience. *The Charleston Gazette*, October 1, 1990.

15. Like other environmental laws preceding it, SMCRA allows a state to become the primary authority responsible for regulating coal mining and reclamation operations on non-federal lands within its borders upon submission of a "state program" and approval of the same by the Secretary of the Interior. 30 U.S.C. § 1253 (Supp. 1990). To obtain "primacy," a state's laws must be no less stringent than and meet the minimum requirements of all applicable provisions of SMCRA. Further, a state's regulations must be no less effective than the Secretary's regulations in meeting the requirements of

in any document filed with a regulatory authority or required to be maintained by the Act;[16] (2) willful and knowing violations of permit conditions;[17] and (3) failing or refusing to comply with orders issued by the Secretary of the Interior or any reviewing court.[18] Given the comprehensive nature of SMCRA's technical provisions, and the regulations promulgated thereunder, the range of activities which could result in a criminal prosecution under one or more of these categories is quite broad.

1. False Statements

Section 518(g) of SMCRA provides that:

> Whoever knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plant [sic], or other document filed or required to be maintained . . . shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.[19]

Thus, a person can be held liable under SMCRA not only for direct falsehoods, but for *failing* to make any statement which should be made in any filed or required document. There are numerous components of SMCRA and the regulations in which affirmative statements and certifications are required, any of which could precipitate an investigation if a person has been less than truthful or evasive in relating the required information.

The fact that many opportunities for such a violation exist is illustrated by the central document required under SMCRA: the permit application. Among other requirements, an applicant must submit detailed information and disclosures including: (1) Whether the ap-

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the Act. *See* 30 C.F.R. § 730. For this general discussion, it may therefore be assumed that most state programs have provisions similar to SMCRA's. However, the specific coal mining laws and regulations under which a particular mine operates should be consulted to gain a detailed understanding of the criminal penalties which may be available under that program because those penalties may differ from the federal SMCRA.

16. 30 U.S.C. § 1268(g) (Supp. 1990).

17. *Id.* § 1268(e).

18. *Id.* § 1268(g). *See also id.* § 1268(f). Any director, officer or agent of a corporate permittee who willfully and knowingly authorized, ordered, or carried out a violation may be subject to the same criminal penalties as may be imposed on a corporation.

19. 30 U.S.C. § 1268(g) (Supp. 1990).

plicant, or any subsidiary, affiliate or persons "controlled by or under common control with" the applicant, has had a federal or state coal mining permit suspended or revoked within the prior five years,[20] (2) a list of all violation notices received by the applicant during the prior three years concerning any "provision of the Act, or of any law, rule or regulation of the United States, or of any state law, rule or regulation enacted pursuant to federal law, rule or regulation pertaining to air or water environmental protection,"[21] and (3) a list of any unabated cessation orders and unabated air and water quality violation notices received by the applicant and any coal mining operation "owned or controlled by either the applicant or by any person who owns or controls the applicant."[22]

As to protection of environmental resources, an applicant is required to submit: (1) a determination of the "probable hydrologic consequences" of the proposed mining and reclamation operation, both on and off the mine site,[23] (2) a statement of the result of test borings or core samplings from the permit area, including a chemical analysis of potentially acid or toxic- forming sections of the overburden,[24] (3) a "detailed description of the measures to be taken during the mining and reclamation process to insure the protection of (inter alia) . . . surface and ground water systems, both on- and off-site,"[25] and (4) an estimate of the cost per acre of reclamation, including a statement of how the permittee plans to comply with *each* of the requirements set out in Section 515 of SMCRA (containing the general environmental protection performance standards).[26] In addition, requests for variances from any SMCRA requirements, including the need for a permit, the obligation to restore land to its approximate original contour, or the requirement that reclamation be conducted "as contemporaneously as practicable with the surface coal

20. *Id.* § 1257(b)(5) (Supp. 1990).
21. 30 C.F.R. § 778.15(c) (1990).
22. 30 U.S.C. § 1257(b)(5) (Supp. 1990); 30 C.F.R. § 778.15(c) (1990).
23. 30 U.S.C. § 1257(b)(11) (Supp. 1990).
24. *Id.* § 1257(b)(15) (Supp. 1990).
25. *Id.* § 1259(a)(13) (Supp. 1990).
26. *Id.* § 1259(a)(5).

mining operations," require further specific representations as to the bases for any such request.[27]

Because both the permit application and other applications for approval of certain practices are frequently viewed by the applicant as documents of persuasion, a requirement that the applicant be completely forthright in discussing site analysis, and environmental problems which could result from the contemplated mining operations, would seem unreasonable if strictly applied and literally interpreted. This is especially so because SMCRA places on the applicant the burden of establishing that all requirements of the regulatory scheme can and will be met.[28] Under this regimen, an applicant for a permit or other approval must reveal all information regarding site conditions which may make it difficult to adequately reclaim a permit area, and then pray that the regulatory authority approves the plan for dealing with these contingencies. Moreover, because of the enormous amount of technical data which must be included in any permit application (i.e., a description of how the permittee plans to comply with each of the environmental protection performance standards), companies required to obtain several permits — particularly for a specific geographic region — frequently assume that simply replicating much of what was included in the first permit application for that area will suffice as applications for additional permits or boundary revisions are submitted. The assumption may be incorrect and, should damage to the environment result from a failure to perform an adequate investigation before submitting any application, a criminal investigation could result. Such an investigation would involve careful scrutiny of application statements and disclosures in an effort to establish that they were known to be false when made, or that willful ignorance, as a result of an inadequate or absent pre-application investigation, rises to the level of a "knowing" violation of the law.[29]

27. *Id.* § 1291(28)(A) (Supp. 1990) (exemption from permit requirement where coal removal is incidental to extraction of other minerals for commercial sale where coal is less than 16 2/3% of total tonnage of minerals removed); 30 U.S.C. § 1262 (Supp. 1990) (coal exploration approvals); 30 U.S.C. § 1265(c)- (e) (variance from approximate original contour restoration); 30 U.S.C. § 1265(b)(16) (variance from contemporaneous reclamation of surface mined lands).

