Duquesne Law Review

Volume 17 | Number 1 Article 9

1978

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Volume 17, Number 1, 1977-1978

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I. INTRODUCTION

The regulatory systems mandated by the Clean Air Act and the Federal Water Pollution Control Act[1] are now firmly established and have generally survived judicial challenge. Having promulgated and defended its regulations, the Environmental Protection Agency (EPA) can now be expected to devote increased attention to enforcement activity.[2] The anticipated emphasis on enforcement raises certain questions concerning the role of civil and criminal penalties in

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The authors acknowledge the important help in the preparation of this article supplied by Maureen L. Atkinson, Celia J. Behrend, and Meredith B. Reynolds, all of whom are Paralegals with Reed Smith Shaw & McClay.

1. The EPA's general counsel has suggested that the Federal Water Pollution Control Act (FWPCA) be referred to as the Clean Water Act to parallel the Clean Air Act. 8 ENVIR. REP.—Current Dev. (BNA) 1987 (Apr. 21, 1978). This article will take a further step in the direction of simplicity: for ease of presentation the FWPCA or Clean Water Act, as amended, will be referred to as the Water Act, and the Clean Air Act, as amended, will be referred to as the Air Act. Amending legislation will be referred to by its actual title.

2. In June of 1977 EPA enforcement personnel said that the Agency was "moving into a new era of enforcement policy." 8 ENVIR. REP.—Current Dev. (BNA) 308 (June 24, 1977).

securing compliance with environmental legislation. Initially, there are the purely legal questions regarding the circumstances under which civil and criminal penalties may be imposed and the persons who can be subjected to such sanctions. Then there are questions as to when each of these penalties ought, and ought not, to be imposed and how they can best be fused to form a comprehensive enforcement strategy that is fair, practical and effective in obtaining compliance with the Air and Water Acts.

II. The Juxtaposition Of Civil And Criminal Penalties Within The Legislative Scheme Of The Air And Water Acts

A. Federal Regulation Prior to 1970

Despite the upsurge of environmental concern in the 1960's, at the end of that decade there was still no centralized governmental control over industrial discharges. The Water Quality Control Act of 1965[3] and the Air Quality Act of 1967[4] took essentially supervisory approaches to the problems of water and air pollution, placing primary emphasis on research, training, demonstration projects and technical assistance.[5]

Regarding direct control of pollution, the Water Quality Act of 1965, amending the FWPCA of 1958,[6] required each State to establish water quality criteria and an appropriate implementation plan applicable to interstate waters within the State, subject to federal approval. The Air Quality Act of 1967 called for the issuance of federal air quality criteria but required each State to establish regional ambient air quality standards and a plan for their implementation, also subject to federal approval.

The states were given primary responsibility for enforcement of the federally approved air and water criteria. The only provisions for federal enforcement were abatement proceedings authorized in certain limited situations.[7] These procedures were rarely utilized for

3. 33 U.S.C. § 1151 (1970).

4. 42 U.S.C. § 1857 (1970).

5. The following summary of federal regulation of air and water pollution prior to 1970 is based primarily upon 1 F. Grad, Treatise on Environmental Law § 2.01(1) (Air) and § 3.03(1)(a) (Water) (1977) [hereinafter cited as Grad].

6. Pub. L. No. 845, ch. 758, 62 Stat. 1115 (1948).

7. Federal abatement of pollution of interstate waters could be initiated after 180 days of notice to the polluter or after a lengthy conference and hearing procedure. Interstate air pollution was subject to abatement after a similar conference procedure or in emergency

a variety of reasons, including the absence of approved state criteria and implementation plans, the difficulty of establishing that a particular polluter was reducing air or water quality below applicable standards and the cumbersome procedural prerequisites to abatement proceedings.[8]

A major event in the evolution of federal governmental pollution control was the the "rediscovery" in 1970 of the Refuse Act of 1899.[9] The Refuse Act makes it a crime to discharge any refuse matter into the navigable waters of the United States without the permission of the Army Corps of Engineers. The Refuse Act has consistently been construed as a "strict liability" statute, imposing liability without any showing of intent, knowledge or even negligence.[10] Thus, for example, the owner of a vessel from which refuse was discharged was convicted even though he did not know of the discharge and had taken reasonable steps to prevent such discharges.[11] Since the Corps of Engineers, prior to 1970, had no program for the issuance of permits to industrial sources of water pollution,[12] all industrial discharges arguably constituted criminal violations of the Refuse Act.

