



March 2014

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Brendan P. Rielly

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Recommended Citation

Brendan P. Rielly, *Using RICO to Fight Environmental Crime: The Case for Listing Violations of RCRA as Predicate Offenses for RICO*, 70 Notre Dame L. Rev. 651 (1993).

Available at: <http://scholarship.law.nd.edu/ndlr/vol70/iss3/5>

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NOTE

Using RICO To Fight Environmental Crime: The Case for Listing Violations of RCRA as Predicate Offenses for RICO

I. INTRODUCTION

Since the 1970s, we, as a nation, have learned to appreciate the fragile balance of the ecosystem in which we live.¹ To protect it, our government has increasingly turned to criminal sanctions based upon the idea that crimes against the environment are crimes against the people. As former United States Attorney General Richard Thornburgh said to the National Association of District Attorneys in Portland, Maine on July 19, 1989: "The concept of 'the environment as a Crime Victim' puts the issue of pollution in its proper context. It says that we believe as a nation and as prosecutors that a polluter is a criminal who has violated the rights and the sanctity of a living thing—the largest living organism in the known universe—the earth's environment."²

As part of a "government-wide trend towards adopting, strengthening, and vigorously enforcing criminal provisions to protect the environment,"³ Congress has added criminal sanctions to most of the major environmental statutes. Yet pollution continues, largely because the costs of continual compliance outweigh the risks of being caught polluting, and because the statutes rely heavily on the potential violators to audit and report themselves

1 In a 1984 Department of Justice poll of 60,000 people, environmental crime ranked ahead of heroin smuggling, bank robbery, attempted murder, arson and vehicular homicide. Anthony J. Celebrezze, Jr. et al., *Criminal Enforcement of State Environmental Laws: The Ohio Solution*, 14 HARV. ENVTL. L. REV. 217, 217-18 (1990). The Department defined environmental crime by three examples: "(1) a factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result, 20 people die, (2) a factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result, one person dies, and (3) a factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result, 20 people become ill but none requires medical treatment." *Id.* at n.2.

2 R. Christopher Locke, *Environmental Crimes: The Absence of 'Intent' and the Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311, 313 (1991).

3 Stephen J. Darmody, *The Oil Pollution Act's Criminal Penalties: On a Collision Course With the Law of the Sea*, 21 B.C. ENVTL. AFF. L. REV. 89, 116 (1993).

for violating the laws. Additionally, prosecutions are complicated by the difficulty in joining diverse defendants and varied, often unrelated acts, which together result in pollution.

In response, the government has begun prosecuting polluters for mail and wire fraud under the Racketeering Influenced and Corrupt Organizations Act (RICO). Increased criminal penalties, longer statutes of limitations and greater ability to join defendants and offenses have proven useful tools in charging and convicting polluters. Yet relying on mail and wire fraud is risky because (1) the violators may not have committed fraud, and (2) some courts disagree whether defrauding a governmental agency in order to receive a permit comes under the mail and wire fraud statutes. Furthermore, prosecuting environmental violations, not fraud, is the government's aim. Why not avoid the peripheral fraud charges altogether and use RICO to prosecute polluters directly for the environmental violations?

In order to accomplish this, Congress must include violations of the environmental statutes as racketeering activities under RICO. Specifically, Congress should add violations of the Resource Conservation and Recovery Act (RCRA)—under which most environmental, criminal prosecutions using RICO's mail and wire fraud provisions have been brought—and of comparable state statutes as predicate offenses under RICO.

In Part II, this Note examines the historical development of the criminalization of environmental law, including a description of the felony criminal provisions in the major federal environmental statutes. Part II also discusses traditional criminal statutes used in conjunction with the environmental statutes before focusing on RICO and its underlying policies. As part of its RICO analysis, this Note tracks the use of mail and wire fraud counts to prosecute environmental violators under federal and state racketeering statutes.

In Part III, this Note compares the disadvantages of prosecuting solely under the environmental statutes with the advantages of using RICO. In its environmental statutes subsection, Part III focuses on the problems of relying on potential polluters to police themselves and on the difficulty in prosecuting increasingly complex environmental violations within the constraints of the federal criminal rules regarding joinder of defendants and of offenses. In the RICO subsection, this Note looks at the deterrent value of RICO's more stringent criminal penalties and at the benefits to the prosecution of RICO's longer statute of limitations and greater

flexibility in joining parties and counts.

In Part IV, this Note argues that listing violations of RCRA and of comparable state statutes as predicate offenses under RICO is the most effective method of preventing and prosecuting environmental crimes.

II. INCREASING CRIMINALIZATION OF ENVIRONMENTAL LAW

A. *Growing Public Concern with Environmental Violations*

While federal environmental protection dates as far back as the Federal Rivers and Harbors Appropriations Act of 1899,⁴ neither the public nor the government were overly concerned with environmental crimes in general or with the illegal disposal of hazardous waste in particular before the 1970s.⁵

In 1972, Congress passed the Federal Water Pollution Control Act (FWPCA), which contained misdemeanor penalties for negligent and willful violations.⁶ In June 1976, the Environmental Protection Agency (EPA) initiated a Draft Criminal Enforcement Strategy and in 1977 Congress enacted the compliance deadlines in the Clean Air and Water Acts.⁷

The demand for criminal prosecution of polluters crystallized in 1978 in Love Canal, New York. The Love Canal disaster captured the nation's attention when hazardous waste forced 263 families to leave their homes along the New York canal. The public was outraged and Congress began criticizing the EPA's handling of improper disposal of hazardous waste.⁸

4 Jed S. Rakoff et al., *Civil and Criminal Enforcement of Federal Environmental Laws: Basic Provisions and Current Controversies*, at 215 (PLI Litig. & Admin. Practice Course Handbook Series No. 474, 1993). Federal prosecutors discovered the Refuse Act, 33 U.S.C. §407 (1988) (§ 13 of the Rivers and Harbors Appropriation Act of 1899), in 1970 and combined it with the investigatory powers of the grand jury to attack industrial water pollution. The Refuse Act once again retreated to the history books when Congress passed the Federal Water Pollution Act Amendments of 1972. Pub. L. No. 92-500, 86 Stat. 816 (1972). See Daniel Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 ENVTL. L. REP. 10,065, 10,066 (March, 1985).

5 DONALD J. REBOVICH, *DAGEROUS GROUND: THE WORLD OF HAZARDOUS WASTE CRIME* 4 (1992).

6 Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 903 (1991).

7 Celebrezze, *supra* note 1, at 219-20.

8 REBOVICH, *supra* note 5, at 4. The criticism of the EPA reached a crescendo when the agency's administrator, Anne Burford, announced in February 1983 that the government had bought an entire town for \$36.7 million. A waste hauler spraying oil on streets to eliminate dust had contaminated Times Beach, Missouri to such an extent that the government relocated the 2,500 residents and bought most of the businesses and homes.

James Moorman, then-Assistant Attorney General for the Lands Division of the Department of Justice (DOJ) echoed the growing public demand for a crack-down on polluters by stating that the DOJ would prosecute "willful, substantive violations of the pollution control laws of the criminal nature."⁹ In 1979, Moorman told the Senate Subcommittee on Environmental Pollution that the government would no longer focus solely on civil and administrative efforts to encourage compliance. Instead it would use criminal sanctions against individuals and corporations to prevent pollution:

Now, however, I believe we stand on the threshold of a significant change in the nature of environmental enforcement litigation. We must move, particularly in the field of toxics and hazardous waste, to a different type of case. These cases will require a substantial improvement in EPA's investigative capability. EPA must improve its ability to audit the pollution control operations of plants; the ability to obtain and analyze samples of many toxic pollutants; and the ability to track down and identify surreptitious discharges.¹⁰

Congress passed the Resource Conservation and Recovery Act (RCRA) in 1976 to track hazardous waste "from cradle to grave" and the Comprehensive Environmental Response, Compensation and Recovery Act (CERCLA) in 1980 to clean up many of the hazardous waste dumping sites. Both contained criminal provisions.¹¹ Also in 1980, the DOJ created a separate Environmental Enforcement Section. Although primarily enforcing civil sanctions, the government now intended to increase the number of criminal

Id. at 5-6.

Later that month, the government awarded a \$7.7 million cleanup contract to Chemical Waste Management Inc. despite the fact that one month earlier, the EPA had charged it with covering up pollution violations. James W. Sanderson, Burford's former consultant, had represented Chemical Waste in its dealings with the government. *Id.* at 6.

As a result of the scandal, Rita M. Lavelle, head of EPA's hazardous waste cleanup program, and several other top officials were fired. Burford resigned in March. Lavelle was indicted on five felony counts in August. A year later, the House Energy and Commerce Committee's Oversight and Investigations Subcommittee charged that Burford and Lavelle had "purposely limited expenditures to clean up abandoned waste sites to dissuade congressional extension of the cleanup program." *Id.* at 7.

⁹ Starr, *supra* note 6, at 903.

¹⁰ *Id.* (quoting statement of James W. Moorman, Assistant Attorney General, Lands Division, DOJ, from *Enforcement of Environmental Regulations, 1979: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environmental and Public Works, 96th Cong., 1st Sess. 339 (1979)*).

¹¹ REBOVICH, *supra* note 5, at 4-5.

prosecutions of "egregious violations" and "deliberate or recalcitrant violations."¹² While the criminal division was responsible for violations of Title 18, such as false statements, conspiracy and mail and wire fraud, the Lands Division pursued violations of environmental regulations.¹³ And in 1981, the EPA developed its own Office of Criminal Enforcement.¹⁴

Prior to the Office of Criminal Enforcement, various EPA offices throughout the country handled criminal environmental investigations. Only the National Enforcement Investigation Center (NEIC) in Denver, Colorado and the EPA Region III office in Philadelphia, Pennsylvania had "developed a limited investigative capability in the area."¹⁵ Yet problems persisted as the EPA attempted to establish centralized authority. Regional offices resisted¹⁶ and bureaucratic bickering and turf wars threatened to poison relations between the EPA, the DOJ and the Federal Bureau of Investigation (FBI).

Because the EPA was used to dealing with the DOJ's Lands Division and because the Criminal Division represented other governmental agencies, the EPA "did not perceive the Criminal Division as either an ally or an aggressive prosecutor,"¹⁷ and resisted the DOJ's invasion of its environmental turf. However, a district court's stinging rebuke of one of its staff attorneys, whose mistakes had tainted the grand jury to the extent that the Fifth Amendment's Due Process Clause required dismissal, "taught EPA an unforgettable lesson about the seriousness and delicacy of criminal cases. Ever-sensitive to criticism about its role, EPA drew back, and from that point forward looked to DOJ to assume the leadership role in the environmental criminal program."¹⁸

12 Starr, *supra* note 6, at 904.

13 *Id.* at 905.

14 Celebrezze, *supra* note 1, at 220.

15 Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 792 (1991). In 1991, EPA Headquarters regained control of its criminal investigators. The NEIC in Denver had overseen the investigations since 1983. Starr, *supra* note 6, at 915 n.41.

16 Starr, *supra* note 6, at 908.

17 *Id.* at 905.

18 *Id.* at 906 (citing *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979)). In *Gold*, the District Court for the Northern District of Illinois found a "totality of grand jury abuse by government attorneys, circumstances of prosecutor conduct that undermined the grand jury, destroyed its independence, and deprived defendants of their Fifth Amendment rights." *Gold*, 470 F. Supp. at 1356. Specifically, the prosecuting attorney, an EPA staff lawyer, testified as a witness and then remained in the grand jury room to interrogate another witness, withheld exculpatory information from the grand jury, and

At the outset, because the EPA did not know how to develop a criminal case, it often referred cases to the DOJ before completing the necessary investigative work. The DOJ accordingly refused about sixty percent of the referrals between 1979 and 1981.¹⁹ In addition, investigations and prosecutions under the complex environmental regulations took a lot of time and effort. Many United States Attorneys felt the effort was not worth the resulting misdemeanor penalties.²⁰

In mid-1981, the EPA and the FBI signed a memorandum of understanding under which the FBI agreed to investigate thirty hazardous cases referred to it by the EPA each year. Yet neither side lived up to the agreement. Despite now being able to pursue felonies under the recently amended RCRA,²¹ the FBI "had little interest" in investigating pursuant to the other environmental statutes which only included misdemeanor penalties.²² The EPA also feared that giving the FBI too large a role in investigating environmental crimes would delay or stop authorization for its own investigators.²³

During the summer of 1982, the EPA's need for centralized control prevailed over the regional offices' desire for greater independence and the agency chose sixteen criminal investigators, raising its total to twenty-three.²⁴ After reorganizing in 1983, the EPA assigned thirty-five investigators to the NEIC and placed the legal staff under the direction of the Assistant Enforcement Coun-

destroyed discoverable documents. *Id.* at 1351-55.