28. 30 U.S.C. § 1260(a) (Supp. 1990).

29. This would include the failure to make any statement which *should* be made, pursuant to 30 U.S.C. § 1268(g). Note that this raises significant questions as to the need for disclosure of the results of "due diligence" investigations, which is beyond the scope of this paper.

Depending on the federal or state programs which pertain to a given operation, there are additional reporting and record keeping obligations imposed by SMCRA. For example, data resulting from groundwater monitoring, records of well logs and bore hole data, and progress reports may be required.[30] With regard to blasting operations, an operator must maintain logs detailing the blast location, the pattern and depth of drill holes, the amount of explosive used, and the order and length of delay in the blast.[31] The log must be kept for a period of at least three years and must be available for public inspection.[32] A decision by a mine officer or employee to record untruthful or incomplete information in any such report to avoid memorializing a violation of the law, particularly if such a pattern persists, could result in exposure to criminal liability for the permittee.

The same is true with respect to any false statement or misrepresentation in a report filed under the federal Abandoned Mine Reclamation program.[33] Particular areas of concern with regard to the submission of statements and fees under the abandoned mine lands program include computation of the proper weight of "coal produced" upon which the fee is calculated, and the fact that (in certain situations) a person exercising control over another actually conducting mining operations may be liable for payment of reclamation fees on the coal produced.[34]

### 2. Willful and Knowing Violations of a Permit

Section 518(e) of SMCRA states that:

> Any person who willfully and knowingly violates a condition of a permit . . . or fails or refuses to comply with any order issued under section 521 or section

30. 30 U.S.C. § 1267(b) (Supp. 1990).

31. *Id.* § 1265(b)(15)(B).

32. 30 C.F.R. 816.68 (1990).

33. 30 U.S.C. § 1232(d) (Supp. 1990). On August 21, 1990 the first person indicted for defrauding the Abandoned Mine Land Fund was sentenced to three years' probation and ordered to pay nearly $10,000 to the federal government. Robert Helfer, a partner in R & H Surface Mining of Sholacta, Pennsylvania pleaded guilty to charges of falsifying coal production reports submitted to the Interior Department. As a convicted felon, Helfer will no longer be able to obtain mining permits. *Mine Regulation Reporter*, July 6, 1990; *id.*, August 31, 1990.

34. *See* United States v. Ranoca Energy Co., 613 F. Supp. 1161 (W.D. Va. 1985).

> 526 of this Act or any order incorporated in a final decision issued by the Secretary under this Act . . . shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.[35]

In this regard, a broad requirement attaching to each permit issued under SMCRA is that the mining operation meet "all applicable performance standards . . . and such other requirements as the regulatory authority shall promulgate."[36] Among such standards are requirements that an operator: (1) remove top soil in a separate layer and segregate it from other spoil, (2) maintain a vegetative cover as necessary to avoid deterioration,[37] (3) "insure that all debris, acid-forming materials, (and) toxic materials . . . are treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters . . . ,"[38] (4) not deposit spoil material or waste outside the permit area,[39] and (5) "to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values . . . ."[40]

An operator intentionally violating any of these requirements, such as failing to have operating guidelines requiring the separation and maintenance of top soil, allowing the haphazard replacement of spoil material in mining pits without identifying and isolating (and treating where required) potentially toxic material, or by placing excess spoil material in a manner or in an area which has not been approved by the regulatory authority, could face a criminal investigation, particularly if long-term-environmental harm results. This is also true in the event of failure to meet additional, site- specific conditions of a mining permit.

### 3. Willful and Knowing Violations of Orders

Section 518(e) of SMCRA authorizes the imposition of criminal penalties for willful and knowing violations of any order issued by

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35. 30 U.S.C. § 1268(e) (Supp. 1990).
36. *Id.* § 1265(a).
37. *Id.* § 1265(b)(5).
38. *Id.* § 1265(b)(14).
39. *Id.* § 1265(b)(11), (22).
40. *Id.* § 1265(b)(24).

the Secretary (or corresponding official under a state program), except for orders involving civil penalties. If employed expansively, this sanction would apply to a violation of orders or rulings issued under the name of the Secretary concerning approval of specific practices or variances from general requirements at a particular operation. Obviously, an operator would be at peril in knowingly undertaking practices which have not been approved, or specifically disapproved, while anticipating later receipt of such approval or a successful attempt to modify or overturn an adverse order.

In addition, section 704 of SMCRA states that:

> Any person who shall, except as permitted by law, willfully resist, prevent, impede, or interfere with the Secretary or any of his agents in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.[41]

Under this provision, refusal to grant access to the mine site to a duly authorized regulatory official or refusal to permit a review of records and reports required to be maintained under SMCRA could result in criminal charges. Indeed, virtually any effort to prevent an official from discovering and evaluating a violation or possible harm to the environment caused by an operation could be prosecuted under this section.

While the criminal penalty provisions of SMCRA have rarely been used in the fourteen years since adoption of the Act, it seems clear that criminal sanctions will be employed more frequently in the future. All persons working at mining and related permitted operations, management and hourly personnel alike, should be made aware of this potential liability. In short, coal operators must not view the reluctance of prosecutors to bring criminal charges during the formative years of the SMCRA regulatory scheme as an indicator that such liability is unlikely in the future.