The Refuse Act's proscription was not applied to industrial water pollution until the late 1960's, however, because prior to that time it was thought that the Act applied only to deposits of refuse which impeded navigation and that industrial discharges fell under an

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situations or where air quality had fallen below applicable standards and the State had failed to take reasonable action to bring about abatement. If intrastate air pollution was involved, federal abatement proceedings could be commenced at the request of the governor. *See* GRAD, *supra* note 5, at § 2.03, pp 2-55—2-57 and § 3.03, pp 3-58—3-62.

8. Although the abatement remedy had existed under the FWPCA since 1948, as of 1972 there had been only one such judicial enforcement proceeding. GRAD, *supra* note 5, at § 3.03, pp 3-60—3-62; S. REP. No. 414, 92d Cong., 2d Sess. 5, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3672; Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970); Note, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HASTINGS L.J. 782, 784-85 (1971). The abatement proceedings applicable to air pollution were also infrequently used and were viewed as rather extraordinary measures. GRAD, *supra* note 5, at § 2.03, p. 2-55.

9. The "Refuse Act" is the popular name for § 13 of the Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1152, 33 U.S.C.A. § 407 (1970). *See* United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 658 n.5 (1973).

10. *See* cases cited in United States v. White Fuel Corp., 498 F.2d 619, 622-24 (1st Cir. 1974). *But see* United States v. Standard Oil Co., 384 U.S. 224, 230 (1966), which by reserving the question suggested that it was not conclusively settled.

11. The President Coolidge, 101 F.2d 638 (9th Cir. 1939).

12. *See* Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835, 844-45 n.45 (1973) [hereinafter cited as Glenn].

exemption for refuse matter "flowing from streets and sewers and passing therefrom in a liquid state." The few reported cases prior to 1965 which did not involve obstruction of navigation were based upon dumping of wastes rather than discharge of industrial effluents.[13]

In 1960 the Supreme Court, in *United States v. Republic Steel Corp.*,[14] ruled that the sewage exception was limited to domestic sewage and did not immunize a corporation from liability for shoals created by the deposit of suspended dust particles in its industrial discharge. Then, in the 1966 case of *United States v. Standard Oil Co.*,[15] the Supreme Court ruled that the Refuse Act applied to all pollutants, not just those which caused navigation-impeding deposits.[16] The theoretical effect of these two cases was to transform the Refuse Act into a blanket prohibition on all industrial water pollution.

Despite these decisions, however, the Act remained virtually dormant until the 1970 Waters and Wetlands Report[17] called for the vigorous prosecution of violators. Thereafter, prosecutors across the country began to wield the sword of strict criminal liability in the battle against water pollution.[18] Commentators hailed the Refuse Act and its strict liability approach as a promising new weapon in the fight for clean water.[19] Not surprisingly, however, the

13. *E.g.*, United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952), La Merced, 84 F.2d 444 (9th Cir. 1936).

14. 362 U.S. 482 (1960), *rev'g* 264 F.2d 289 (7th Cir. 1959).

15. 384 U.S. 224 (1966).

16. It has been suggested that the dictum in this case was overbroad and that the petroleum-based refuse matter involved in this and the previous dumping cases did by itself threaten navigation. *See* Comment, *Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483, 512-14 (1972) [hereinafter cited as *Discharging New Wine*].

17. H.R. REP. No. 917, 91st Cong., 2d Sess. (1970). *See Discharging New Wine*, *supra* note 16, at 486-90, for an account of how the Refuse Act came to be rediscovered. There had, however, been a few prosecutions of industrial polluters prior to the Waters and Wetlands Report: *e.g.*, United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970), *aff'd*, 482 F.2d 439 (7th Cir.), *cert. denied*, 414 U.S. 909 (1973); United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969).

18. Glenn, *supra* note 12, at 840-41, 851; Tripp and Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 ALBANY L. REV. 60 n.1 (1970) [hereinafter cited as Tripp & Hall]. *See* cases cited in United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 671-72 (1973).

19. Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761 (1971) [hereinafter cited as Rodgers]; Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y. U. L. REV. 304 (1971); Comment, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*,

"rediscovery" of the 1899 legislation and its application in a modern industrial setting generated substantial confusion and engendered a goodly amount of litigation.[20]

Contemporaneously with the rediscovery of the Refuse Act there was an increasing societal awareness that pollution was not so much a wrongful act as an inevitable byproduct of an industrial culture.[21] Viewed from this perspective, some commentators began to explore the moral and legal justifications for the imposition of sanctions on industry and local government bodies and to question whether criminal sanctions should be employed at all in dealing with the problem of pollution.[22] With regard to pollution control, the criminal law was characterized as "too blunt a weapon,"[23] "cumbersome"[24] and "not well-suited to corporations and other business organizations."[25] More fundamentally, it became clear that effective environmental protection necessitated a more comprehensive and rational regulatory program than could be afforded by existing law or by use of criminal prohibitions.