19 Starr, *supra* note 6, at 907.

20 *Id.*

21 *Id.* at 915 n.37. The Hazardous and Solid Waste Amendments of 1984 made RCRA the first environmental law containing felony provisions. Pub. L. No. 948-616 § 232, 948 Stat. 3221, 3256-57 (codified as amended at 42 U.S.C. §§ 6928(d)-(e) (1988)). In 1986, the Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, § 109, 100 Stat. 1613, 1632-33 (codified as amended at 42 U.S.C. §§ 9603(b), (d) (1988)) and the Emergency Planning and Community Right-to-Know Act, Pub. L. No. 99-497, § 325, 100 Stat. 1728, 1753 (codified at 42 U.S.C. § 11,045(b)(4) (1988)) added felony provisions to CERCLA. The Act of Nov. 15, 1990, Pub. L. No. 101-549, § 701, 1991 U.S.C.C.A.N. (104 Stat.) 2675, amended § 113 of the Clean Air Act, adding felony violations. And the Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 7, 42-44 (codified at 42 U.S.C. § 1319(c) (1988)), added felony provisions to the FWPCA. The Toxic Substances Control Act (TSCA), and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) are the only major environmental statutes without felony provisions. Starr, *supra* note 6, at 915 n.37.

22 Starr, *supra* note 6, at 909.

23 *Id.*

24 *Id.*

sel for Criminal Enforcement.²⁵

While criminal environmental prosecutions began to rise,²⁶ the EPA's troubles continued throughout the 1980s. According to a 1989 report by an EPA inspector, the Agency restricted its employees from investigating cleanup sites. It instead told them to use information from state agencies or from consultants of the potentially responsible companies. The investigators even had to practice inspecting in order to retain their investigative skills.²⁷

In addition, the DOJ opposed giving EPA investigators full police power, "including authority to make arrests, execute criminal search warrants, and carry firearms."²⁸ EPA investigators had to ask law enforcement agencies to perform these duties. Frustrated by being "relegated to second-class status in the law enforcement community,"²⁹ in July 1983, the EPA asked the DOJ to deputize its investigators as Special Deputy United States Marshals. The DOJ instead offered to deputize half of the EPA's investigators. The EPA refused and both agencies testified before the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce. The Office of Management and Budget subsequently issued guidelines for giving police powers to EPA's investigators, requiring the agency to "show additional justification before its investigators could receive the full breadth of enforcement authority."³⁰ In April 1984, the DOJ deputized the EPA's investigators for a trial period, which lasted about four years. Finally, in 1988, Congress passed the Medical Waste Tracking Act which gave the EPA criminal investigators the full police powers they had been requesting for the past six years.³¹

While the criminalization of environmental law has at times

25 Adler, *supra* note 15, at 792.

26 *Id.* From 1982, when the Justice Department created its Environmental Crimes Unit, to 1990, the department secured 703 indictments, 517 convictions, \$56,074,616 in fines, restitution, and forfeitures, and 316 years of jail time. Dick Thornburgh, *Criminal Enforcement of Environmental Laws: A National Priority*, 59 GEO. WASH. L. REV. 775, 778-79 (1991). The numbers have continued to increase throughout that span, with 234 indictments being returned and more than \$43 million levied in fines, restitution and forfeitures from 1988 to 1990. *Id.* at 778 n.19.

27 REBOVICH, *supra* note 5, at 8.

28 Starr, *supra* note 6, at 911-12 (quoting Letter from Courtney M. Price, Special Counsel to the Administrator for Enforcement, EPA, to Carol E. Dinkins, Assistant Attorney General, Lands Division, DOJ (July 7, 1983)).

29 *Id.* at 911.

30 *Id.* at 912.

31 *Id.*

been a struggle, it is proceeding nonetheless. Virtually all major environmental statutes now have criminal provisions, most including felony violations. The following is a list and brief description of the major environmental statutes with felony criminal provisions.

B. Major Federal Environmental Statutes With Felony Criminal Provisions

1. Resource Conservation and Recovery Act (RCRA)

RCRA³² has been dubbed "mind-numbing" for its complexity.³³ Enacted in 1976, RCRA actually is a series of amendments to the Solid Waste Disposal Act.³⁴ RCRA regulates the generation, treatment, storage, transportation and disposal of all wastes, including hazardous wastes.³⁵

Under RCRA, anyone (1) knowingly transporting hazardous waste to a facility which does not have a permit,³⁶ or (2) knowingly treating, storing, or disposing of hazardous waste either without a permit or in knowing violation of the permit or other applicable regulations,³⁷ commits a felony and shall be fined up to \$50,000 per day of violation and possibly imprisoned up to five years.³⁸ Anyone (1) knowingly omitting material information or making a false statement,³⁹ or (2) knowingly generating, storing, treating, transporting, disposing of, exporting of, or otherwise handling hazardous waste or used oil without filing the appropriate documentation,⁴⁰ also commits a felony and shall be fined up to \$50,000 per day of violation and possibly imprisoned for up to two years.⁴¹

32 Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992) (1988 & Supp. V 1993).

33 Sharzad Heyat et al., *Ninth Survey of White Collar Crime*, 31 AM. CRIM. L. REV. 475, 494 (1994).

34 Kenneth M. Mack, *Individual and Criminal Liability Under Environmental Laws*, at 289, (PLI Litig. & Admin. Practice Course Handbook Series No. 459, 1993). RCRA has also been amended by the Hazardous and Solid Waste Amendments (HSWA), Pub. L. No. 98-616, 98 Stat. 3256 (1984) and the Superfund Amendment and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1703 (1986). *Id.*

35 Heyat, *supra* note 33, at 494.

36 42 U.S.C. § 6928(d)(1) (1988).

37 *Id.* § 6928(d)(2).

38 *Id.* § 6928(d)(6).

39 *Id.* § 6928(d)(3).

40 *Id.* § 6928(d)(4).

41 *Id.* § 6928(d)(6).

Any person committing any of the above-mentioned violations, knowing that it endangers someone, may be fined up to \$250,000 and possibly imprisoned up to fifteen years. An organization committing such a violation may be fined up to one million dollars.⁴² The government does not have to show that the defendant knew the activity in question violated RCRA.⁴³ Specifically, the government does not have to prove that the alleged violator knew of the permit requirement.⁴⁴ It must show that the defendant was aware of the conduct and of the existing circumstances, or believed that the behavior was substantially certain to endanger someone.⁴⁵ Yet the person is accountable "only for actual awareness or actual belief that he possessed."⁴⁶ Knowledge will not be attributed from one person to another.⁴⁷ However, "[i]gnorance of the law is no defense" under RCRA.⁴⁸

A defendant may escape liability by showing by a preponderance of the evidence that the endangered person consented and that the "danger and conduct were reasonably foreseeable hazards of (A) an occupation, a business, or a profession; or (B) medical treatment or medical scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent."⁴⁹

Congress has amended RCRA by enacting, in 1980, the Solid Waste Disposal Act⁵⁰ and the Used Oil Recycling Act,⁵¹ and, in 1984, the Hazardous and Solid Waste Amendments.⁵²

42 *Id.* § 6928(e).

43 *United States v. Baytank*, 934 F.2d 599, 613 (5th Cir. 1991); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

44 *United States v. Dean*, 969 F.2d 187, 190 (6th Cir. 1992); *United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); *United States v. Laughlin*, 768 F. Supp. 957 (N.D.N.Y. 1991).

45 42 U.S.C. § 6928(f)(1) (1988). The government must show that the defendant "knew the material was hazardous in that it had the potential to be harmful to persons or the environment." *United States v. Self*, 2 F.3d 1071, 1091 (10th Cir. 1993); *Baytank*, 934 F.2d at 613; *Dee*, 912 F.2d at 745; *Hoflin*, 880 F.2d at 1039. However, it does not have to prove that the defendant knew that RCRA listed the material as hazardous waste. *Self*, 2 F.3d at 1091; *Baytank*, 934 F.2d at 612; *Dee*, 912 F.2d at 745.

46 42 U.S.C. § 6928(f)(2)(A) (1988).

47 *Id.* § 6928(f)(2)(B).

48 *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

49 42 U.S.C. § 6928(f)(3) (1988).

50 Pub. L. No. 96-482, 94 Stat. 2334 (1980).

51 Pub. L. No. 96-463, 94 Stat. 2055 (1980).

52 Pub. L. No. 98-616, 98 Stat. 3221 (1984).

2. Comprehensive Environmental Response, Compensation and Recovery Act (CERCLA)

Congress enacted CERCLA,⁵³ or Superfund, in 1980 to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."⁵⁴ In so doing, Congress provided for strict, joint and several liability⁵⁵ for all responsible parties: (1) current owners and operators, (2) owners and operators of the facility when the hazardous waste was disposed, (3) waste generators, and (4) waste transporters.⁵⁶ Liability under CERCLA is expansive.⁵⁷ Courts have construed "owners and operators" to include "entities and individuals exerting substantial control over the management and/or operations of a point source, even when the entity or individual does not have an actual ownership interest."⁵⁸ Responsible parties are liable even when they did not know of the hazardous waste disposal.⁵⁹ Parties may escape liability only if an act of God, an act of war, or a third party's unforeseeable act or omission caused the violation.⁶⁰

In 1986, Congress amended CERCLA, upgrading its criminal penalties from misdemeanors to felonies.⁶¹ Anyone in charge of a vessel or facility from which hazardous substances are released

53 Pub. L. No. 96-510, 94 Stat., 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9674 (1988 & Supp. V 1993)).

54 Heyat, *supra* note 33, at 518 (quoting H.R. Rep. No. 1016, 96th Cong. 2d Sess. 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125).

55 42 U.S.C. § 9607 (1988).

56 *Id.* § 9607(a).

57 *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

58 Heyat, *supra* note 33, at 520-21 (construing 42 U.S.C. § 9601(20) (1988)).

59 Heyat, *supra* note 33, at 522 (citing *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (manufacturer of hazardous substance liable for third party disposal regardless of lack of control over third party because manufacturer retained ownership of hazardous substance and accrued certain benefits from third party's disposal); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) (liability extends to owners of waste facilities regardless of their degree of participation subsequent to disposal of hazardous waste), *cert denied*, 490 U.S. 1106 (1989); *Washington v. Time Oil Co.*, 687 F. Supp. 529, 533 (W.D. Wash. 1988) (denying "innocent landowner" defense in response recovery suit)). However, Heyat cites *Chemical Waste Management Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1291 (E.D. Pa. 1987), to demonstrate that current owners liable under CERCLA may recover clean-up costs from generators and former owners.

60 42 U.S.C. §9607(b) (1988).

61 Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, at 1632-33 (codified as amended at 42 U.S.C. § 9603(b) (1988)).

without a federal permit who does not notify the appropriate agency as soon as he or she has knowledge of the release or who submits false or misleading information to the agency shall be fined pursuant to Title 18 and possibly imprisoned for three years. If the person has already been convicted of violating CERCLA, the prison term could increase to five years.⁶² The statute contains the same punishment for destroying records.⁶³ Fines may amount to \$250,000 for individuals and \$500,000 for organizations for violations of CERCLA.⁶⁴

"Knowledge" in CERCLA is defined as "knowingly" is in RCRA. The government does not have to prove that the defendants knew they were violating CERCLA or that CERCLA even existed, only that they knew that they were "doing the statutorily prescribed acts."⁶⁵

3. Federal Water Pollution Control Act (The Clean Water Act)

Congress enacted the Federal Water Pollution Control Act in 1948.⁶⁶ In 1972, Congress passed the Federal Water Pollution Control Act Amendments,⁶⁷ which have become known as the Clean Water Act (CWA).⁶⁸ Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁶⁹ Yet the statute contained only misdemeanor provisions until 1987 when Congress elevated violations to felonies.⁷⁰

Under CWA, anyone who negligently or knowingly violates any permit condition or limitation or any pre-treatment program's requirements is subject to a fine and possibly imprisonment. Similarly, anyone who negligently or knowingly "introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably

62 42 U.S.C. § 9603(b).