## III. Criminal Sanctions Under General Environmental Laws

While SMCRA established the environmental regulatory scheme most readily associated with the coal industry, state and federal re-

41. *Id.* § 1294 (Supp. 1990).

gulators have an additional array of penalty mechanisms available to them under other environmental laws. A multitude of federal and state environmental protection laws give regulators the ability to deal with coal operator violations in a comprehensive manner, including related activities such as transportation, processing, transloading, by-product and sales operations. Virtually all major federal environmental statutes which pertain to such operations provide both federal and state regulatory agencies with various penalties with which to deter polluters and correspondingly enforce compliance. These statutes generally enable state and federal agencies to modify or revoke permits, issue compliance orders, seek injunctive relief, or compel clean-up of environmental contamination while still providing an impressive variety of civil penalties which may be assessed. In addition, most major environmental statutes pertaining to coal and related operations also contain stringent criminal sanctions. Indeed, the presence of both civil and criminal sanctions within individual environmental statutes may, at times, lead to parallel civil and criminal actions for the same alleged violation.[42]

Over the past two decades, Congress has consistently and continuously expanded individual response to criminal liability under the various health, safety, and environmental statutes. Within the area of food and drugs, for instance, a strict liability standard has been established for violations which involve adulterated or mislabeled products. Nevertheless, Congress has not yet seen fit to introduce strict or even vicarious liability within environmental protection statutes. These statutes generally contain a scienter requirement, expressly cover more classes of individuals, and allow for substantially increased penalties for violations. Criminal prosecution in the area of environmental regulation is clearly intended to foreshadow a metamorphosis of what is viewed by regulators as a noncompliance culture within industry. It is generally recognized that the primary objective of criminal provisions, their very presence within the environmental protection laws,

42. United States v. Kordel, 397 U.S. 1 (1970). *See id.* at 11-12. The United States Supreme Court held, as a general matter, that evidence obtained through civil discovery may be introduced in criminal actions. An exception to this rule is where the "Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . ."

is to provide a deterrence to violation and an incentive for voluntary compliance with the parallel civil provisions. Thus, in the end, these penalties are all designed to punctuate the economic unattractiveness of noncompliance.

Possibly the most notable change within criminal enforcement of environmental compliance lies within the very nature of the criminal penalties themselves. Beyond application of criminal penalties for the knowing or negligent violation of substantive provisions of the various acts, several of these statutes introduce criminal penalties for the failure to immediately notify government agencies of the discharge or release of certain pollutants or hazardous substances. Similarly, stringent prohibitions against false statements provide bases upon which acts involving knowing misstatements within required reports or monitor tampering may be prosecuted. Possibly most striking of all has been the advent and dramatic increase of criminal convictions for crimes of "knowing endangerment." Here, a criminal conviction can be sustained even in the absence of actual injury. All that need be proved is that the defendant knowingly created an imminent risk of death or serious bodily injury to persons.

Under modern environmental compliance enforcement, individuals stand naked in the face of criminal prosecution: void of corporate insulation and protection and very much accountable for the consequences of their actions. The following subsections contain an abridgement of the elements of criminal offenses under five major federal environmental statutes potentially affecting a broad spectrum of coal industry activity, along with a description of the corresponding enforcement penalties.

### *A. The Resource Conservation and Recovery Act*[43]

RCRA states that any person who knowingly transports, treats, stores, or disposes of hazardous waste without a permit[44] or in knowing violation of a permit, or who omits material information, makes

43. 42 U.S.C. § 6928(e) (hereinafter "RCRA").

44. One is deemed to have a RCRA permit for activities covered by SMCRA. *See* 42 U.S.C. § 6925(f).

any false material statement, conceals, destroys, or alters any record or report mandated by RCRA may be fined up to $50,000 per day of violation or be subject to imprisonment for up to five years, or both. A second violation of RCRA may result in a fine or imprisonment of up to double the maximum penalty appropriate for the first violation or both. Under RCRA section 6928(d)(6), anyone who knowingly exports hazardous waste without the consent of the receiving country, or in violation of any international agreement between the United States and the receiving country, may be fined up to $50,000 per day, imprisoned for up to two years, or both. Under section 6928(e) of RCRA, any person convicted of knowingly transporting, treating, storing, disposing, or exporting hazardous waste, which thereby places another person in imminent danger of serious bodily injury or death may, upon conviction, be fined up to $250,000, imprisoned for up to fifteen years, or both. (Corporate violators may be fined up to $1,000,000 for such a violation.).

### *B. Comprehensive Environmental Response, Compensation and Liability Act*[45]

Under CERCLA, any person in charge of a vessel or facility from which a hazardous substance in equal to or greater than a reportable quantity is released and who fails to notify the National Response Center of such release may be fined up to $10,000 or imprisoned for up to three years (up to five years for a second or subsequent violation), or both. Moreover, any facility owner, operator, or transporter of hazardous substances to a facility who knowingly fails to notify the EPA of the existence of such a facility, the amount and type of hazardous substances to be found there, and any known, suspected, or likely releases from such a facility, may be fined up to $10,000 or imprisoned for up to one year.[46] Under CERCLA section 9603(d)(2), any person who knowingly destroys, mutilates, erases, conceals, falsifies, or otherwise renders unavailable any records with respect to hazardous substances at a

45. 42 U.S.C. § 9603(b) (hereinafter "CERCLA").

46. 42 U.S.C. § 9603(c).

facility may be fined up to $20,000 or imprisoned for up to three years (up to five years for second or subsequent violations).

### C. *Clean Air Act*

Under the Clean Air Act Amendments of 1990, P.L.101-549, felony-level penalties have recently been introduced for criminal conduct actionable under the Clean Air Act of 1977.[47] The knowing and willful violation of any rule, order, waiver, or permit promulgated or approved (including any requirement for the payment of any fee owed to the federal government under requirements regarding state implementation plans), orders to comply with state implementation plans or standards, requirements for ozone protection, new source performance, hazardous emissions, inspections, preconstruction requirements, or provisions regarding permits and acid-deposition control is punishable by imprisonment for up to five years or fines of up to $250,000 (for individuals) or $500,000 (for organizations), or both. The amendments generally expand prison terms from one year (under the prior law) to up to five years for first offenses, while, at the same time, substantially increasing the amounts of fines that may attach. Furthermore, the amendments authorize the doubling of penalties for repeat offenders for all categories of conduct considered criminal under the Act.[48]

Under section 113(c)5 of the amended Act, the knowing release of hazardous or extremely hazardous air pollutants or substances which cause imminent danger of death or serious bodily injury to persons is punishable by imprisonment of up to fifteen years and a fine of up to $1,000,000 for violators who are organizations. Under section 113(c)4 of the amended Act, negligent releases are punishable by fines of up to $250,000 for individuals and $500,000 for corporations, or imprisonment of up to one year, or both. Under section 113(c)3 of the amended Act, violations of any key requirement of the Act are punishable by fines of up to $250,000 for individuals, and $500,000 for corporations, or may result in imprisonment for not more than one year, or both.