The absolute criminal prohibition of the rediscovered Refuse Act was philosophically inconsistent with the permissive regulatory scheme of the FWPCA,[26] but the former eventually provided a tool for the latter's enforcement. In June of 1970 the Justice Department issued its "Guidelines for Litigation Under the Refuse Act" which stated that the Refuse Act would not be used for general pollution

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58 CAL. L. REV. 1444 (1970); Note, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HASTINGS L.J. 782 (1971); Tripp & Hall, *supra* note 18. *But see Discharging New Wine, supra* note 16, criticizing the expansion of the Refuse Act as a "clear misconstruction of the statute."

20. *See* Glenn, *supra* note 12, at 844-45 n.45, and United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 659 n.9, 670-75 (1973), for a review of the events and the confusion caused by the transformation.

21. At the culmination of a "weighty" discussion of environmental matters, Walt Kelly's comic strip possum, Pogo, declared: "We have met the enemy, and he is us!"

22. *See, e.g.*, Morris, *Environmental Problems and the Use of Criminal Sanctions*, 7 LAND & WATER REV. 421, 429-31 (1972) [hereinafter cited as Morris]. *See also* Comment, *Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALBANY L. REV. 61, 67 (1972) [hereinafter cited as *Criminal Responsibility*]; Kovel, *A Case for Civil Penalties: Air Pollution Control*, 46 J. URBAN L. 153, 154 (1969) [hereinafter cited as Kovel]. *But see* Mix, *The Misdemeanor Approach to Pollution Control*, 10 ARIZ. L. REV. 90 (1968).

23. Kovel, *supra* note 22, at 154.

24. Laughran, *The Law and The Corporate Polluter: Flexibility and the Adaption in the Developing Law of the Environment*, 23 MERCER L. REV. 571, 586 (1972); Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. REV. 429, 466 (1971).

25. Morris, *supra* note 22, at 429.

26. *Discharging New Wine, supra* note 16, at 521-22.

abatement, but rather to aid enforcement of the FWPCA by punishing both the "occasional or recalcitrant polluter" and "discharges, which are either accidental or infrequent, but which are not of a continuing nature."[27] An attempt was then made to harmonize the two statutes in the 1970 Executive Order which established the Refuse Act permit program and made issuance of a permit contingent upon compliance with FWPCA water quality standards.[28] The implementation of the Refuse Act permit program thus transformed the Refuse Act "from a criminal statute into the cornerstone of a major regulatory program."[29]

The intended ascendancy of regulation over criminalization with regard to water pollution occurred simultaneously with the enactment of a comprehensive scheme regulating air pollution in the 1970 amendments to the Clean Air Act.[30] Then, after the Refuse Act permit program foundered on the shoals of litigation,[31] the 1972 FWPCA amendments[32] replaced it with a more detailed regulatory program. Thus, while prior to 1970 there had been no truly effective federal control over air and water pollution, by 1972 the Air and Water Acts had been enacted with the intention of creating a comprehensive system of environmental regulation having broad enforcement provisions.

B. Civil and Criminal Sanctions Under the Air and Water Acts

The regulatory schemes established by the Air and Water Acts for industrial and municipal sources of pollution, though quite different in many respects, share the broad approach of establishing strict emission limitations for various pollutants pursuant to federal

27. 1 ENVIR. REP.—Current Dev. (BNA) 288 (July 17, 1970). These guidelines were not heeded by the United States Attorneys in several key industrial centers who initiated a series of actions which were inconsistent with those guidelines. *See, e.g,* Glenn, *supra* note 12, at 851; United States v. Pennsylvania Industrial Chemical Corp., 461 F.2d 468 (3d Cir. 1972), *rev'd* 411 U.S. 655 (1973). It is thus open to question whether the federal government really intended to adhere to the guidelines.

28. Exec. Order No. 11,574, 3 C.F.R. § 188 (1970). *See* the discussion in Glenn, *supra* note 12, at 841-44.

29. Glenn, *supra* note 12, at 845.

30. 42 U.S.C. § 1857 (1970).

31. *See* Glenn, *supra* note 12, at 852-54 on the demise of the Refuse Act permit program. One of the major problems was the absence of a clear definition of the term "refuse" so that neither prosecutors nor industry had clear guidelines as to which activities were proscribed.