63 *Id.* § 9603(d).

64 *Id.* § 9612(b)(1).

65 *United States v. Buckley*, 934 F.2d 94, 88 (6th Cir. 1991).

66 Pub. L. No. 80-845, 62 Stat. 1155.

67 Pub. L. No. 91-604, sec. 4(a), § 113(c), 94 Stat. 1676, 1686 (1972) (codified as amended at 42 U.S.C. § 7413(c) (Supp. V 1993)).

68 Thornburgh, *supra* note 26, at 776 n.3.

69 33 U.S.C. § 1251(a) (1988).

70 Thornburgh, *supra* note 26, at 776 n.3 (citing Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 7, 42-45 (codified at 33 U.S.C. § 1319(c) (1988 & Supp. V 1993))).

could have known could cause personal injury or property damage, or . . . which causes such treatment works to violate any effluent limitation or condition in any permit" violates the CWA.⁷¹ Negligent violations are misdemeanors and carry fines ranging from \$2,500 to \$25,000 per day of violation and a possible prison term of one year.⁷² A knowing violator commits a felony and may be fined between \$5,000 and \$50,000 per day of violation and possibly imprisoned for three years. Knowingly submitting false, material information or tampering with a monitoring device is punishable by up to a \$10,000 fine and up to two years in prison.⁷³ Subsequent convictions may double the fines and prison time.⁷⁴

The statute contains increased penalties for knowing endangerment, with up to \$250,000 in fines and 15 years and up to one million dollars with no prison time for organizations.⁷⁵ Under this provision, individuals are accountable only for "actual awareness or actual belief . . . possessed."⁷⁶ Knowledge will not be imputed to the defendant.⁷⁷ However, as in the previous two statutes, the government need not prove that the alleged violators were aware of the CWA's requirements or even its existence,⁷⁸ only that they knew of their actions and possessed "actual awareness" or "actual belief" that their actions were placing someone in imminent danger.⁷⁹

The defendant may avoid prosecution by showing by a preponderance of the evidence that the endangered person consented to the conduct in question and "that the danger and conduct were reasonably foreseeable hazards of (I) an occupation, a business, or a profession; or (II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been aware of the risks in-

71 33 U.S.C. § 1319(c).

72 *Id.* § 1319(c)(1).

73 33 U.S.C. § 1319(c)(4) (1988).

74 33 U.S.C. § 1319(c)(2), 1319(4)(1988 & Supp. V 1993).

75 *Id.* § 1319(c)(3).

76 33 U.S.C. § 1319(c)(3)(B)(i)(I) (1988).

77 *Id.* § 1319(c)(3)(B)(i)(II).

78 *United States v. Weitzenhoff*, 1 F.3d 1523, 1529-30 (9th Cir. 1993), *amended and superseded on other grounds on denial of reh'g en banc* by 35 F.3d 1275 (9th Cir. 1993); *United States v. Villegas*, 784 F. Supp. 6, 11 (E.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds* by *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643 (2d Cir. 1993), *cert. denied*, *United States v. Villegas*, 114 S. Ct. 2764 (1994).

79 *Villegas*, 784 F. Supp. at 11.

involved prior to giving consent."⁸⁰

The CWA distinguishes between certain types of discharges, banning discharges of radiological, chemical or biological warfare agents, high-level radioactive wastes and medical wastes.⁸¹ The statute prohibits discharging oil⁸² and hazardous substances⁸³ into navigable waters "in such quantities as may be harmful."⁸⁴ The CWA also authorizes the EPA to look for violations, rather than wait for violators to report themselves. The EPA may enter premises subject to the statute without a warrant, examine and copy any required records, monitor required equipment, and take samples.⁸⁵

4. Clean Air Act (CAA)

Enacted in 1967 to "protect and enhance the quality of the Nation's air resources, so as to promote the public health and welfare, and the productive capacity of its population,"⁸⁶ the CAA controls air pollution by requiring the EPA administrator to set national ambient air quality standards,⁸⁷ enforced through state or federal implementation plans.⁸⁸

The CAA imposes criminal liability for knowingly violating an implementation plan;⁸⁹ violating, failing or refusing to comply with an order;⁹⁰ violating the New Source Performance Standards or the National Emissions Standards for Hazardous Air Pollutants,⁹¹ or violating any requirements regarding smelters, noncom-

80 33 U.S.C. § 1319(c)(3)(B)(ii) (1988).

81 *Id.* § 1311(f).

82 Heyatt, *supra* note 33, at 505 (citing 33 U.S.C. § 1321(a)(1) (1988) (defining "oil" as including "oil of any kind or in any form")).

83 *Id.* (citing 33 U.S.C. § 1321(a)(14) (1988) (defining "hazardous substances" as including only those substances found by EPA to "present an imminent and substantial danger to public health or welfare")).

84 *Id.* (citing 40 C.F.R. §§ 110.3(a)-(b) (1990) (defining "harmful" quantities of oil as discharges that "(a) [v]iolate applicable water quality standards, or (b) [c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines")). Heyatt also refers to *United States v. Boyd*, 491 F.2d 1163, 1168-69 (9th Cir. 1973) (sheen test upheld on grounds of administrative ease).

85 33 U.S.C. § 1318(a)(4)(B) (1988).

86 42 U.S.C. § 7401(b)(1) (1988).

87 *Id.* § 7409(a).

88 42 U.S.C. § 7410(a) (Supp. V 1993).

89 42 U.S.C. § 7413(c)(1)(A) (Supp. V 1993).

90 *Id.* § 7413(c)(1)(B).

91 *Id.* § 7413(c)(1)(C).

pliance penalties or ozone.⁹² The offender could be fined up to \$25,000 per day of violation and imprisoned up to one year. Fines and prison terms double for subsequent convictions.⁹³ Anyone who knowingly falsifies a document required by the CAA or a monitoring device may be fined up to \$10,000 and imprisoned for six months.⁹⁴

The Clean Air Act Amendments of 1990 upgrade knowing violations from misdemeanors to felonies, providing for fines pursuant to Title 18.⁹⁵ Anyone who knowingly releases hazardous air pollutants into the ambient air, knowing "at the time that he thereby places another person in imminent danger of death or serious bodily injury" commits a felony and "shall" be fined pursuant to Title 18 and possibly imprisoned for up to fifteen years.⁹⁶ Any organization violating this provision "shall" be fined up to one million dollars for each violation.⁹⁷

The statute does not require showing that the official "purposely set out to commit the crime, only that the officer was aware of its occurrence."⁹⁸ The government must show "knowledge only of the emissions themselves, not knowledge of the statute or of the hazards that emissions pose."⁹⁹ Yet the CAA, like RCRA and the CWA,¹⁰⁰ holds potential offenders accountable for only "actual awareness or actual belief possessed,"¹⁰¹ and does not impute knowledge from one person to another.¹⁰²

A defendant may escape liability by showing by a preponderance of the evidence that the endangered person consented and that the "danger and conduct were reasonably foreseeable hazards of (i) an occupation, a business, or a profession; or (ii) medical treatment or medical scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent."¹⁰³

Anyone who negligently releases hazardous air pollutants into

92 *Id.* § 7413(c)(1)(D).

93 *Id.*

94 *Id.* § 7413(c)(2).

95 *Id.* § 7413(c)(1), (2), (3), (5).

96 *Id.* § 7413(c)(5)(A).

97 *Id.*

98 *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6, 9 (E.D. Ark. 1978).

99 *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991).

100 *See supra* notes 43-49 (RCRA), 76-80 (CWA) and accompanying text.

101 42 U.S.C. § 7413(c)(5)(B)(i) (Supp. V 1993).

102 *Id.* § 7413(c)(5)(B)(ii).

103 *Id.* § 7413(c)(5)(C).

the ambient air, negligently "placing another person in imminent danger of death or serious bodily injury shall" be fined pursuant to Title 18 and possibly imprisoned for up to one year.¹⁰⁴ The statute also authorizes the administrator to pay any individual up to \$10,000 for providing information leading to a criminal conviction or judicial or administrative civil penalty for a CAA violation.¹⁰⁵

C. Other Statutes Used to Prosecute Environmental Offenders

In addition to the felony criminal penalty provisions in the major environmental statutes, prosecutors have begun using other traditional criminal statutes to prosecute environmental violators.¹⁰⁶ The primary reason behind this trend appears to be the desire to secure greater fines and longer sentences.¹⁰⁷

1. Conspiracy

Under 18 U.S.C. § 371, if two or more people conspire to commit an offense against the United States or to defraud the United States or its agencies and at least one of them acts to accomplish the conspiracy's object, all conspirators may be fined up to \$10,000 and imprisoned up to five years even if the object is

104 *Id.* § 7413(c)(4).

105 *Id.* § 7413(f).

106 Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 848 (1990); Rakoff, *supra* note 4, at 225; see also Thornburgh, *supra* note 26, at 777.

Apart from the amendments to existing laws, two other developments in the mid-1980s further reflected the move toward recognizing criminal enforcement of environmental laws as a national priority. First, Congress enacted the Criminal Fine Improvements Act of 1987, which raised the level of criminal fines that may be imposed on an organization from \$100,000 to \$200,000 per misdemeanor. Second, and perhaps more significant, Congress passed the Sentencing Reform Act of 1984. Enacted as part of the Comprehensive Crime Control Act of 1984, the Sentencing Reform Act directs the United States Sentencing Commission to establish policies and practices that eliminate unwarranted disparity in sentencing while maintaining flexibility when appropriate.

White collar criminals, who often have no prior record and are 'first-time offenders,' historically have been given probation. Conduct subject to sentencing under the new sentencing guidelines has resulted in more serious consequences for first-time offenders. Sentencing for environmental crimes reflects this trend toward tougher sanctions." *Id.* (citing the Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, sec. 6, § 3571(c), 101 Stat. 1279, 1280 (codified at 18 U.S.C. § 3571(c) (1988)) and the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1987-2040 (codified as amended at 18 U.S.C. §§ 3551-3742 (1988), 28 U.S.C. §§ 991-998 (1988))).

107 Fromm, *supra* note 106, at 848.

never achieved.¹⁰⁸ However, if the underlying offense is a misdemeanor, the punishment for the conspiracy cannot exceed the maximum allowable for the misdemeanor.¹⁰⁹

Prosecutors have brought conspiracy charges when two or more individuals have conspired to violate environmental laws. For example, when two persons conspire to illegally dump hazardous wastes, prosecutors may charge them with violating RCRA and with conspiracy.¹¹⁰ Similarly, prosecutors may bring both charges when, as in *United States v. Import Certification Laboratories, Inc.*,¹¹¹ three laboratory managers certified over a three year period that nearly 8,000 imported vehicles met the emission standards under the Clean Air Act, when in fact they did not. The managers pled guilty to conspiracy to defraud the United States. In this case, the penalties available under the conspiracy statute were far greater than those listed in the Clean Air Act: five years imprisonment to one year, respectively.¹¹²

2. False Statements

Knowingly and willfully falsifying a material fact or making a false representation "in any matter within the jurisdiction of any department or agency of the United States" will result in a fine up to \$10,000 and possibly a prison term of five years.¹¹³ Because most environmental statutes require filings and permits, environmental defendants will often violate this statute.¹¹⁴

For example, the defendants in *Import Certification Laboratories* also pled guilty to making false statements.¹¹⁵ Also, in *United States v. Pollution Control Industry of America*,¹¹⁶ a hazardous waste treatment company was fined \$200,000 for telling a government agency that it would dispose of benzene at a Texas facility, but instead treated and disposed of it at its facilities in Indiana.¹¹⁷

108 18 U.S.C. § 371 (1988).

109 *Id.*

110 Fromm, *supra* note 106, at 848.

111 18 Env't Rep. (BNA) 1993 (C.D. Cal. Jan. 8, 1988).

112 Fromm, *supra* note 106, at 848.

113 18 U.S.C. § 1001 (1988).