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47. 42 U.S.C. § 7401.

48. Clean Air Act § 113(c), as amended.

### *D. Clean Water Act*

Under the Federal Water Pollution Control Act,[49] commonly referred to as the Clean Water Act, any person who negligently violates the provisions of the Act or negligently discharges into a sewer system or publicly owned treatment system (POTW) any pollutant which such person knew or reasonably should have known could cause personal injury or property damage, and which causes such POTW to violate any effluent limitation or permit condition, may be fined not less than $2,500 per day, nor more than $25,000 per day per violation, or imprisoned for up to one year, or both. (Second or subsequent violations may result in a doubling of fines and prison terms.) Under section 19(c)(2) of the Act, any person who *knowingly* violates the provisions of the Act or knowingly introduces into a sewer system or POTW a pollutant under the terms as described in section 1319(c)(1) may be fined not less than $5,000, nor more than $50,000 per day of violation, or imprisoned for up to three years, or both. (Likewise, second or subsequent violations may result in a doubling of fines and prison terms.).

A violation of any provision of the Clean Water Act, coupled with knowingly placing another person in imminent danger of death or serious bodily injury may subject the violator to a penalty of up to $250,000, imprisonment of up to fifteen years, or both. In addition, corporations may be fined up to $1,000,000, if convicted of such a violation.

Knowingly making false statements or representations in documents or reports required under the Clean Water Act, or tampering with monitoring equipment, may result in fines of up to $10,000 or imprisonment of up to two years, or both.[50] Moreover, the failure of any person in charge of a vessel or on-shore facility to report any discharge of oil or other hazardous substance from such vessel or facility can result in fines up to $10,000 or imprisonment for up to one year, or both.[51]

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49. 33 U.S.C. § 1319(c)(1) (commonly referred to as the "Clean Water Act").
50. Section 1319(c)(4).
51. Section 1321(b)(5).

### *E. Toxic Substances Control Act*

Under the Toxic Substances Control Act[52] any person who knowingly or willfully violates the provisions of the Act may, upon conviction, be subject to a fine of up to $25,000 per day of violation or one year imprisonment, or both.

### *F. Other Significant Non-Environmental Criminal Statutes*

In addition to the criminal provisions and penalties contained in these environmental statutes, federal environmental enforcement authorities may also apply general criminal statutes and sanctions to violators of environmental law. Thus, certain actions on the part of alleged violators may cause enforcement authorities to initiate actions under the various nonenvironmental law criminal provisions in conjunction with the specific provisions provided for within the environmental statutes themselves.

Federal law, under 18 U.S.C. § 1001 (1982), establishes criminal penalties which may be sought by federal prosecutors for a broad range of false statements and representations made to government agencies in addition to similar penalties provided for in the environmental statute allegedly violated. Under 18 U.S.C. § 1001, criminal penalties may attach for the communication of false statements to government agencies above and beyond that which would otherwise attach for submitting false reports under any of the environmental statutes. Under section 1001, anyone who knowingly and willfully makes a false statement to the federal government may be fined up to $10,000 or imprisoned for up to five years.

Under 18 U.S.C. § 1341 and § 1343, use of the mails, airways, or interstate wires in connection with a "scheme or artifice" to defraud, or for obtaining money or property by means of false or fraudulent representations may result in a fine of up to $10,000 or imprisonment of up to five years.

Under 18 U.S.C. § 1503, the Federal Obstruction of Justice Provision, there are provisions for fines of up to $5,000 or imprisonment

52. 15 U.S.C. § 2615 (hereinafter "TSCA").

of up to five years for the intimidation of witnesses or the obstruction of the administration of justice by corrupt or threatening conduct or communications. This statute may very well come into play in situations of employer/employee conflict of interest within criminal enforcement actions (for example, when employees act as government "informants").

Section 371 of 18 U.S.C. establishes a fine of up to $10,000 or imprisonment of up to five years for conduct which involves knowingly and willfully conspiring to defraud, or otherwise circumventing federal agency regulations. (However, it should be noted that section 361 of 18 U.S.C. may only be employed if *two or more* corporate employees conspire to violate an environmental statute.).

Under the Racketeer Influenced and Corrupt Organizations Act (RICO) provisions of the Organized Crime Control Act of 1970, section 901(a), 18 U.S.C. §§ 1961-1968 (1982), it is illegal to acquire, maintain, or control any enterprise through a "pattern" of racketeering activities.[53] However, in order to establish a "pattern" of racketeering activity, and thus to be criminally convicted under RICO, the prosecution must establish that at least two acts of racketeering activity occurred, with the last such act having occurred within ten years of the most recent.

Federal enforcement authorities have placed a substantial emphasis on the prosecution of criminal provisions and sanctions provided for in the various major federal environmental, as well as nonenvironmental, statutes. Indeed, the criminal provisions contained within the environmental statutes alone are formidable weapons with which federal prosecutors may not only deter violations and enforce compliance, but hold accountable individuals and corporations responsible for past damage to the environment.

## IV. Who Is At Risk? The "Knowing" Violation

As noted earlier, Congress has not employed strict or vicarious liability standards within the criminal provisions of environmental protection statutes. A "scienter" requirement is found in each of

53. 18 U.S.C. § 1962(a).

the major environmental laws detailed. Because of the recent emphasis on the use of criminal sanctions, the courts are presently grappling with the issues of what constitutes a "knowing" violation and what levels of the corporate hierarchy (mine site to executive suite) are at risk of sanctions. Currently, discerning a standard for "knowing" under most environmental statutes represents the unravelling of "a riddle wrapped in puzzles, surrounded by enigma."[54] By reviewing the origin of the "knowing" requirement, one gains a better understanding of its purpose and function. Historically, a culpable state of mind has been a universal component of criminal conduct.[55] Mental culpability serves so central a role in criminal law that courts, reluctant to impose penal sanctions absent some form of scienter, usually read such an element into statutes found lacking in this respect.[56]

### *A. Welfare Statutes — An Historical Perspective*

As reflected earlier, modern environmental laws employ "knowing" as the standard for determining when actions constitute culpable violations.[57] Placing environmental protection laws in the broader context of "public welfare" statutes serves as a helpful first step in developing an analytical framework. Such classification causes courts to apply a different, and in some ways more complex, series of reasoning criteria from those used with regard to the mens rea of crimes deriving from common law.