32. Pub. L. No. 92-500, 86 Stat. 816 (1972).

guidelines promulgated by the Administrator of the EPA.[33]

Under the Air Act each State must develop, and the Administrator must approve, a state implementation plan (SIP) which establishes emission limitations for stationary sources of air contaminants within geographical air quality control regions. Each SIP must, at least theoretically, provide for the achievement of national ambient air quality standards set by the Administrator for designated pollutants such as particulates and sulfur doxide.[34]

A permit system was the cornerstone of the 1972 amendments to the Water Act which had as a goal the phasing out of all water pollution (attain "no-discharge") by 1981. The 1972 amendments created a National Pollutant Discharge Elimination System (NPDES) permit program under which the permitee must conform to specified effluent limitations based upon federally established effluent limitation guidelines.[35] The permit system is federally administered and enforced, but the Administrator may delegate the federal authority to state-created permit programs which receive the approval of the Administrator.

The enforcement provisions of the Air and Water Acts[36] are now substantially similar, the 1970 Clean Air Act amendments having served as a model for the 1972 FWPCA amendments which in turn served as a model for certain changes made by the 1977 Clean Air Act amendments. Both Acts provide for federal and state enforcement jurisdiction,[37] the EPA Administrator taking action only if the polluter fails to abate, and the state fails to act, within 30 days after both have been notified of the violation of a SIP emission standard or a NPDES permit effluent limitation.[38] The Administrator then

33. This article focuses on the emission and effluent limitations applicable to industrial and municipal sources of pollution under the Air and Water Acts. The discussion herein is relevant, however, to the enforcement of other aspects of these Acts, such as the moving source and ozone protection provisions of the Air Act and the oil and hazardous substances and marine sanitation devices provisions of the Water Act.

34. *See* Air Act, §§ 105-114, 42 U.S.C.A. §§ 7405-7414 (Supp. 1978).

35. *See* Water Act, §§ 301-309, 316 and 331-332, 33 U.S.C.A. §§ 1311-1319, 1326, and 1341-1342 (Supp. 1978).

36. Air Act, § 113, 42 U.S.C.A. § 7413 (Supp. 1978); Water Act, § 309, 33 U.S.C.A. § 1319 (Supp. 1978).

37. Both Acts also permit citizen suits for enforcement. Air Act, § 304, 42 U.S.C.A. § 7604 (Supp. 1978); Water Act, § 505, 33 U.S.C.A. § 1365 (Supp. 1978).

38. One curious difference between the Air and Water Acts is that EPA enforcement appears to be mandatory ("shall") under the Water Act, whereas under the Air Act it appears to be discretionary ("may"; except since 1977 in the case of major stationary sources). The Fifth Circuit has recently held, however, that despite the mandatory language of the Water

has the option of either issuing a "compliance order" or proceeding directly with a civil action for enforcement *(i.e.,* injunctive relief and civil penalties) in federal court. Violation of a compliance order is itself subject to sanctions,[39] so, in theory, a compliance order should often obviate the need for court-ordered enforcement.

There are several significant differences between the penalty provisions of the Air and Water Acts which are somewhat surprising in view of the Acts' virtually identical enforcement procedures. Both Acts provide for a criminal fine of up to $25,000 per day of violation and/or imprisonment of up to one year,[40] but only the Water Act specifies a minimum fine—$2,500 per day of violation. Both acts provide criminal penalties for the violation of emission or effluent standards, but only under the Air Act is it a crime to violate a compliance order. The Acts have different scienter requirements: the Air Act's criminal provisions apply to "knowing" violations, whereas the Water Act punishes both "willful" and "negligent" violations. Furthermore, the criminal provisions of the Air Act generally apply only to violations which continue after notice to the defendant, while the Water Act permits criminal prosecutions without any prior notification.[41] Both Acts do share one identical provision, however: both attempt to protect the integrity of the reporting and monitoring system underlying the enforcement process by providing a $10,000 fine and/or six months imprisonment for any person who knowingly makes a false statement in any required document or tampers with any required monitoring device.[42]

Act, the Administrator retains discretion in its enforcement, both in the issuance of compliance orders and in the initiation of litigation. Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977). *See also* State Water Control Board v. Train, 559 F.2d 921, 927 (4th Cir. 1977), and Bethlehem Steel Corp. v. Train, 544 F.2d 657, 660 (3d Cir. 1976), *cert. denied,* 430 U.S. 975 (1977), in which the courts recognized the existence of prosecutorial discretion under the Water Act.

39. For violation of a compliance order, both criminal and civil penalties may be imposed under the Air Act; under the Water Act, however, only civil penalties may be imposed.