114 See Rakoff, *supra* note 4, at 226.

115 Fromm, *supra* note 106, at 850 (citing *Import Certification Lab.*, 18 Env't Rep. (BNA) at 1993). The president of the lab received a one year prison sentence without parole, a \$50,000 fine and five years probation. *Id.*

116 20 Env't Rep. (BNA) 579 (N.D. Ind. June 19, 1989).

117 *Id.*

3. Mail and Wire Fraud

Any person using the mails,¹¹⁸ the wire or television¹¹⁹ to defraud is subject to fines up to \$1,000 and a five year prison term. Anyone attempting to defraud a financial institution may be fined up to one million dollars and imprisoned up to thirty years.¹²⁰ This note will discuss cases involving mail and wire fraud in section 5(b).¹²¹

4. Aiding and Abetting

Anyone aiding and abetting the commission of an offense is punishable as a principal.¹²² To prove this offense, the government must show that someone committed the underlying substantive offense and that the defendant "share[d] in the intent to commit the offense . . . [and] participated in some manner to assist its commission."¹²³ Prosecutors often use this statute to charge corporate officers and employees who did not directly commit the environmental offense in question.¹²⁴ For example, in *United States v. Hoflin*, the Director of Public Works for the City of Ocean Shores, Washington was convicted of aiding and abetting the disposal of hazardous wastes in violation of RCRA and of 18 U.S.C. § 2 for telling a plant employee to bury drums of paint waste at a sewage treatment plant.¹²⁵

5. Racketeering Influenced and Corrupt Organizations Act (RICO)

(a) *Overview of RICO.*—In 1970, Congress passed the Organized Crime Control Act, adding Chapter 96, entitled Racketeer Influenced and Corrupt Organizations, to Title 18 of the United States Code¹²⁶ in order "to seek the eradication of organized crime in

118 18 U.S.C. § 1341 (Supp. V 1993).

119 *Id.* § 1343.

120 *Id.* §§ 1341, 1343.

121 *See infra* notes 148-90 and accompanying text. The mail and wire fraud statutes may be read together because they "share the same language." *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

122 18 U.S.C. § 2(b) (1988).

123 *United States v. Self*, 2 F.3d 1071, 1088-89 (10th Cir. 1993).

124 *Rakoff*, *supra* note 4, at 226.

125 880 F.2d 1033, 1034-35 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

126 18 U.S.C. § 1961-68 (1988 & Supp. V 1993).

the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."¹²⁷

To that end, Congress made it unlawful (1) to use or invest income gained from a pattern of racketeering activity or from collecting unlawful debts in an enterprise that affects interstate commerce;¹²⁸ or (2) to acquire or maintain an interest in or control of an enterprise by engaging in a pattern of racketeering activity or collecting unlawful debts;¹²⁹ or (3) for anyone employed by or associated with an enterprise engaged in, or whose activities affect, interstate commerce to participate, directly or indirectly, in that enterprise through a pattern of racketeering activity or collecting unlawful debts.¹³⁰ RICO also makes it a crime to conspire to commit any of the above-mentioned offenses.¹³¹

RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or

127 *United States v. Turkette*, 452 U.S. 576, 589 (1981) (quoting statement of findings prefacing the Organized Crime Control Act, 84 Stat. at 923). According to the statement, Congress found

"that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact."

Turkette, 452 U.S. at 588 (quoting 84 Stat. 922-23).

128 18 U.S.C. §1962(a) (1988).

129 *Id.* §1962(b).

130 *Id.* §1962(c).

131 *Id.* §1962(d).

group of individuals associated in fact although not a legal entity."¹³² Legitimate and illegitimate enterprises are included in this definition.¹³³ While the "major purpose of [RICO was] to address the infiltration of legitimate business by organized crime," Congress intended the statute to reach both legitimate and illegitimate enterprises.¹³⁴ Legitimate businesses "enjoy neither an inherent capacity for criminal activity nor immunity from its consequences."¹³⁵

To insure that RICO is not read too narrowly, Congress included a provision requiring the statute to be construed liberally.¹³⁶ "If RICO's language is plain, it controls; if its language, syntax, or context is ambiguous, the construction that would 'effectuate its remedial purposes...by providing enhanced sanctions and new remedies' is to be adopted."¹³⁷

The statute defines "pattern of racketeering activity" as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."¹³⁸ The Supreme Court in *H. J. Inc. v. Northwestern Bell Telephone Co.* crafted a two-part test for determining if a pattern exists: "a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity."¹³⁹

In a paper presented to the judges of the D.C. and Second Circuits, Professor G. Robert Blakey wrote that up to six questions must be asked to determine if the facts of a particular case satisfy this test:

- (1) Are the acts in a series (at least two) related to one another, for example, are they part of a single scheme?
- (2) If not, are they related to an external organizing prin-

132 *Id.* §1961(4).

133 *United States v. Turkette*, 452 U.S. 576, 579 (1981).

134 G. Robert Blakey, *The Racketeer Influenced Corrupt Organizations Act*, 2 (Oct. 24-25, 1994) (unpublished manuscript, presented at workshop for judges of the D.C. and Second Circuits, on file with the *Notre Dame Law Review*) [hereinafter Blakey paper] (quoting *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 244 (1988)).

135 *Id.*

136 18 U.S.C. § 904(a) (1988).

137 Blakey paper, *supra* note 134, at 3 (quoting 84 Stat. 923, 947 (1970)).

138 18 U.S.C. § 1961(5) (1988).

139 492 U.S. 229, 239 (1989).

principle, for example, to the affairs of the enterprise?

[If the answer to both questions is no, then the relationship prong is not satisfied and the inquiry is over. If either is answered yes, then up to three additional questions must be asked:]

(3) Are the acts in the series open-ended, that is, do the acts have no obvious termination point?

(4) If not, did the acts in the closed-ended series go on for a substantial period of time, that is, more than a few weeks or months?

[If either of these are answered yes, then continuity exists and the plaintiff or prosecutor has satisfied the test. If the answer to both is no, then up to two additional questions must be asked:]

(5) May a threat of continuity be inferred from the character of the illegal enterprise?

(6) If not, may a threat of continuity be inferred because the acts represent the regular way of doing business of a lawful enterprise?

[If either of these questions are answered yes, then a threat of continuity exists and the test is satisfied.]¹⁴⁰

Offenses which may constitute a pattern of racketeering activity are termed "predicate offenses." The statute contains an exclusive list of all predicate offenses.¹⁴¹

RICO provides for criminal penalties and civil remedies. Criminal penalties include fines, prison terms up to twenty years (or life, if the punishment for the violation serving as a predicate offense is life imprisonment) and mandatory forfeiture of: (1) "any interest the person has acquired or maintained in violation of section 1962;"¹⁴² (2) "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962;"¹⁴³ and (3) "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."¹⁴⁴ Also, the court may

140 Blakey paper, *supra* note 134, at 8-9.

141 18 U.S.C. § 1961(1) (Supp. V 1993).

142 18 U.S.C. § 1963(a)(1) (1988 & Supp. V 1993).

143 *Id.* § 1963(a)(2).

144 *Id.* § 1963(a)(3). Real and personal (both tangible and intangible) property are forfeitable under this section. *Id.* § 1963(b). In addition, anyone taking right, title or in-

fine a defendant who "derives profits or other proceeds from an offense" up to twice the gross profits or proceeds.¹⁴⁵

Civil remedies include injunctions, treble damages and reasonable attorneys' fees.¹⁴⁶ Modeled after the antitrust laws, civil RICO creates "a private enforcement mechanism that . . . deter[s] violators and provide[s] ample compensation to the victims."¹⁴⁷

(b) *Mail and Wire Fraud in Illegal Disposal of Hazardous Wastes.*—Environmental crimes are not listed as predicate offenses under RICO,¹⁴⁸ yet that has not prevented prosecutors and plaintiffs from using RICO to attack polluters and other environmental violators. Instead they have relied upon mail and wire fraud, both predicate offenses, to show a pattern of racketeering activity.¹⁴⁹ Because "multiple mailings of correspondence between company employees containing some environmental reports which include untrue or false information could potentially result in a conviction under RICO,"¹⁵⁰ environmental offenses "may go hand-in-hand with RICO charges."¹⁵¹

(i) *Criminal Prosecutions.*—RICO prosecutions of environmental offenses usually involve the illegal disposal of solid or hazardous wastes. In *United States v. Paccione*, the District Court for the Southern District of New York ruled that "allegations of mail and wire fraud are not invalidated as predicate acts because the alleged enterprise is accused of violations of environmental laws as well."¹⁵² The court convicted Angelo Paccione and Anthony

terest to the property from the violator after the violation has occurred must show that he or she is "a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section." *Id.* § 1963(c).

145 *Id.* § 1963(a)(3).

146 18 U.S.C. § 1964 (1988).

147 Blakey paper, *supra* note 134, at 17-18, (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982)).

148 See 18 U.S.C. § 1961(1) (Supp. V 1993).

149 See Heyat, *supra* note 33, at 488 (Demonstrating the use of mail and wire fraud violations as grounds for RICO prosecutions discredits the argument that environmental offenses cannot be predicate offenses for RICO. Also, RCRA does not preempt RICO.); see also Elizabeth E. Mack, *Another Weapon: The RICO Statute and the Prosecution of Environmental Offenses*, 45 Sw. L.J. 1145, 1151 n.40 (1991) ("Mail and wire fraud are the foundation for liability for most environmental RICO cases."); Fromm, *supra* note 106, at 852. (RICO is "an extremely attractive statute for use in the conviction of environmental crimes.").

150 Fromm, *supra* note 106, at 852.

151 Mack, *supra* note 149, at 1159.

152 738 F. Supp. 691, 699 (S.D.N.Y. 1990) (denying defendants' motion for dismissal,

Vulpis of mail fraud, racketeering and racketeering conspiracy stemming from their operation of an illegal landfill. A codefendant, John McDonald, was convicted of mail fraud.¹⁵³ According to the court, Paccione and Vulpis perpetrated "one of the largest and most serious frauds involving environmental crimes ever prosecuted in the United States. The amount of damage with respect to monetary loss resulting from the fraud is literally off the Sentencing Guidelines' charts and is in the tens of millions of dollars. The Guidelines contemplate fraud involving amounts up to \$5,000,000. However, a conservative estimate of the fraud here is \$35,000,000."¹⁵⁴

In 1988, New York City raised its rates for disposing of waste at its landfill from \$9 to \$18 a ton. Paccione and Vulpis procured permits and licenses to collect, transport and dispose of solid and hazardous waste by "intentionally [making] false statements to City agencies claiming, among other things, that they intended to operate a clean fill grading operation on certain land in Staten Island."¹⁵⁵ They instead dumped thousands of tons of garbage, including asbestos, on land in Staten Island near a residential area.¹⁵⁶

The court convicted Paccione and McDonald of mail fraud for making fraudulent statements to the New York State Department of Environmental Conservation. For example, the two defendants said that McDonald owned New York Environmental Contractors, a New York corporation which was also a defendant, and that they, the defendants, had permission to deliver medical waste to a Pennsylvania incinerator. Paccione and McDonald then

suppression and severance). "Nothing in the decisions of this Circuit suggests that mail or wire fraud, properly alleged, in the conduct of an enterprise cannot be included as racketeering activity because the enterprise is alleged to have engaged in violations of regulatory schemes which do not constitute racketeering activity on their own Contrary to defendants' contention, the existence of environmental regulatory schemes, including criminal penalties, does not somehow 'preempt' the use of properly stated allegations of mail fraud as racketeering activity in charging a violation of RICO because violations of that environmental regulatory schemes are also implicated. The indictment in this case is not merely an instance of the Government using the mail fraud statute, and thereby RICO, to add counts 'in an indictment the gravamen of which was the violation of other federal criminal statutes.'" *Id.* (quoting *United States v. Mangan*, 575 F.2d 32, 49 (2d Cir. 1978), *cert. denied*, 439 U.S. 931 (1978)).

153 *United States v. Paccione*, 751 F. Supp. 368 (S.D.N.Y. 1990), *aff'd* 949 F.2d 1183 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3029 (1992).

154 *Id.* at 371.

155 *Id.* at 372.

156 *Id.*

defrauded doctors and hospitals by charging them the rates required to lawfully dispose of the medical waste, and then dumping it illegally on the Staten Island property.