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54. Paraphrasing the late Winston Churchill.

55. Morissette v. United States, 342 U.S. 246, 253-54 (1952); United States v. United States Gypsum Co., 438 U.S. 422, 437 (1977).

56. *Morissette*, 342 U.S. at 253-54; *United States Gypsum Co.*, 438 U.S. at 437; *see also* Webber, *Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?*, 16 B.C. ENVTL. AFF. L. REV. 53, 55 (1988-89).

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Morrissette, 243 U.S. at 250-51.

57. Riesel, *Criminal Prosecution of Environmental Crimes*, TOXICS L. REP. (BNA) 1025, 1067-70 (Feb. 18, 1987); Webber, *supra* note 56.

"Public welfare" statutes emerged largely in response to the social needs produced by the industrial revolution.[58] As populations shifted from rural farms into congested urbanized settings, Congress and state legislatures sought to protect the public from the dangers inherent in such change.[59] These protective measures took the form of regulations creating new duties or imposing new standards of care on those in control of industry or engaging in activities affecting the public health, safety, and welfare.[60] Where lawmakers felt that civil fines would not provide a sufficient deterrent to the undesired activity, criminal sanctions were imposed to make such regulations more effective.[61]

Many of these new criminal offenses required no mens rea or mental culpability.[62] Instead, violation often entailed no more than a breach of duty of care or failure to perform a newly imposed duty.[63] The imposition of strict liability on defendants accused of "public welfare offenses" forced courts faced with adjudication under the new laws to develop a rationale which addressed the due process concerns stemming from lack of an intent element.[64] One of the first opinions to address such concerns adopted the view that the state may, on public policy grounds, create new offenses which impose strict liability regardless of the actor's ignorance or good faith.[65] In reaching that result, courts placed emphasis on the utilitarian nature of such statutes, deferring to the lawmakers' decision that the good to be obtained by protecting society exceeded any possible injustice done to individuals.[66]

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58. *See Morissette*, 342 U.S. at 253-54; *see also* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

59. *See United States v. Dotterweich*, 320 U.S. 277, 280 (1943); Morissette, 342 U.S. at 254.

60. *Morissette*, 342 U.S. at 254.

61. *See Dotterweich*, 320 U.S. at 280-81; *Morissette*, 342 U.S. at 254-55.

62. *See id.* at 254-55.

63. *Id.* at 255.

64. *See* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69-70 (1910); United States v. Balint, 258 U.S. 250, 252 (1922).

65. *Balint*, 258 U.S. at 252. Although the cases make clear that Congress and state legislatures can enact strict liability statutes, the constitutional limits in this area remain ill- defined. *See also* United States v. Behrman, 258 U.S. 280 (1922) (decided the same day as *Balint*); Smith v. California, 361 U.S. 147, 150 (1959).

66. *See id.*, at 254; *see also* Sayre, Public Welfare Offenses, 33 COLUM. L REV. 55 (1933).

 

In *United States v. Balint*,[67] the United States Supreme Court employed similar reasoning to sustain a conviction for narcotics possession under the Harrison Anti-Narcotic Act of 1914.[68] The statute lacked any provision making knowledge an element of the offense.[69] In addressing the due process concerns of the defendant, the Court contrasted regulatory measures enacted for social betterment to those offenses deemed *mala in se* where the goal was punishment.[70] Viewing the issue as one of statutory construction based upon inferences as to Congressional intent, the Court announced that the tendency to imply a culpability requirement into codified common-law crimes should be modified when such a requirement would "obstruct" a statute's purpose.[71] Later courts were to seize upon the weakness inherent in the distinction *Balint* had drawn between common law offenses which required intent and those strict liability offenses under "welfare statutes."[72] "Obstruction of the statutory purpose" did not provide much justification for abandonment of the traditional intent requirement, since every statute is "obstructed" by an intent requirement.[73]

Not until the Supreme Court's decision in *United States v. Dotterweich*,[74] was a more helpful rationale forthcoming. In *Dotterweich*, the Court upheld a conviction under a food and drug statute which required no conscious wrongdoing on the part of the defendant.[75] The Court's opinion focused on the nature of the offense[76] and the purpose of the legislation, stating that the Act placed a

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67. 258 U.S. 250 (1922).
68. *Id.* at 252-54.
69. *Id.* at 251.
70. *Id.* at 252.
71. *Id.*
72. *See Morissette*, 342 U.S. at 259:
Of course, the purpose of every statute would be "obstructed" by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore, the obstruction rationale does not help us to learn the purpose of the omission by Congress.
73. *See id.*
74. 320 U.S. 277 (1943).
75. *See id.* at 280-81:
The prosecution . . . is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing.
76. *Id.* (i.e., shipping adulterated and misbranded drugs).

burden upon those persons in a responsible relation to the public danger.[77]

Balint and Dotterweich dealt with federal food and drug regulations which imposed strict criminal liability[78] with regard to all elements of the given offense. New issues arose in connection with regulations which could be construed as requiring strict liability only with regard to some of the elements. The Supreme Court addressed these issues in the case of United States v. Freed.[79] The defendant in *Freed* had been indicted for possessing unregistered hand grenades in violation of the National Fire Arms Act.[80] To sustain a conviction under that Act, the government carried the burden of proof on three material elements: (1) that the defendants possessed certain items, (2) that the items possessed were grenades, and (3) that the grenades were not registered.[81] The Court held that the statute required the prosecution to prove knowing possession of the items as well as knowledge that the items possessed were grenades.[82] No culpable intent was necessary in regard to the unregistered status of the grenades.[83]

The import of *Freed* lies in the distinction drawn between the first two elements of the offense and the third element. Proving intent with regard to the third element would require the Government to show that the defendants possessed some knowledge of the relevant law.[84] The concurrence in *Freed* articulated that although such an intent requirement would involve a legal element — whether

77. *See id.* at 281.