40. An offense committed after a first conviction carries a fine of up to $50,000 and up to two years imprisonment.

41. *See* notes 57-62 and accompanying text *infra.*

42. These criminal penalties would seem to be fully applicable to falsification of data by government enforcement personnel inasmuch as under both acts the term "person" includes any "individual", and in the Air Act it expressly includes government employees. Air Act, § 302(e), 42 U.S.C.A. § 7602(e) (Supp. 1978); Water Act, § 502(5), 33 U.S.C.A. § 1362 (Supp. 1978). *Cf.* United States v. Moss-American, Inc., 11 ERC 1470 (E.D. Wisc. 1978), in which the court dismissed the government's enforcement action when it was discovered that an EPA investigator had intentionally mislabeled a water pollution sample.

In addition to these criminal sanctions, the 1972 FWPCA amendments contained a provision for "civil penalties" (with no knowledge or negligence requirement) of up to $10,000 per day of violation of either the Act or of a compliance order.[43] Similar "civil penalties" were incorporated in the 1977 amendments to the Air Act, except that the ceiling was set at $25,000 per day of violation.[44]

The 1977 Clean Air Act amendments also contain an entirely new enforcement provision—the mandatory administrative noncompliance penalty.[45] The noncompliance penalty, which goes into effect in July of 1979,[46] represents an attempt to offset the possible economic value of a delay in compliance by authorizing the State or the Administrator to assess a penalty based on the capital and operating costs "saved" by the polluter as a result of its noncompliance. The noncompliance penalty purports to prevent a noncomplying source from gaining a competitive advantage over sources already in compliance.[47] The provision requires that the recipient of a notice of violation calculate the amount of penalty owed within 45 days of such notice or the calculation will be made by the State or the EPA Administrator. Failure to pay the noncompliance penalty results in an additional penalty of 20% per quarter year on the unpaid balance. The Administrator may commence a civil action to recover the noncompliance penalty and nonpayment penalty.

In sum, the Air and Water Acts provide a broad panoply of civil and criminal sanctions and vest great discretion in the hands of the government agencies charged with their enforcement. The existence of such a variety of enforcement options raises questions concerning the circumstances under which each sanction is applicable and how these sanctions can be molded into a comprehensive and effective enforcement strategy which not only adheres to existing principles of our legal system but also takes into account the conflicting realities present in an industrial culture faced with resource scarcity.

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43. The distinction between criminal and civil penalties is discussed at length in text accompanying notes 63-71 *infra*.

44. Pub. L. No. 95-95, Section 111(b), 91 Stat. 685, 42 U.S.C.A. § 7413 (Supp. 1978).

45. 42 U.S.C.A. § 7420 (Supp. 1978).

46. The EPA is already incorporating the concept underlying the noncompliance penalty in calculating its settlement demands in civil penalty actions brought pursuant to both the Air and Water Acts. *See* text accompanying notes 98-105 *infra*.

47. H.R. REP. No. 294, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1155.

48. *E.g.*, United States v. Park, 421 U.S. 658, 670-74 (1975); United States v. Dotterweich, 320 U.S. 277, 281 (1943). Among the many law review articles discussing strict criminal

III. Legal Criteria Governing Imposition Of Civil And Criminal Penalties

A. Background: Regulatory Offenses and Strict Criminal Liability

A fundamental tenet of our jurisprudence is that common law crimes require proof of the defendant's criminal intent as an element of the offense. With the growth of government regulation in the 20th century, however, Congress has created a number of "regulatory offenses" which are punishable without regard to the defendant's state of mind. These regulatory offenses are said to create strict criminal liability, since the defendant may be punished for such offenses without proof of intent or even of recklessness.

The Supreme Court has upheld the imposition of criminal sanctions on a strict liability basis, without regard to the actor's "consciousness of wrongdoing," in certain "regulatory offense" situations.[48] The rationale underlying strict criminal liability is that persons who engage in certain regulated activities accept a duty to achieve compliance with the applicable regulations.[49] The Supreme Court explained in *United States v. Park:*

> [T]he [Federal Food, Drug and Cosmetic] Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products

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liability for regulatory offenses, *see, e.g.*, Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 Ky. L.J. 73 (1976); Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 Stan. L. Rev. 197 (1965) [hereinafter cited as Ball & Friedman]; Kadish, *Some Observations of the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423 (1963); Note, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 Yale L.J. 280 (1961) [hereinafter cited as *Increasing Community Control*]; Wasserstrom, *Strict Liability in the Criminal Law*, 12 Stan. L. Rev. 731 (1960); Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 417-25 (1958); Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).