In sentencing Paccione and Vulpis, the court took pains to note that fraud, not the environmental violations, was the underlying RICO activity.¹⁵⁷ It recognized that "a court cannot sentence a defendant for uncharged and unrelated conduct;"¹⁵⁸ here, the environmental violations. Yet it found "a very strong nexus between the fraud and the environmental damage."¹⁵⁹ In fact, in applying the sentencing guidelines for racketeering, the court added four points because both defendants played "leadership roles in the dumping of illegal and toxic substances."¹⁶⁰ The RICO guidelines applied "because the environmental offense came under the rubric of the fraud offense which in turn came under the rubric of the RICO offense."¹⁶¹

In *United States v. Case*, a New Jersey district court convicted Herbert Case of conspiracy to commit mail fraud and of mail fraud stemming from his illegal dumping of hazardous waste.¹⁶² Case told hazardous waste generators that he would dispose of the waste legally, then dumped it into Hudson Bay through Passaic Valley's sewage system and into an unauthorized landfill. To conceal this scheme, he submitted false reports and manifests to the New Jersey Department of Environmental Protection (NJDEP) and sent fake invoices to the generators, charging them for legally disposing of the waste.¹⁶³

After being convicted, Case moved for relief, relying on the Supreme Court's holding in *McNally v. United States* that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."¹⁶⁴ Case argued that, after *McNally*, the mail fraud statute protected only intangible and tangible property rights and that, since submitting false information to state agencies did not deprive those agencies of any property or money, the mail fraud

157 *Id.* at 374.

158 *Id.* at 375 (relying on *United States v. Barone*, 913 F.2d 46 (2d Cir. 1990) and *United States v. McCall*, 915 F.2d 811 (2d Cir. 1990)).

159 *Id.*

160 *Id.* at 376.

161 *Id.* at 376 n.6.

162 684 F. Supp. 109 (D.N.J. 1988), *aff'd*, 866 F.2d 1413 (3d Cir. 1988).

163 *Id.* at 110.

164 *McNally v. United States*, 483 U.S. 350, 356 (1987).

statute does not protect against this type of scheme.¹⁶⁵

The court said that the defendant's use of Passaic Valley facilities and procurement of a permit—both of which were obtained fraudulently—constitute a loss to Passaic Valley and to the NJDEP. The court was not "convinced" that the mail fraud statute would not protect against this type of loss, but stated that it did not need to decide this issue to uphold the convictions.¹⁶⁶ Since the jury convicted Case of a scheme to defraud Passaic Valley, NJDEP and the generators, who suffered a monetary loss in being defrauded, the court found that, at the very least, Case conspired "to obtain contracts and money from the generators of hazardous waste" and so was guilty of mail fraud.¹⁶⁷

In *United States v. Self*,¹⁶⁸ Steven Self was convicted of violating RCRA, mail fraud, conspiracy to violate RCRA, the Clean Air Act and the Clean Water Act. On appeal, the Tenth Circuit said the evidence did not support convictions for violating RCRA and for mail fraud because the government had not proven that the waste in question was "hazardous" under RCRA. Since the government had charged that Self planned to defraud the Southern California Gas Company (SCGC) of money by contracting to legally dispose of a "hazardous waste," here, natural gas condensate, but instead transported it to a gas station, mixed it with gas and sold it, the government also had to show that the condensate was a hazardous waste. Since it failed to show this, the evidence supporting the mail fraud count was "insufficient as a matter of law."¹⁶⁹ Despite the failure on these particular facts, the case still shows how mail fraud and environmental violations may work closely together.

Two states have also used racketeering counts to prosecute for environmental violations. In *Commonwealth v. Lavelle*,¹⁷⁰ the State of Pennsylvania charged William Lavelle, W.A. Lavelle and Son Co. and Lavco, Inc. with violating the corrupt organizations provisions of the Pennsylvania Crimes Code. Lavelle told generators of solid and liquid waste that he would dispose of the waste legally, then

165 *Case*, 684 F. Supp. at 113-14.

166 *Id.* at 114.

167 *Id.* at 115.

168 2 F.3d 1071 (10th Cir. 1993).

169 *Id.* at 1084.

170 16 Env'tl. L. Rep. 20497 (Pa. Ct. C.P. Lackawanna Cty. 1985), *aff'd* 555 A.2d 218 (Pa. Super. Ct. 1989), *appeal denied*, 568 A.2d 1246 (Pa. 1989) (no written opinion) (discussing 18 PA. CONS. STAT. ANN. § 911 (Supp. 1994)).

"systematically dumped or disposed . . . [the waste] at the Morgan Highway landfill or poured [it] down a mine borehole located at the office address of both companies then in existence."¹⁷¹ Neither site was approved and neither Lavelle nor the site owner had a permit to dispose of the industrial waste.¹⁷² The court convicted Lavelle and the two corporations of committing "hundreds of thefts by deception."¹⁷³

More recently, the Appellate Division of the Superior Court of New Jersey found two dirt brokers, a dumper, a truck company and three public officials among others guilty of racketeering, conspiring to commit racketeering, bribery, theft of services, falsifying and tampering with public records, forgery and unlawful engagement in the business of solid waste collection and disposal.¹⁷⁴ In *New Jersey v. Ball*, the court found that these defendants "conspired to illegally dump solid waste generated in New York in several New Jersey sites."¹⁷⁵ Specifically, Richard Bassi and Michael Harvan found illegal dump sites in North Bergen and other places in North Jersey, contacted New York waste haulers like Patrick Ball and Big Apple Leasing, Ball's company, and arranged for them to dispose of their solid waste at the unlawful sites. The public official defendants accepted bribes in exchange for granting permits and facilitating the illegal dumping.¹⁷⁶

Holding that the New Jersey legislature intended its racketeering statute to be even broader than the federal RICO statute,¹⁷⁷ the court found that an enterprise exists when a "group of people associate together in order to provide and operate illegal dumping sites in New Jersey for out-of-state waste."¹⁷⁸ The statute defines

171 *Id.*

172 *Id.*

173 *Id.* The statute lists "thefts and related offenses" as predicate offenses. It does not list environmental violations. 18 PA. CONS. STAT. ANN. § 911(h)(i) (Supp. 1994).

174 *State v. Ball*, 632 A.2d 1222 (N.J. Sup. Ct. 1993), *cert. granted sub nom. State v. Bassi*, 639 A.2d 304 (N.J. 1994) (no written opinion). The court's holding was adopted in *Maxim Sewerage Corp. v. Monmouth Ridings*, 640 A.2d 1216 (N.J. Sup. Ct. 1993) (civil RICO action brought by sewage utility against developer alleging common-law fraud, federal RICO violations, breach of contract and of statutory duties).

175 *Ball*, 632 A.2d at 1226-27.

176 *Id.* at 1227.

177 *Id.* at 1240.

178 *Id.* at 1239. Some of the differences between the New Jersey and the federal statutes that the court cites are: (1) unlike the federal RICO statute, New Jersey's statute (1) specifically includes "illicit as well as licit enterprises;" (2) "expressly defines what constitutes a 'pattern of racketeering activity;'" (3) includes a statutory presumption "which makes it easier to trace funds from a specific source into an investment;" and (4)

enterprise as including "any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities."¹⁷⁹ According to the court, "all that is required to satisfy the New Jersey RICO enterprise element is a group of people, however loosely associated, whose existence provides the common purpose of committing two or more predicate acts."¹⁸⁰ The predicate acts for the state RICO conspiracy were bribery, money laundering, forging waste origin forms at the Hackensack Meadowlands Development Commission (HMDC) baler, and theft of services from the HMDC baler.¹⁸¹

(ii) *Civil Suits*.—Plaintiffs have used RICO to gain federal

"provides more specificity and clarity respecting the proscribed conduct and counters the 'constitutional vagueness' argument often leveled against Federal RICO." *Id.* at 1240.

The New Jersey racketeering statute defines "pattern of racketeering activity" to require:

- (1) Engaging in at least two incidents of racketeering conduct one of which shall have occurred after the effective date of this act and the last of which shall have occurred within 10 years . . . after a prior incident of racketeering activity; and
- (2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

N.J. STAT. ANN. § 2C:41-1d (West Supp. 1994).

179 N. J. Stat. Ann. § 2C:41-1c (West Supp. 1994).

180 *Ball*, 632 A.2d at 1240.

181 *Id.* at 1249. The statute does not, however, list environmental violations as predicate offenses. *See* N.J. STAT. ANN. § 2C:41-1a (West 1994). Other states have enacted some form of RICO (statutory sections listed define prohibited activities). *See* ARIZ. REV. STAT. ANN. § 13-2312 (1994); CAL. PENAL CODE § 186.2 (West 1995) (criminal profiteering statute); COLO. REV. STAT. ANN. § 18-17-104 (West 1994); CONN. GEN. STAT. § 53-395 (1994); DEL. CODE ANN., tit. 11, § 1503 (1994); FLA. STAT. ANN. § 895.03 (West 1995); GA. CODE ANN. § 16-14-4 (Michie 1994); HAW. REV. STAT. § 842-2 (Michie 1994); IDAHO CODE § 18-7804 (Michie 1994); IND. CODE ANN. § 35-45-6-2 (West 1994); LA. REV. STAT. ANN. § 15:1353 (West 1994); MINN. STAT. ANN. § 609.903 (West 1995); MISS. CODE ANN. § 97-43-5 (1993); NEV. REV. STAT. ANN. § 207.400 (Michie 1993); N.M. STAT. ANN. § 30-42-4 (1994); N.Y. PENAL LAW § 460.20 (McKinney 1995) (enterprise corruption statute); N.C. GEN. STAT. § 75D-4 (1994); N.D. CENT. CODE § 12.1-06.1-03 (1994); OHIO REV. CODE ANN. § 2923.31 (Anderson 1994); OKLA. STAT. ANN., tit. 22, § 1403 (West 1995); OR. REV. STAT. ANN. § 166.720 (1993); 18 PA. CONS. STAT. ANN. § 911 (1994); R.I. GEN. LAWS, § 7-15-2 (1994); TENN. CODE ANN. § 39-12-204 (1994); UTAH CODE ANN. § 76-10-1603 (1994); WASH. REV. CODE ANN., § 9A.82.010 (West 1994); WIS. STAT. ANN., § 946.83 (West 1994).

jurisdiction, and to use the statute's treble damages provision to "leverage favorable settlements."¹⁸² In accordance with this, plaintiffs have used mail and wire fraud to bring actions under RICO for environmental violations. Plaintiffs have often had difficulty pleading a RICO cause of action with sufficient particularity,¹⁸³ or establishing a causal link between the mail fraud and the harm suffered from the environmental violation,¹⁸⁴ or showing a pattern of racketeering,¹⁸⁵ or proving a threat of continuing activity,¹⁸⁶ or properly alleging participation,¹⁸⁷ or trying to hold a municipality liable.¹⁸⁸ However, these are largely pleading

182 Mack, *supra* note 149, at 1145. State courts now have concurrent jurisdiction. *Id.* at n.5 (citing Tafflin v. Levitt, 493 U.S. 455 (1990)).

183 See Chartrand v. Chrysler Corp., 785 F. Supp. 666, 669 (E.D. Mich. 1992) (Plaintiffs given extension to amend civil RICO count in complaint to include added details.); Bernfield v. Chester Valley Disposal, Co., 1988 WL 25283, *1 (E.D. Pa. 1988) ("This complaint does not meet the test of a 'short and plain statement of the claim showing that the pleader is entitled to relief' set forth in Fed.R.Civ.P. 8(a). Its allegations instead amount to legal conclusions reiterated.").

184 See Brittingham v. Mobil, 943 F.2d 297, 305 (3d Cir. 1991) ("Plaintiffs have neither alleged nor demonstrated a connection with the use or investment of racketeering income other than the normal reinvestment of corporate profits."); Mish v. Richter, 1990 WL 120650, *2 (E.D. Mich. 1990) ("Defendants' environmental misdemeanors and alleged mail fraud . . . may have resulted in an inability to obtain drilling permits for plaintiff's land, but this does not establish an enterprise engaged in a pattern of racketeering activity as required by RICO . . . Defendants' environmental violations and their dealings with the MDNR [Michigan Department of Natural Resources] are separate and distinguishable from defendants' alleged breach of their contract with plaintiffs.").

185 See Huntsman-Christensen Corp. v. Mountain Fuel Supply Co., 1986 WL 15400, *9 (D. Utah 1986) (evidence supports only one episode of mail/wire fraud).