78. *See* Batey, *Strict Construction of Firearms Offenses: The Supreme Court and the Gun Control Act 1968*, 49 LAW & CONTEMP. PROBS. 163, 176 & nn.114, 116 (1986).

Strict liability is the general rule with respect to pure food and drug laws:

> [t]he distribution of impure or adulterated food for consumption is an act perilous to human life and health, hence, a dangerous act, and cannot be made innocent and harmless by the want of knowledge or by the good faith of the seller; it is the act itself, not the intent, that determines the guilt, and the actual harm to the public is the same in one case as in the other.

79. United States v. Freed, 401 U.S. 601 (1971).

80. *Id.*

81. *Id.* at 612 (Brennan, J., concurring).

82. *Id.*

83. *Id.*

84. *Id.* at 614-15 (Brennan, J., concurring).

the grenades were registered in accord with federal law, such a requirement would not involve "consciousness of wrongdoing" in the sense of knowledge that one's actions were prohibited or illegal.[85] "The knowledge involved is solely knowledge of the circumstances that the law has defined as material to the defense."[86] This type of knowledge, reasoned the Court, arose from the injurious nature of the grenades involved. "[T]he likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it."[87]

The analysis embodied in *Freed* provided the foundation for future judicial interpretation of "welfare offenses" which entail some form of culpability as a prerequisite to criminal conviction.[88] *Freed* also set precedent in that it was the first conviction under a "public welfare statute" which imposed felony, rather than misdemeanor, penalties. Expanding the category of public welfare offenses to encompass statutes that imposed felony penalties marked a departure from past practice.[89] Previous decisions under "public welfare statutes" dealt with misdemeanor penalties which were viewed as causing no grave damage to a defendant's reputation.[90] In contrast, some commentators have noted that the infamous label of felony is "as bad a word as you could give to man or thing."[91]

### *B. Advent of Environmental Protection Statutes*

The environmental debacles of the late 60's and early 70's engendered a growing public concern which found expression in the

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85. *Id.*

86. *Id.* The Model Penal Code illustrates the distinction:

> It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element.

Model Penal Code § 2.02 comment 131 (Tent. Draft No. 4, 1955).

87. *See Freed*, 401 U.S. at 616.

88. *See* Weber, *supra* note 55, at 57.

89. *See, e.g., Dotterweich*, 320 U.S. 277; *Morissette*, 342 U.S. 246.

90. *See Morissette*, 342 U.S. at 256.

91. *Id.* at 260 (citation omitted):

> Stealing, larceny, and its variants and equivalents . . . existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is . . . as bad a word as you can give to man or thing.

passage of many federal and state measures designed to protect the environment. Most of these new laws contrasted with earlier public welfare statutes, such as those relating to food and drugs, in that they required some measure of culpability before a penal sanction could be imposed.[92] As originally enacted, most, if not all, environmental statutes presented the threat of a misdemeanor conviction.[93] However, growing public awareness and concern in this area, accompanied by fears that misdemeanor convictions were being viewed merely as a cost of doing business, resulted in amendments which elevated violations of certain environmental protection statutes to felonies.[94]

While these statutes reflected public health and safety concerns similar to those which initiated earlier public welfare statutes, due process considerations and the fear of punishing innocent conduct prompted legislators to reject the strict liability standard.[95] As a result, most environmental protection statutes included a class of offenses that imposed criminal penalties only when conduct was "knowing."[96] Courts adjudicating offenses under such statutes were faced with the task of integrating the "knowing" requirement, and the due process concerns which it reflects, with the public welfare nature of offenses under the environmental protection statutes.

The Supreme Court considered these competing concerns in the case of *United States v. International Minerals & Chemical Corp.*[97] In International Minerals, a shipper was charged with violating a Department of Transportation Regulation which required that the classification of certain hazardous materials appear on the shipping papers for such materials.[98] Title 18 U.S.C. § 834(a) empowers the

92. Reisel, *supra* note 56, at 1067. Detailed in Section III of this Article, these environmental protection statutes included the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(b) (1982) ("knowingly or willfully"); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 1361 (1982) ("knowingly"); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928 (d)-(e) (1982 & F. Supp. III 1985) ("knowingly"); Clean Air Act (CAA), 42 U.S.C. § 7413(c)(1)-(2) (1982) ("knowingly").

93. *See* sources cited *supra* note 91.

94. *See, e.g.*, RCRA, 42 U.S.C. § 6928(d).

95. *See* S. Rep. No. 172, 96th Cong., 2d Sess. 39 (1980).

96. *See* Weber, *supra* note 55, at 61.

97. 402 U.S. 558 (1971).

98. *Id.* at 559.

Department of Transportation to formulate regulations for the safe transportation of corrosive liquids and other dangerous articles and to impose criminal sanctions upon individuals who 'knowingly violate any such regulations.'[99] Citing Freed, the Court held that the statute required knowledge of the shipment of dangerous materials, but not "knowledge" of the particular regulation.[100] The Court stated that it could "see no reason why the word 'regulations' should not be construed as a short-hand designation for specific acts or omissions which violate the Act."[101] Oddly enough, in 1960 the Senate had approved an amendment which would have deleted "knowingly" and substituted in its place 'being aware that the Interstate Commerce Commission had formulated regulations for the safe transportation of explosives or other dangerous articles.'[102] The House refused to agree to the later amendment, favoring retention of 'the present law by providing that a person must 'knowingly' violate the regulations.'[103] Despite this legislative history, the Court analogized to the principles in the Freed decision to distinguish between "knowing" in connection with possession and "knowingly" with regard to violation of the regulation.[104] In doing so, the Court reiterated the presumption that, based upon the nature of the material involved, anyone consciously possessing such materials or dealing with them must be aware of the regulation.[105] The Court had, in effect, read the regulation as containing the proposed amendments which Congress rejected in 1960.