49. *See, e.g., Criminal Responsibility, supra* note 22, at 94-95 (advocating imposition of strict criminal liability in environmental protection legislation); *Increasing Community Control, supra* note 48, at 303-04.

affect the health and well-being of the public that supports them.[50]

There remains a philosophical conflict between the common law assumption that "consciousness of wrongdoing" is a prerequisite to imposition of criminal liability and legislative attempts to dispense with the state of mind requirement by enacting strict liability regulatory offenses. The Supreme Court's interpretation of strict criminal liability as applied to corporate officers has attempted to resolve this conflict by equating strict liability with a negligence standard of care: the officer is punished for violation of a duty of care owed to the public. In *United States v. Park*[51] the Court upheld the conviction, under the Federal Food, Drug and Cosmetic Act, of the president of a supermarket chain which had shipped contaminated food in interstate commerce. In its holding that the president could be held liable without proof of conscious wrongdoing, the Court emphasized that he had been notified of the sanitation problem and was generally "responsible" for the conduct of the subordinates to whom he delegated the task of correcting it. The Court explained:

> The concept of a 'responsible relationship' to, or a 'responsible share' in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.[52]

The dissenting opinion of Justice Stewart in the *Park* case most clearly articulates the equivalence of strict liability and negligence. The dissenters believed that the jury had not been adequately in-

50. 421 U.S. at 672.
51. 421 U.S. 658 (1975).
52. *Id.* at 673-74.

structed with regard to the president's "responsibility," but they did not dispute the appropriateness of strict criminal liability:

> As I understand the Court's opinion, it holds that in order to sustain a conviction under § 301(k) of the Federal Food, Drug, and Cosmetic Act the prosecution must at least show that by reason of an individual's corporate position and responsibilities, he had a duty to use care to maintain the physical integrity of the corporation's food products. A jury may then draw the inference that when the food is found to be in such condition as to violate the statute's prohibitions, that condition was 'caused' by a breach of the standard of care imposed upon the responsible official. This is the language of negligence, and I agree with it.[53]

Strict criminal liability is truly "strict", however, where the defendant is a corporation rather than an individual, since the concept underlying regulatory offenses is that corporations may be held accountable for the consequences of their operations regardless of the fault of any of their employees. Nevertheless, a corporation can only be held criminally liable where it (*i.e.*, its employees) had sufficient control to prevent the violation.[54]

Despite the arguable similarity between strict criminal liability

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53. *Id.* at 678-79. Even assuming, however, that strict criminal liability can be philosophically equated with a negligence standard of proof, an assumption which warrants further judicial consideration, there is constitutional doubt as to whether imprisonment or large criminal fines may be imposed on individuals absent proof of knowledge. Thus, in United States v. Corporation of the Era, 68 Cr. 903 (S.D. N.Y. September 29, 1969) (unpublished opinion), the court held that the government must prove that an *individual* defendant knew of the violation and was in a position to prevent it. *See* discussion in *Criminal Responsibility, supra* note 22, at 78-80; Tripp & Hall, *supra* note 18, at 76. For a suggestion that severe criminal penalties under a strict liability standard are unconstitutional, *see* Rosenthal, FEDERAL POWER TO PRESERVE THE ENVIRONMENT: ENFORCEMENT AND CONTROL TECHNIQUES, in ENVIRONMENTAL REGULATION: PRIORITIES, POLICIES AND THE LAW 235 n.74 (F. Grad, A. Rathjens and A. Rosenthal eds., 1971) [hereinafter cited as Rosenthal]. *But see* Dubin, *Mens-Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 390-91 (1966) [hereinafter cited as Dubin], arguing that a "due diligence" standard would satisfy due process. *Cf.* Robinson v. California, 370 U.S. 660 (1962) and Lambert v. California, 355 U.S. 225 (1957).

54. In United States v. Georgetown University, 331 F. Supp. 69 (D.D.C. 1971), the district court found the University not guilty of a violation of the Refuse Act on the grounds that it was not in a position to prevent the oil spill which occurred during the testing of a newly-installed power plant when a University employee turned on the pumps at the direction of a mechanical contractor. The court held that the contractor, not the University, had "control" of the power plant.

and traditional negligence, it is clear that regulatory offense liability may be imposed on the basis of conduct which many citizens would not criticize. It has therefore been questioned whether it is appropriate to attach the stigma of criminality to the nonblameworthy conduct of persons engaged in a socially beneficial enterprise.[55] Conversely, it has been suggested that criminal prosecution for regulatory offenses will not measurably improve compliance since juries may hesitate to convict in the absence of a public perception of moral wrongdoing, and a conviction even if obtained, would not carry the real stigma of criminality.[56] Such tendencies would be magnified where the alleged violator on trial was an enterprise which played an important role in the local economy.