186 See Brossman Sales, Inc. v. Broderick, 808 F. Supp. 1209 (E.D. Pa. 1992) ("Plaintiff Brossman Sales has failed to allege a threat of defendants' racketeering activities continuing beyond the date the property was sold. Plaintiff has alleged that the environmental violations continue to exist and that defendants refuse to remedy them, but these alleged wrongdoings are not the predicate acts which constitute defendants' alleged racketeering activity. Plaintiff accused defendants of three predicate racketeering acts: mail fraud, wire fraud and bank fraud. These acts are completed, and while defendants' continuing acts may be wrongful, they do not constitute predicate crimes under RICO."); PMC, Inc. v. Ferro Corp., 131 F.R.D. 184, 188 (C.D. Cal. 1990) (Plaintiff's "assertion that evidence of fraudulent transactions not connected with the sale of the Productol plant is relevant to proving a 'continuing threat' for its RICO claims is unpersuasive.").

187 See Genty v. Resolution Trust Corp., 937 F.2d 899, 915-16 (3d Cir. 1991) (" . . . plaintiffs adduced at trial no direct evidence or circumstantial evidence that these defendants 'wilfully participated in the [fraudulent] scheme with the intent that its illicit objectives be achieved,' . . . as is required to establish a federal mail fraud violation."); Standard Equipment, Inc. v. Boeing Co., 1985 WL 70, *7 (W.D. Wash. 1985) (court dismissed one of plaintiff's three RICO claims for failing to allege that defendant participated in the fraudulent scheme).

188 See Albanese v. City Fed. Sav. & Loan Ass'n, 710 F. Supp. 563, 568 (D.N.J. 1989) ("Because the Township is a municipality, it cannot form the requisite mental state to

and evidentiary problems. They do not pose any inherent difficulty in using the mail and wire fraud as predicate offenses to bring suits arising out of environmental violations under RICO.¹⁸⁹

III. RICO AS A TOOL TO FIGHT ILLEGAL DISPOSAL OF HAZARDOUS WASTE

Prosecutors took the first step towards prosecuting environmental violations as predicate offenses under RICO when they used mail and wire fraud as surrogates for the actual substantive environmental violations. However, it is not enough to stop here. In the cases previously mentioned, it is reasonable to assume that the prosecutors and plaintiffs did not bring those actions because of the mail or wire fraud per se. The environmental damage caused was the primary concern.

Relying on mail and wire fraud to invoke RICO is risky because the polluter may not have committed any acts of mail or wire fraud. Also, as previously mentioned,¹⁹⁰ the Supreme Court's holding in *McNally* limiting the mail and wire fraud statutes solely to deprivations of property as opposed to intangible rights such as the right to honest services poses problems for using those statutes to prosecute individuals for fraudulently obtaining a state permit to operate a waste disposal site. Although the Court subsequently narrowed *McNally's* holding in *Carpenter v. United States*,¹⁹¹ many of the circuits have limited the government's property interest in various permits and licenses not yet issued.¹⁹²

commit an act of racketeering activity, and it is therefore incapable of violating 18 U.S.C. § 1962(a), (c), and (d), and cannot be liable under RICO's civil liability provision, 18 U.S.C. § 1964(c).").

189 See generally *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805 (N.D. Cal. 1989); *Prudential Ins. Co. of America v. United States Gypsum*, 711 F. Supp. 1244 (D.N.J. 1989) (in which plaintiffs successfully pursued civil RICO claims arising from environmental offenses using mail and wire fraud).

190 See *supra* notes 164-67 and accompanying text.

191 484 U.S. 19, 25 (1987) ("*McNally* does not limit the scope of § 1341 to tangible as distinguished from intangible rights.>").

192 See, e.g., *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator permit not property under mail or wire fraud statutes), *cert. denied*, 500 U.S. 921 (1991); *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989) (federal pilot licenses not property before government issues them); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxi driver's license not property before issued by government); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988) (certificate of registration to operate bingo games not property before issued), *cert. denied*, 488 U.S. 924 (1988); *Mylan Lab., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1072-73 (D. Md. 1991) (FDA has no property interest in its approvals of new drug applications within meaning of wire and mail fraud statutes). *But see United States v. Martinez*, 905 F.2d 709, 713-15 (3d Cir. 1990)

The Second Circuit, for example, in *United States v. Schwartz*, held that a permit to export goods was not property within the meaning of the wire and mail fraud statutes.¹⁹³ A license not yet issued "does not constitute property in the hands of the government for federal fraud statute purposes."¹⁹⁴ Just because the government has the "power to regulate does not *a fortiori* endow it with a property interest in the license; that is the mere issuance of a document designed to formalize the government's regulation does not thereby create a property interest for the government."¹⁹⁵

In *United States v. Sacco*,¹⁹⁶ the Second Circuit disagreed with the analysis in *Schwartz*, saying that the government had a property interest in permits to operate waste dump sites. Yet it still reversed the defendant's convictions for mail and wire fraud because it felt "bound" by *Schwartz*.¹⁹⁷

While Congress in 1988 amended the definition of "scheme or artifice to defraud" to include the deprivation of the intangible right of honest services,¹⁹⁸ thereby superseding *McNally*, prosecutors seeking to use instances of alleged fraud occurring prior to the amendment as predicate offenses under RICO could run into court decisions like those just mentioned. As a result, relying on the mail and wire fraud statutes may not always bring environmental violations under RICO. Therefore, it makes sense to do directly what the courts are already allowing prosecutors and plaintiffs to do indirectly: prosecute environmental crimes under RICO.

Listing environmental violations as predicate offenses under RICO is not a new idea. In 1990, Professor G. Robert Blakey recommended adding offenses under RCRA and a state hazardous waste program to RICO.¹⁹⁹ Professor Blakey relied in part on a similar recommendation passed by the National Association of

(statute-issued license to practice medicine issued is property), *cert. denied*, 498 U.S. 1017 (1990).

193 924 F.2d 410, 416-18 (2d Cir. 1991).

194 *Id.* at 417.

195 *Id.*

196 923 F.2d 970, 973-75 (2d Cir.), *reh'g*, 927 F.2d 726 (2d Cir.), *cert. denied*, 500 U.S. 919 (1991).

197 *Id.* at 973.

198 18 U.S.C. § 1346 (1988).

199 G. Robert Blakey, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: Mother of God—Is This the End of RICO?*, 43 VAND. L. REV. 851, 927 n.210 (1990). Yet he cautioned that RICO should be used only for substantial, not technical, violations. *Id.* at 927.

Attorneys General (NAAG), which was also cited by Michigan Representative John Conyers in a speech on the floor of the House of Representatives on August 7, 1987.²⁰⁰ The NAAG proposed amending the list of RICO predicates in the following manner:

Any act which is indictable under section 3008 of the federal Resource Conservation and Recovery Act ('RCRA'), 42 U.S.C. sec. 6928 (1984), or any act which is chargeable as a crime under a similar provision of a state hazardous waste program authorized by the administrator of the Environmental Protection Agency, pursuant to section 3006 of RCRA, 42 U.S.C. sec. 6926 (1984).²⁰¹

The NAAG explained that its resolution would "add knowing violation of hazardous waste management and disposal laws to the list of RICO 'predicate offenses,' two (2) violations of which trigger application of the RICO statute's deterrent civil and criminal sanctions."²⁰² The NAAG based its decision on the increasing cost-difference between legal and illegal disposal of hazardous waste, which provides a "growing impetus for corrupt individuals and organizations to seek illicit gain by inducing legitimate businesses, through fraud, or misrepresentation, to utilize the 'lower cost' hazardous waste disposal 'services' offered by the corrupt individuals or organizations;"²⁰³ on RICO's being "the principal and most-effective piece of federal legislation aimed at deterring such illegal enterprises and diverting from corrupt organizations such illicit proceeds;"²⁰⁴ on the fact that "many state 'RICO' and organized crime control acts incorporate by reference the list of predicate offenses recited in the federal RICO Act . . . thereby enabling a single change in the federal Act to achieve maximum beneficial effect by directly enabling states to apply their own resources, processes and sanctions to such criminal enterprises while at the same time enabling federal enforcement resources to

200 "Mob Involvement in Hazardous Waste Disposal: Why We Need a Strong RICO," Aug. 7, 1987. 134 Cong. Rec. H6788 (daily ed. Aug. 10 1988) [hereinafter "Mob Involvement"].

201 Resolution III, passed during the Spring Meeting of the National Association of Attorneys General, March 8-10, 1987, entitled Hazardous Waste Violation as a Predicate Offense for RICO.

202 *Id.*

203 *Id.*

204 *Id.*

be effectively applied against such criminal enterprises;²⁰⁵ and on the realization that "the absence of a specific provision in federal RICO aimed at criminal enterprises in the hazardous waste management and disposal areas makes application of the RICO statute's provisions and sanctions to hazardous waste-related crimes more difficult and uncertain, thereby reducing and/or eliminating the significant deterrent potential of the statute and exposing our nation's citizens and natural resources to endangerments which would otherwise be prevented or deterred."²⁰⁶ Adding a RCRA violation as predicate offense instead of violations of all major environmental statutes makes sense and is a good first step since RCRA "is the primary source of criminal environmental prosecutions to date."²⁰⁷

If environmental offenses were listed as predicate offenses, they would probably either involve an association in fact²⁰⁸ or a legitimate business operated through a pattern of racketeering activity. Prosecution under all four subsections of §1962 would be possible. For example, a hauler of hazardous waste who has received income from transporting and disposing of the waste without a permit would violate § 1962(a) by investing that income in a legitimate business affecting interstate commerce, i.e. a disposal facility.²⁰⁹ RICO's §1962(b) is usually used in scenarios where a gang is trying to collect protection money from a storekeeper and instead takes a one-third ownership interest in the store in exchange for the money owed. It might apply in the environmental context where a hauler learns the business for which he works is handling hazardous waste without filing the appropriate documentation, in violation of § 6928(d)(4) of RCRA.²¹⁰ Not disclosing this information or falsifying reports to conceal it in exchange for an interest in the company would probably violate § 1962(b) of RICO.²¹¹

However, most prosecutions would probably be brought under

205 *Id.*

206 *Id.*

207 Rakoff, *supra* note 4, at 220. For example, in 1989, 71% of all criminal enforcement cases in the environmental field involved violations of either RCRA or the Clean Water Act. Adler, *supra* note 15, at 797-98.

208 18 U.S.C. § 1961(4) (1988).

209 *Id.* §1962(a) (violation of 42 U.S.C. § 6928(d)(2)(1988)).

210 42 U.S.C. § 6928(d)(4).

211 18 U.S.C. § 1962(b) (1988).

§ 1962(c).²¹² For example, operating a disposal facility handling hazardous waste from different states without a permit would now violate not only RCRA, but RICO too.²¹³ Finally, a § 1962(d) charge could be added for conspiring to violate any of these three subsections of RICO.²¹⁴

A. *Disadvantages of Environmental Statutes in Fighting Illegal Disposal*

1. Reliance on Self-auditing and Voluntary Disclosure

(a) *Only Non-intentional Polluters Likely to Audit and Report.*—One of the problems in relying on the environmental statutes is their dependence upon self-auditing over investigation and upon compliance over enforcement. As the NAAG recognized, the rising costs for legal disposal encourages some people to dump illegally (and less costly). Only by increasing the available criminal and civil sanctions for dumping illegally will the government be able to stop this tide.

212 *Id.* § 1962(c).

213 *Id.* (violation of 42 U.S.C. § 6928(d)(2)(1988)). While RICO would extend criminal liability further than RCRA would, the Supreme Court has limited liability under § 1962(c) to those who participate in "the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1172 (1993).