Since International Minerals, the Supreme Court has not addressed similar issues under environmental protection statutes. Interim lower court decisions vary in result, because of a failure to faithfully follow or adequately pursue the *International Minerals* analysis.[106] These variations also derive from the fact that some of

99. *Id.*

100. *Id.* at 560, 563.

101. *Id.* at 562.

102. *Id.* (quoting H.R. Rep. No. 1975, 86th Cong, 2d Sess. 10-11 (1960)).

103. *Id.* (quoting H.R. Rep. No. 1975, 86th Cong., 2d Sess. 2 (1960)).

104. *Id.* at 560, 565; *see Freed*, 401 U.S. at 609 (holding the Federal Firearms Control Act to be a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act).

105. *International Minerals*, 402 U.S. at 565.

106. Weber, *supra* note 55, at 65.

the lower courts addressed offenses under different statutes with different legislative history.[107]

*United States v. Johnson & Towers, Inc.*[108] is one such decision. In *Johnson & Towers*, the Third Circuit addressed the "knowing" requirement as it pertains to a conviction under the Resource Conservation and Recovery Act (RCRA).[109] In *Johnson & Towers*, two employees of a chemical plant were indicted for allegedly violating RCRA section 6928(d)(2)(A) which prohibited "knowing" disposal of hazardous waste without a permit.[110] After determining that the later section applied to employees as well as owners and operators,[111] the Court proceeded to address the "knowing" requirement. In making its analysis, the Court looked to the language of the statute and then to the Act's legislative history.[112] Rejecting government arguments limiting "knowingly" as used in the statute to modify only "treats, stores, or disposes" as overly literal,[113] the Court concluded that "knowingly" also applied to the permit requirement

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107. *Id.*

108. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

109. *Id.* at 664.

RCRA's criminal provision applies to:

"[a]ny person who —

. . . .

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either —

(A) without having obtained a permit under section 6925 of this title . . . or

(B) in knowing violation of any material condition or requirement of such permit."

42 U.S.C. § 6928(d).

110. *Johnson & Towers*, 741 F.2d at 664.

111. *Id.* at 664-65 (the counts under RCRA charged that the defendants "did knowingly treat, store, and dispose of, and did cause to be treated, stored and disposed of hazardous wastes without having obtained a permit . . . in that the defendants discharged, deposited, injected, dumped, spilled, leaking and placed degreasers . . . into the trench . . . ." The indictment alleged that both Angel and Hopkins "managed, supervised and directed a substantial portion of Johnson & Towers' operations . . . including those related to the treatment, storage and disposal of the hazardous waste and pollutants" and that the chemicals were discharged by "the defendants and others at their direction." Johnson & Towers pled guilty to the RCRA counts. Hopkins and Angel pled not guilty.

The Court held that section 6928(d)(2)(A) cover employees as well as owners and operators of the facility who knowingly treat, store, or dispose of any hazardous waste, but the employees can be subject to criminal prosecution only if they knew or should have known that there had been no compliance with the permit requirement of section 6925.

112. *Id.* at 665.

113. *Id.* at 667-68.

stated in RCRA section 6928(d)(2)(A).[114] To convict the employees under that section the government would have to prove that each defendant knew that *Johnson & Towers* was required to have a permit, and that each defendant knew that Johnson & Towers did not have a permit.[115] The Court qualified its holding by stating that a jury could be instructed that such knowledge may be inferred.[116]

### C. *Redefining "Public Welfare Statute"*

In 1985, the Supreme Court was presented with an opportunity to further develop its notions regarding the degree of culpability required under the criminal provisions of public welfare statutes.[117] The issue presented itself in the case of *Liparota v. United States*,[118] an action in which the Federal Government sought conviction of a restaurant owner under 7 U.S.C.S. § 2024(b). This section provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or other authorization cards in any manner not authorized by [the statute] or the regulations" is subject to fine and imprisonment.[119] Even though *Liparota* did not involve environmental statutes or regulations, the Court's approach to distinguishing the food stamp regulations at issue from other public welfare statutes served to refine that concept along with the corresponding culpability requirement.[120]

The *Liparota* opinion found the expression by Congress of the mental state required for conviction under the statute to be ambiguous and of little guidance.[121] Nothing in the legislative history clarified the Congressional purpose on the issue.[122] Consequently, the Court resorted to the broad legal maxims which place criminal offenses requiring no mens rea in a "generally disfavored status" and

114. *Id.* at 668-69.
115. *Id.* at 667.
116. *Id.* at 670.
117. *See* Weber, *supra* note 55, at 72.
118. *Liparota v. United States*, 471 U.S. 419 (1985).
119. 7 U.S.C. § 2024(b)(1) (1988).
120. *See* Weber, *supra* note 55, at 72.
121. *Liparota*, 471 U.S. at 424.
122. *Id.* at 424-25.

favored resolving ambiguous criminal statutes in a manner which provides fair warning concerning conduct rendered illegal.[123] Without rejecting the holding in *Johnson & Towers* that "regulatory statutes . . . are to be construed to effectuate the regulatory purpose,"[124] the *Liparota* opinion emphasized that the purposes behind the food stamp act were not compelling enough to justify dropping all culpability requirements.[125] The Court stated that:

> the offense at issue here differs substantially from those public welfare offenses we have previously recognized. In most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the communities health or safety.[126]

In the absence of such health and safety considerations and lacking a clearer expression of Congressional intent, the Court found no basis for controverting the traditional mens rea requirement.[127] In articulating the two part test for determining whether a given statute qualifies as a "public welfare statute," the Court made explicit the importance which the nature of the activity has on that determination.[128]

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123. *Id.* at 426-27:

> 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." Rewis v. Uited States, 401 U.S. 808, 812 (1971). *See also* United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978); United States v. Bass, 404 U.S. 336, 347-348 (1971); Bell v. United States, 349 US 81, 83 (1955); United States v. Universal C.I.T. Credit Corp., 334 U.S. 218, 221-22 (1952). Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. . . . Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear.