Congress was no doubt aware of these concerns when, despite the legacy of strict criminal liability under the Refuse Act, it chose to make some element of wrongdoing a prerequisite to the imposition of criminal penalties under the Air and Water Acts. On the other hand, however, Congress retained strict liability in the "civil penalty" provisions of those Acts. Criminal sanctions have thus been reserved for situations in which the stigma of criminality is viewed as more appropriate, while civil penalties are used to reinforce a higher standard of care. Since the criminal and civil penalty provisions of the Acts apply to different types of violations, different problems will arise in their application.

B. Standards Governing Imposition of Criminal and Civil Penalties Under the Air and Water Acts

1. Criminal Penalties

The Air and Water Acts both require a showing of some consciousness of wrongdoing before criminal sanctions can be imposed. Neither purports to impose strict criminal liability. The Air Act pun-

55. *See* articles cited in notes 22 & 53 *supra*.

56. Comment, *Criminal Liability Under the Refuse Act of 1899 and the Refuse Act Permit Program*, 63 J. CRIM. L. 366, 368 (1972); *Criminal Responsibility*, *supra* note 22, at 154.

In *Criminal Responsibility*, however, the author argues that "today pollution can almost be classified as *malum in se*, something wrong in and of itself." *Id.* at 67. In any event, a possible counter to the contention that no moral stigma is currently attached to pollution "crimes" is that its proponents overlook the evolution of public consciousness produced by the criminal sanctions themselves. *See* Ball & Friedman, *supra* note 48, at 200. *See also* Glenn, *supra* note 12, at 857-58, arguing that enforcement of the Refuse Act "focused public attention on the criminality of water pollution."

ishes "knowing" violations while the Water Act penalizes either "willful" or "negligent" violations. The legislative histories give no indication as to why either of these standards of criminal liability was chosen or why the two different standards were created.

An initial question is whether the "willfully or negligently" standard set forth in the 1972 FWPCA amendments is different in scope from the "knowingly" standard of the 1970 Clean Air Act amendments or whether it merely represents a clarification of the earlier language. Although the legislative history is silent on this matter, it would appear that these standards are distinct and that a higher degree of culpability is a prerequisite to criminal liability under the Air Act.

Section 2.02 of the American Law Institute's MODEL PENAL CODE (Proposed Official Draft 1962) distinguishes among four states of mind: purposely, knowingly, recklessly and negligently.[57] On this spectrum, an actor is "negligent" when the actor should have been aware of certain facts if reasonable care had been taken, whereas

57. (2) *Kinds of Culpability Defined.*

(a) *Purposely.*

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) *Knowingly.*

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) *Recklessly.*

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) *Negligently.*

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

"knowing" conduct involves an *actual* awareness of the relevant conduct, circumstances or results thereof.[58] It thus seems apparent that criminal liability may be imposed under the Water Act on a lesser showing of culpability than under the Air Act.[59]

The different *mens rea* requirements of the Air and Water Acts correspond to the difference in the nature of the conduct for which criminal sanctions may be imposed under each Act. Under the Air Act the criminal penalties generally apply only where a violation has continued after the defendant has received notice of the noncompliance.[60] A defendant "knowingly" violates the Air Act by failing to take appropriate action after having been notified of a violation. Under the Water Act, however, there are no provisions for notification prior to the imposition of criminal penalties.[61] Accord-

58. *See* United States v. Gallo, 543 F.2d 361 (D.C. Cir. 1976), holding that the crime of transporting gold coins "knowing the same to have been stolen" is not established merely by evidence that the defendant should have been put on notice that they were stolen. The court noted, however, that a defendant could be convicted on circumstantial evidence that he "must have known" the coins were stolen without direct proof that he actually possessed this knowledge.

To establish a "knowing" violation the government need not prove that defendant specifically intended to violate the Air Act. *See* United States v. Ouelette, 11 ERC 1350 (E.D. Ark. 1978), holding that specific intent is not an element of the crime of "knowingly" making a false statement under the Air Act.

59. *See* Pub. L. No. 92-500, § 309(c)(1), 86 Stat. 816 (1972). Since liability may be imposed for even a negligent violation of the Water Act, it is unnecessary to define precisely the degree of culpability necessary to find a "willful" violation. The term "willfulness" is generally used, as it is in the Water Act, to contrast with the term "negligence", and willfulness has been deemed to encompass reckless, knowing or purposeful behavior, depending on the context. *See* the various definitions set forth in BLACK'S LAW DICTIONARY (1968 ed.) and in 45 WORDS AND PHRASES, "Willful; Willfully" (1970 and Supp. 1978).

The Supreme Court has recognized that the word may have different meanings according to its context. United States v. Murdock, 290 U.S. 389, 394-95 (1933). In the Internal Revenue Code, for example, willfulness generally connotes "a voluntary intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973). The intentional element of willfulness thus makes it more akin to "purposeful" than to "knowing" among the definitions provided by the Model Penal Code.