To be liable, the participant does not have to be primarily responsible for the enterprise, nor even be an employee. *Id.* Even "lower-rung participants . . . under the direction of upper management" may be liable if they "exert control" over the enterprise. *Id.* at 1173. However, the Court declined to decide "how far § 1962(c) extends down the ladder of operation." *Id.*

Subsequent court decisions have tried to define liability under § 1962(c), agreeing that a person may be liable without managing or operating the enterprise or sharing in its profits. *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994); *United States v. Viola*, 35 F.3d 37, 41 (2d Cir. 1994); *United States v. Thai*, 29 F.3d 785, 816 (2d Cir. 1994), *cert. denied sub nom. Tran v. United States*, 115 S. Ct. 456 (1994), and by *Do v. United States*, 115 S. Ct. 496 (1994). Yet the participation must be "willful and knowing." *Viola*, 35 F.3d at 41. *See also United States v. Wong*, 1994 WL 617584, *24-25 (2d Cir. 1994) (distinguished itself from *Reves*, in which the accountant was not aware of the surrounding criminal activities, and found gang members liable under § 1962(c) because they were "thoroughly indoctrinated participants in the criminal activities" of the gang). Merely taking directions and performing tasks "necessary and helpful" to the enterprise might not be sufficient to trigger liability. *Viola*, 35 F.3d at 41. *See also Oreto*, 37 F.3d at 750 ("one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them"); *University of Maryland at Baltimore v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1992) (providing financial services and attending board meetings not sufficient to trigger liability under § 1962(c)). The Third Circuit in *Peat, Marwick* went even farther than the other circuits in saying that "[s]imply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise." *Id.*

214 18 U.S.C. § 1962(d) (1988).

The emphasis on compliance rather than enforcement began in the early 1980's during Anne Burford's administration. From 1980 to 1981, the number of cases referred from the EPA's Office of Enforcement to the Justice Department declined 69 percent, 82 percent in RCRA and Superfund cases.²¹⁵ In delegating enforcement to the states, the EPA's "chief goal" had been encouraging compliance through self-auditing and governmental inspection.²¹⁶

In a speech before a January 1991 conference of federal enforcement officials, former Assistant Attorney General Richard Stewart remarked that "the system only works if voluntary compliance is the norm."²¹⁷ Since most polluters "are not bank robbers or drug dealers, but legitimate business enterprises" the government should tailor its enforcement to encourage self-auditing and voluntary disclosure.²¹⁸ In 1991, Judson Starr and Nancy Voisin contended that a program in which voluntary disclosure would mitigate punishment would reduce investigative costs and quicken how fast remedial measures could begin. Companies would be persuaded to report themselves because disclosure would cost less than the potential civil and criminal penalties.²¹⁹

Yet this only works for the unintentional polluter; the person or corporation who makes a mistake, realizes it and tries to find the least costly method of remedying the error. It does not work for those who choose to violate environmental laws in order to cut costs and increase profits. The intentional polluters are doing so because it is less costly and more profitable than complying with the environmental laws. They have no reason to report honestly. As Representative Conyers said in endorsing the NAAG's recommendation: "Voluntary compliance—particularly by the mob—is not likely to occur. Truly legitimate businesses may be expected to follow the law. The problem is that all too often the businesses in this area are far from legitimate."²²⁰

(b) *Lower Costs of Illegal Disposal (Incentive Not to Report)*.—Whether dealing with organized crime or with businessmen taking advantage of criminal opportunities, self-auditing is not a

215 REBOVICH, *supra* note 5, at 8-9.

216 *Id.* at 9.

217 Judson W. Starr & Nancy Voisin, *Toward an Environmental Voluntary Disclosure Program*, 16 COLUM. J. ENV'T. L. 333, 336 (1991).

218 *Id.*

219 *Id.*

220 "Mob Involvement," *supra* note 200, at H6789.

sufficient safeguard because of the drastically rising cost difference between legal and illegal disposal. "The truth is that the cost of legitimate hazardous waste disposal has risen steadily since the 1940s and has been seen as a deciding factor for corporations choosing to dispose illegally."²²¹ The cost of legal treatment of hazardous waste can range from \$15 to \$550 per 55 gallon drum, depending on the chemical. Pharmaceutical companies average \$125 per drum for legal disposal.²²² Midnight dumping is the cheapest form of illegal disposal: "all that is required is 'a truck and a lack of regard for public safety.'"²²³ Therefore, the costs of complying with the various environmental regulations coupled with the emphasis on self-policing encourages polluting. At the very least, they are not sufficient deterrents. More aggressive investigation and stricter sanctions are needed to fight pollution. RICO would provide both.

2. Who is Dumping Illegally?

While most illegal dumping involves individual enterprises, organized crime may also be involved in this area, especially in the New Jersey-New York region.²²⁴ According to Rep. Conyers, the mob, with its traditional involvement in garbage disposal and operating landfills, was particularly well-suited to move into hazardous waste disposal.²²⁵ Michigan Representative John Dingell agreed, calling organized crime's link to illegal dumping of toxic substances a "continuing threat to undermine the Government's efforts to resolve the national problem of hazardous waste disposal through the Resource and Conservation and Recovery Act."²²⁶

According to Representative Conyers, garbage haulers connected to organized crime easily obtained the permits necessary to dispose of the waste.²²⁷ Yet in addition to a license for the haul-

221 REBOVICH, *supra* note 5, at 3.

222 *Id.*

223 *Id.*

224 *Id.* at 59. In his study, Mr. Rebovich found no cases of mob involvement in the other states he surveyed: Maine, Maryland and Pennsylvania. *Id.* at 64.

225 "Mob Involvement," *supra* note 200, at H6789.

226 Statement of Representative John Dingell, Chairman of Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce on Thursday, May 28, 1981, p.1. Lt. Col. Justine Dintino, New Jersey State Police, agreed with Rep. Dingell in testimony before the same subcommittee. *Id.* at 5.

227 "Mob Involvement," *supra* note 200, at H6789 (referring to Organized Crime and Hazardous Waste Disposed: House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 92 Cong. 2 Sess. 22 (Dec. 16, 1980)).

ers, RCRA required a landfill operator to sign the manifest, stating that the waste has been properly disposed of. Organized crime already owned many landfills, which subsequently began accepting "dubious shipments of hazardous waste thinly disguised as ordinarily municipal waste."²²⁸ They also bribed or threatened other sites to sign the manifest for waste never received or shipped elsewhere and began establishing false disposal and treatment centers.²²⁹ The phony disposers would then store it on site or dump it somewhere, like on a roadway, down a sewer or in the ocean.²³⁰

On the other hand, other commentators argue that organized crime plays at best a limited role in the illegal disposal of hazardous waste. According to a study of hazardous waste dumping in four states, "most commonly, the criminal dumper is an ordinary, profit-motivated businessman who operates in a business where syndicate crime activity may be present but by no means pervasive."²³¹ One commentator has stated that

the average hazardous waste offender has more in common with the Ivan Boesky ideal than with that of Don Corleone. The average dumper appears to be an entrepreneur who starts out by running a safe and legal business. But harsh competition, lax enforcement, and ample opportunities to go astray tempt our would-be tycoon into becoming a real-life criminal.²³²

Regardless of the exact extent of the mob's involvement in

228 *Id.*

229 *Id.*

230 *Id.*

231 REBOVICH, *supra* note 5, at xiv.

232 *Id.* at 59.

The usual form of organized hazardous waste criminal behavior in the sample was a loosely knit, independent criminal unit based on the triadic nature of the legitimate hazardous waste disposal processing cycle (generator, hauler, and treat-er). Early criminal offenses grew from simple, individualized offenses, such as midnight dumping, that were eventually prone to failure as a result of enforcement advancements, and rose to a point where small detection-avoidance enterprises were formed.

Id. at 60-61.

According to Mr. Rebovich, organized crime would have a difficult time crossing over from garbage hauling to disposing of hazardous waste because it cannot control the "Corporate America" which generates the waste and can dispose of it anywhere (woods, sewers, etc.). Since access to disposal sites is not limited, anyone willing to break the law is able to dispose of hazardous waste. *Id.* at 67-68.

disposing of hazardous wastes, the same issue remains: illegal disposal costs so much less and is so much more profitable than legal disposal that "[a]ttainment of full compliance by the Government by traditional forms of civil and criminal suits is not likely to happen in the foreseeable future."²³³ Even "[i]f more severe criminal penalties were available under these laws, we would still have the problem of limited investigative and prosecutorial resources."²³⁴ RICO "may offer a promise of an avenue to deal with the aggravated violations of our hazardous waste statutes."²³⁵

B. *Advantages of RICO*

1. Greater Criminal and Civil Sanctions

First, the increased criminal and civil sanctions available under RICO²³⁶ should raise the costs of illegally disposing of hazardous waste to the point where compliance makes financial sense. For example, a generator of medical waste may think twice before paying a hauler to dump the waste down a sewer. In fact, generators may investigate potential haulers and disposal facilities to make sure that they are not exposing themselves to criminal liability under RICO by contracting with these parties.

Besides the increased criminal and civil sanctions, the advantage of prosecuting under RICO is the increased statute of limitations and the more lax joinder rules.²³⁷

2. Longer Statute of Limitations

Because RICO does not expressly include a statute of limitations, courts look to the five year limit in 18 U.S.C. § 3282,²³⁸ a "catchall" federal criminal statute of limitations.²³⁹ This means

233 "Mob Involvement," *supra* note 200, at H6789.

234 *Id.*

235 *Id.*

236 See *supra* notes 142-47 and accompanying text.

237 Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1040 (1990) (If RICO's elements are satisfied, "the 'normal' rules of joinder and computation of the statute of limitations do not apply.").

238 "Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282 (1988).

239 *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 155 (1987); *United States v. Eisen*, 974 F.2d 246, 264 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1840 (1993).

that the government must bring a prosecution within five years after the defendant has committed a predicate offense. While some courts have applied the "last predicate act" rule, starting the limitations period running as soon as the last predicate act occurs, the majority position is that the period is tolled until the government, or in civil cases, the plaintiff, learns of the pattern of racketeering activity.²⁴⁰ Since the other predicate act only has to have occurred within ten years of the last predicate act,²⁴¹ the prosecution therefore may reach crimes committed more than fifteen years previously: first predicate act plus ten years; then second act, then if using majority rule wait until pattern is discovered, then five year statute of limitations. In addition, the limitations period for a RICO conspiracy does not begin to run until the object of the conspiracy is accomplished or forsaken.²⁴²

This is much longer than the five year statutory period currently invoked for RCRA,²⁴³ which does not include the ten year connection between criminal acts. As a result, prosecuting RCRA violations under RICO would allow the government to gather together a greater number of criminal acts extending backwards over a longer period of time.

3. Facilitates Joinder

Under Rule 8 of the Federal Rules of Criminal Procedure, the government may join in one indictment any offenses "of the same or similar character" or "based on the same act or transaction" or a series of acts and transactions "constituting parts of a common scheme or plan"²⁴⁴ and any defendants who "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."²⁴⁵

240 *Bontkowski v. First Nat'l Bank of Cicero*, 998 F.2d 459 (7th Cir. 1993), cert. denied, 114 S. Ct. 602 (1993); *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992).

241 18 U.S.C. § 1961(5) (1988); Coffey, *supra* note 237, at 1041 n.27.

242 *United States v. Eisen*, 974 F.2d 246, 263 (2d Cir. 1992).

243 Courts routinely invoke the five year period of 28 U.S.C. § 2462 in cases involving RCRA because the statute, like CWA and CAA (prior to the 1990 amendments), does not have a statute of limitations. Teresa A. Holderer, *Enforcement of TSCA and the Federal Five Year Statute of Limitations for Penalty Actions*, 91 MICH. L. REV. 1023, 1059 n.75 (1993). See also Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, C883 ALI-ABA 81, 112 (Feb. 17, 1994) ("five year statute of limitations of 28 U.S.C. § 2462 probably applies to citizen RCRA imminent hazard actions").

244 FED. R. CRIM. P. 8(a) (1994).

245 *Id.* 8(b).

This has proven troublesome in the environmental context because of the many players involved, performing different, often unrelated acts. The government also has had a difficult time proving that the individuals knew of the other participants. As Mr. Rebovich wrote, quoting a yard worker involved in illegally disposing of hazardous waste:

Unless prosecutors are successful in shutting down operations, the prosecution of core group individuals and their managers can ultimately be fruitless. 'If one of the guys who dumps gets into trouble with the law . . . somebody else will be picked or hired to take his place . . . Even if one of the supervisors gets caught, there will be someone else at work or they have enough connections with people outside of work to bringing in the 'right' person to get the job done . . . Unless the place is shut down, somebody will find a way—maybe a little different way—to get the job done.'