*See also* United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978) ("[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.").

124. *Johnson & Towers*, 741 F.2d at 666. *See also* United States v. Park, 421 U.S. 658, 672-73 (1975); Smith v. California, 361 U.S. 147, 152 (1959); *Dotterweich*, 320 U.S. at 280-81; *Balint*, 258 U.S. at 251-52; United States v. Frezzo Brothers, Inc., 602 F.2d 1123, 1128 (3d Cir. 1979), *cert. denied* 444 U.S. 1074 (1980).

125. *Liparota*, 471 U.S. at 426-27, 432-33. ("A food stamp can hardly be compared to a hand grenade, . . . nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in *Dotterweich*.").

126. *Id.* at 4.

127. *Id.* at 425-26; *see also* Weber, *supra* note 55, at 72.

128. *Liparota*, 471 U.S. at 432-34.

### D. Current Status of the "Knowing" Requirement

One year after the Supreme Court decision in *Liparota*, the Eleventh Circuit Court of Appeals addressed the extent to which knowledge of regulations should be required before imposition of criminal penalties under RCRA section 6928(d)(1).[129] In *United States v. Hayes*,[130] an employee of Hayes, an airplane refurbishing plant which produced waste in the form of solvents mixed with paint, had negotiated a deal with an employee of Performance Advantage, Inc. to dispose of these wastes at no charge.[131] Under the oral agreement, Performance Advantage would obtain from Hayes the jet fuel drained from the planes for twenty cents per gallon, and, at no charge, would remove the other waste from the Hayes plant.[132] The Government began its action when approximately six hundred drums of waste were found deposited among seven illegal disposal sites in Georgia and Alabama.[133] The waste in the drums was determined to be the paint and solvent which Performance Advantage had removed from the Hayes facility.[134]

For purposes of analysis, the *Hayes* opinion broke the statute into two separate questions: (1) whether knowledge of the regulations was required and (2) whether knowledge of the permit status was required? The Court began by noting that RCRA falls within the category of "public welfare statutes."[135] Classifying RCRA in such a manner affected the Court's analysis of the culpability requirement.[136] Based upon a lack of Congressional guidance, either in the statute or in the legislative history, the Court proceeded to

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129. 42 U.S.C. § 6928(d)(1) provides criminal sanctions for "[a]ny person who . . . (1) knowingly transports any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under section 6925 of this title." 42 U.S.C.A. § 6928(d)(1) (Supp. 1985). The current version of the statute applies to anyone who "transports or causes to be transported. *Id.*

130. 786 F.2d 1499 (11th Cir. 1986).

131. *Id.* at 1500-01.

132. *Id.*

133. *Id.* at 1501.

134. *Id.*

135. *Id.* at 1503. (in addition, section 6928(d)(1) is undeniably a public welfare statute, involving a heavily regulated area with great ramification for the public health and safety).

136. *Id.* (it is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions).

analyze the requirement under general legal principles.[137] Reasoning that because the public policy behind such a statute is so compelling the Court deemed the defendant presumptively aware of RCRA's regulations.[138]

The presumption disposed of the first issue. Next, the *Hayes* Court considered how far along the sentence the "knowing" requirement should travel.[139] In analyzing this issue, the Court placed emphasis on the Congressional purpose of combating the transportation of hazardous waste to unlicensed facilities in enacting RCRA.[140] Expressing concern over the criminalization of innocent conduct, the Court held that the government must prove that a given defendant acted with knowledge of the permit status of the facility.[141] The Court attempted to mitigate the holding by stating that "knowledge does not require certainty; a defendant acts knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'"[142]

## V. CONCLUSION

The maturing of regulatory and technical schemes under the nation's central environmental protection laws, including RCRA, signals a new emphasis on compliance enforcement, particularly through the use of the deterrent effects of criminal sanctions. Public concern for the environment, coupled with many recent successes in the prosecution of polluters, will encourage an increasing resort to criminal sanctions for noncompliance.

Because of the disturbance of land and other natural resources necessarily associated with the recovery, processing and transpor-

137. *Id.* at 1502.

138. *Id.* at 1502-03.

139. *Id.* at 1503.

140. *Id.* at 1504.

141. *Id.* (the precise wrong Congress intended to combat through section 6928(d) was transportation to an unlicensed facility. Removing the knowing requirement from this element would criminalize innocent conduct; for example, if the defendant reasonably believed that the site had a permit, but in fact had been misled by the people at the site).

142. *Id.* Jurors may also consider the circumstances and terms of the transaction. It is common knowledge that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at an unusual price or circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permitted facility.

tation of coal and coal by-products, those engaged in the industry are among those most likely to be the object of increased investigation and use of criminal sanctions to encourage future compliance. Boom or bust cycles, and the accompanying effects on the ability of marginal producers to maintain compliance, ensures that the industry as a whole, regardless of how conscientious management may be or how advanced and institutionalized environmental compliance programs may be, will remain under close and increasing scrutiny.

Judicial interpretations of the "knowing" standard contained in most environmental statute criminal provisions have expanded the range of individuals in industry beyond those traditionally thought to be at risk. Presumptions that those involved in an industry subject to strong environmental regulation have knowledge of the applicable regulations and the critical nature of environmental disturbance peculiar to the industry facilitate criminal prosecution. Viewing "knowing" as the capacity to determine whether or not something was known renders the headquarters executive as likely a target of investigation and sanctions as the front line manager or hourly worker handling regulated materials or executing the mining plan. Only by encouraging attentiveness to compliance standards and regulatory requirements, as well as institution-wide education of who is at risk and why, can the likelihood of criminal sanctions be reduced or eliminated. There can be no substitute for renewed and enhanced use of compliance audits, in-house training programs, and efficient communication of obligations and responsibilities to all levels of a company's hierarchy in this rapidly expanding universe of environmental liability.