For the hazardous waste crime enforcement community, nullifying the illegal actions of individual criminal managers may, indeed, amount to a shallow enforcement gesture. Once firmly established . . . workplace subcultures seemingly could easily survive without the services of those managers removed from the criminal mainstream of prosecution.²⁴⁶

RICO is tailor-made for just such a task. As the General Accounting Office concluded after studying federal organized crime prosecutions:

Prior to the passage of [RICO], attacking an organized criminal group was an awkward affair. RICO facilitates the prosecution of a criminal group involved in superficially unrelated criminal ventures and enterprises connected only at the usually well-insulated upper levels of the organization's bureaucracy

Before the Act, the government's efforts were necessarily piece-meal, attacking isolated segments of the organization as they engaged in single criminal acts. The leaders, when caught, were only penalized for what seemed to be unimportant crimes. The larger meaning of these crimes was lost because the big picture could not be presented in a single criminal prosecution. With the passage of RICO, the entire picture of the organization's criminal behavior and the involvement of its leaders in directing that behavior could be captured and presented.²⁴⁷

246 REBOVICH, *supra* note 5, at 57.

247 Blakey paper, *supra* note 134, at 19-20 (quoting General Accounting Office, *Effec-*

RICO makes it easier to join the various offenses and defendants, creating a substantive offense which links "these diverse parties and crimes"²⁴⁸ to an enterprise.²⁴⁹ If the acts involved are predicate offenses under RICO, they "by definition, are related to the affairs of the enterprise."²⁵⁰ The enterprise concept is the

tiveness of the Government's Attack on La Cosa Nostra (April 14, 1988)).

248 *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978). See generally Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989) (discussion of enterprise's role in facilitating joinder of offenses and defendants).

249 Enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals as in fact although not a legal entity". 18 U.S.C. § 1961(4). Also, compare the following subsections of § 1962 (emphasis added):

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any *enterprise* which is engaged in, or the activities of which affect, interstate or foreign commerce

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any *enterprise* which is engaged in, or the activities of which affect interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such *enterprise's* affairs through a pattern of racketeering activity or the collection of unlawful debt.

18 U.S.C. § 1962 (emphasis added).

250 O'Neill, *supra* note 248, at 691 (quoting *United States v. Thevis*, 474 F. Supp. 117, 130 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir. 1982), *cert. denied*, 456 U.S. 1008 (1982)). See generally Prakash Himatlal Mehta, *Project: Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 844, 860 n.1009 (1994) (citing *United States v. Zannino*, 895 F.2d 1, 16 (1st Cir. 1990) (joinder of two counts of illegal gambling and one count of making extortionate loan proper when offenses alleged to be predicate acts in furtherance of RICO conspiracy, even though defendant not charged with RICO conspiracy, because part of common scheme), *cert. denied*, 494 U.S. 1082 (1990), *habeas corpus denied*, 1994 WL 707131 (1994)); *United States v. Balzano*, 916 F.2d 1273, 1280 (7th Cir. 1990) (joinder of witness intimidation count with extortion and RICO conspiracy counts proper because witness intimidation intended to prevent testimony concerning other counts and therefore "part and parcel of the same criminal scheme"); see also Mehta, *supra*, at 860 n.1014 (citing *United States v. Alvarez*, 860 F.2d 801, 824 (7th Cir. 1988) (joinder of offense for sale of cocaine with narcotics conspiracy and RICO offenses proper, even though sale of cocaine unrelated to charges against all but one of 11 defendants, because CCE charge against that defendant "arose out of the same overall scheme" of narcotics violations that were alleged throughout the indictment" (quoting *United States v. Holzer*, 840 F.2d 1343, 1350 (7th Cir. 1988), *cert. denied*, 486 U.S. 1035 (1988))), *cert. denied*, 493 U.S. 829 (1989)); see also Mehta, *supra*, at 860 n.1016 (citing *United States v. DiNome*, 954 F.2d 839, 843-44

key, "work[ing] in RICO as a joinder mechanism that expands the number of people who may be considered related."²⁵¹

In *United States v. Castellano*, the court "clarified the notion that a 1962(c) claim may in fact circumscribe the requirements of Rule 8(b) by 'loosening the statutory requirements for what constitutes joint criminal activity.'"²⁵² Just alleging a RICO conspiracy "presumptively satisfies Rule 8(b), since the allegation implies that the defendants named have engaged in the same series of acts or transactions constituting an offense."²⁵³ The court explained that having a substantive RICO count and a RICO conspiracy count "further broadens the government's power to charge multiple defendants together."²⁵⁴ RICO also has a spillover effect, permitting joinder of defendants not charged with RICO if the defendant "is alleged to have participated in the same series of acts or transactions that constituted the conspiracy or RICO offense, despite the fact that his participation may have been too limited to permit his being included as a co-conspirator or co-racketeer."²⁵⁵

RICO's effect may be clearly seen in the conspiracy area.²⁵⁶

(2d Cir. 1992) (joinder of defendants in single RICO conspiracy count permissible even though defendants did not participate in charged acts of codefendants involving deadly force because all defendants' criminal activities tended to prove existence of RICO enterprise and pattern of racketeering activity by each), *cert. denied*, 113 S. Ct. 95 (1992)); *United States v. Eufrazio*, 935 F.2d 553, 566-67 (3d Cir. 1991) (joinder of codefendants and racketeering, RICO, and extortion offenses proper even though one of three defendants also charged with murder conspiracy; "all criminal acts charged against each defendant, including the murder conspiracy, were undertaken in furtherance of single, commonly charged racketeering enterprise" and, therefore, "consistent with law of joinder in RICO cases"), *cert. denied*, 112 S. Ct. 340 (1991); *United States v. Caporale*, 806 F.2d 1487, 1509-10 (11th Cir. 1986) (joinder of defendants in single RICO conspiracy count permissible even though defendants charged with different acts of racketeering in different parts of the country when acts charged furthered overarching RICO conspiracy to receive kickbacks from insurance or health care service representatives), *cert. denied*, 483 U.S. 1021 (1987).

251 O'Neill, *supra* note 248, at 680. "Enterprise again plays the critical role. The concept unites what otherwise would be wholly separate offenses committed by the same defendant or defendants." *Id.* at 688.

252 *Id.* at 682 (quoting *United States v. Castellano*, 610 F. Supp. 1359, 1396 (S.D.N.Y. 1985)).

253 *Castellano*, 610 F. Supp. at 1396.

254 *Id.*

255 *Id.* at 1396-97.

256 *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978) is the "standard for joinder of defendants in a RICO conspiracy case." O'Neill, *supra* note 248, at 684.

The 'enterprise conspiracy' is a legislative innovation in the realm of individual liability for group crime The substantive proscriptions of the RICO statute apply to insiders and outsiders—those merely 'associated with' an enterprise—who

By "creating a substantive offense which ties together . . . diverse parties and crimes," RICO eliminates the problem of finding a single agreement or common objective.²⁵⁷ By committing an act listed as a predicate offense, each individual agrees to participate, directly or indirectly, in the enterprise.²⁵⁸ It does not matter that each defendant performed different and even unrelated acts, "so long as we may reasonably infer that each crime was intended to further the enterprise's affairs."²⁵⁹

In *United States v. Elliot*, the Fifth Circuit was "convinced that, through RICO, Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate 'wheel' and 'chain' rationales with a new statutory concept: the enterprise."²⁶⁰ By linking the various defendants and offenses into an enterprise, RICO "has displaced many of the legal precepts traditionally applied to concerted criminal activity," freeing the prosecution from "the strictures of the multiple conspiracy doctrine," and allowing "the joint trial of many persons accused of diversified crimes."²⁶¹

4. Avoiding Severance

Not only does RICO facilitate joinder of defendants and counts under Rule 8, but helps avoid severance under Rule 14. Even if defendants and counts are properly joined under Rule 8, defendants may ask the court to sever if the joinder causes prejudice.²⁶² The court will often find prejudice if (1) the defendants' defenses are mutually antagonistic or exclusive,²⁶³ (2) a codefendant refuses to give testimony exculpating the movant defendant

participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. This effect is enhanced by principles of conspiracy law also developed to facilitate prosecution of conspirators at all levels.

Id. at 684 n.165 (quoting *Elliot*, 571 F.2d at 903).

257 *Elliot*, 571 F.2d at 902.

258 *Id.* at 902-03. "Thus the object of a RICO conspiracy is to violate a substantive RICO provision here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity." *Id.* at 902.

259 *Id.* at 902-03.

260 *Id.* at 902.

261 *Id.* at 899.

262 FED. R. CRIM. P. 14 (1994).

263 *See Zafiro v. United States*, 113 S. Ct. 933 (1993).

in order to avoid self-incrimination, or (3) using a codefendant's extra judicial confession against that codefendant still incriminates the movant defendant.²⁶⁴ Courts will often not find prejudice when evidence used in a joint trial would have been admissible against the movant defendant in a separate trial or if the evidence was easily compartmentalized into the individual defendants and offenses.²⁶⁵

The compartmentalization of evidence will depend upon the facts of each specific case. However, in general, RICO increases the amount of evidence that can be introduced against each defendant for each count, thereby reducing the likelihood of a court finding prejudice. By connecting different defendants and offenses into a pattern of racketeering activity involving an enterprise, RICO expands the amount of evidence that would be admissible in separate trials for the individual crimes and parties. Since the offenses and defendants are connected, evidence regarding all of them is relevant to each of them in proving the substantive RICO count. For example, in *United States v. DiNome*, the Second Circuit said that evidence of "numerous crimes, including the routine resort to vicious and deadly force to eliminate human obstacles, was relevant to the charges against each defendant because it tended to prove the existence and nature of the RICO enterprise."²⁶⁶ The court found that the evidence would have been admissible "even if the defendants had been accorded individual trials"²⁶⁷ because it "may reveal the threat of continued racketeering activity and thereby help to establish that the defendant's own acts constitute a pattern within the meaning of RICO."²⁶⁸

One last concern is that the combination of RICO and RCRA might prove too complex for most juries. While calling RICO "an interesting alternative method of prosecution," Dennis Vacco, U.S. Attorney for the Western District of New York said the technical and complex nature of RICO and of the environmental statutes "might prove to be—as a practical matter—too complicated for the average jury, at this time."²⁶⁹ However, Vacco acknowledged

264 Mehta, *supra* note 250, at 851-53.

265 *United States v. DiNome*, 954 F.2d 839, 844 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 95 (1992).

266 *Id.* at 843; *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964).

267 *DiNome*, 954 F.2d at 844.

268 *Id.* at 843.

269 Dennis C. Vacco, *Government's Reponse to Compliance in Environmental Matters in the*

that RICO will probably be increasingly used for environmental violations as the regulations and statutes become more "common place."²⁷⁰ Since RICO and RCRA have been used in criminal and civil cases for roughly two decades, courts and juries are probably familiar enough with the statutes to use the two together. In fact, juries have already demonstrated their familiarity with the two statutes by using them in the mail and wire fraud context.

IV. CONCLUSION

The illegal disposal of hazardous waste has been characterized as "one long game of hot potato. The idea is to make as much profit as you can by being the temporary possessor of the hot potato before unloading it on some other person, organization, or place. In the end, the final recipient is the loser."²⁷¹ If the illegal dumping of hazardous wastes continues at its current pace, we will all be the losers. As former Attorney General Dick Thornburgh wrote:

As a government and as a people we must remain vigilant; as legal defenders of our land, water, and air, we must investigate, prosecute, and convict polluters; as individuals we must never again say 'so what' to environmental crime Our long-term goal, therefore, must be to continue to set an even higher standard of protecting our environment from criminal depredation.²⁷²

Today, RICO is the "prosecutor's tool of choice against sophisticated forms of crime."²⁷³ It is time we allowed prosecutors to use that tool to stop the illegal dumping of hazardous wastes on our land and in our streams, rivers and oceans. It is time to add violations of RCRA and of comparable state statutes as predicate offenses to RICO.

*Brendan P. Rielly**

Western District of New York, C496 ALI-ABA 41, 44 (Apr. 19, 1990).

270 *Id.* at 45.

271 REBOVICH, *supra* note 5, at 125.

272 Thornburgh, *supra* note 26, at 780.

273 Blakey paper, *supra* note 134, at 18.

* Special thanks to Professors Jimmy Gurulé and G. Robert Blakey for their advice and assistance, and to my wife, Erica, for her support and understanding.