60. The most important criminal provisions under the Air Act apply to violation of a state implementation plan more than 30 days after receipt of a notice of violation, violation of or refusal to comply with a compliance order and failure to pay a noncompliance penalty, all of which involve prior notice to the violator. Prior notification is not a prerequisite, however, to penalties for violation of a state implementation plan during federally-assumed enforcement, construction or operation of a new or modified source in violation of the new source standards of performance, violation of a condition contained in an order suspending an applicable emission limitation or violation of ozone regulations.

61. The Water Act criminal penalties apply to "Any person who willfully or negligently violates section 301 [effluent limitations], 302 [water quality related effluent limitations],

ingly, a defendant may be convicted under the Water Act not only for a willful violation but also for negligently failing to prevent or abate a violation.[62]

2. *Civil Penalties*

As an alternative to the above-discussed criminal sanctions, the Air and Water Acts contain provisions for "civil penalties" which may be assessed against those who violate either the Acts or compliance orders issued thereunder. Civil and criminal penalties have traditionally been distinguished on the basis of their purpose: civil penalties are "remedial" where as criminal penalties are "punitive."[63] Even such severe sanctions as a 50% fraud penalty under the Internal Revenue Code[64] or forfeiture and double damages for customs violations[65] have been deemed remedial rather than punitive on the ground that such penalties are not unreasonable or excessive and serve to reimburse the Government for enforcement expenses or other costs generated by the violation. The Supreme Court has stated that the question of whether a given penalty is civil/remedial or criminal/punitive is a matter of statutory construction.[66]

The principal practical distinction between civil and criminal penalties is that the procedural safeguards of criminal due process, including trial by jury and the burden of overcoming the presumption of innocence by proving guilt beyond a reasonable doubt, are absent in civil penalty proceedings. Also, the government can obtain discovery from the defendant in in a civil penalty proceedings.[67]

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306 [national standards of performance], 307 [toxic and pretreatment effluent standards] or 308 [inspections, monitoring and entry] of this title, or any permit condition or limitation implementing any of such sections in a permit. . ." Pub. L. No. 92-500, § 309(c)(1), 86 Stat. 816 (1972).

62. The legislative history does not reveal whether Congress imposed this greater duty of care under the Water Act because it viewed water pollution as a more urgent problem or because it deemed industry to be more capable of monitoring its fluid effluents than its gaseous emissions. Perhaps the inclusion of the negligence standard in the Water Act reflects a Congressional reluctance to abandon the strict liability approach of the Refuse Act.

63. One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972); Helvering v. Mitchell, 303 U.S. 391, 398-401 (1938). *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-65 (1963).

64. *Helvering*, 303 U.S. at 398-401.

65. *One Lot Emerald Cut Stones*, 409 U.S. at 237.

66. *Id. Helvering*, 303 U.S. at 399.

67. *Id.* at 402-04. *See* Kovel, *supra* note 22, at 156-58 for a procedural comparison of civil and criminal penalty proceedings.

Also, the government can obtain discovery from the defendant in a civil penalty proceeding and can appeal from an adverse judgment. Thus, it is far easier for the government to prevail in a civil penalty proceeding than in a criminal trial.

Apart from these procedural differences, the primary distinction between the civil and criminal penalty provisions of the Air and Water Acts is that the civil penalties may be imposed without regard to the actor's knowledge or negligence.[68] These provisions represent a compromise between the proponents and critics of strict criminal liability. Strict liability is retained, but in a non criminal context, without the dual threats of imprisonment and moral stigma; on the other hand, the absence of criminal procedural safeguards, coupled with the "preponderance of the evidence" standard of proof, facilitates imposition of the civil penalties.

Indeed, it can be argued that the "civil" penalties of the Air and Water Acts do not differ substantially from criminal penalties but are merely labeled "civil" to circumvent the obstacles to conviction in criminal proceedings.

There is a substantial body of Supreme Court authority concerning the question of how to determine whether a particular sanction is civil or criminal,[69] and those decisions can be interpreted as negating the argument that the civil penalties of the Air and Water Acts are really criminal in nature. The fact that these sanctions are denominated "civil penalties" and co-exist with "criminal penalties" under a regulatory scheme has been held to be virtually conclusive evidence that Congress intended a non-criminal sanction.[70] That Congress expressly provided a civil procedure for collection of the penalty under the Air Act is also indicative of such an intent.[71] The Supreme Court decisions permit a civil penalty to have a punitive aspect so long as it is primarily regulatory and is not excessive.

The legislative history does suggest a remedial purpose underlying the civil penalty provisions of the Air and Water Acts: to render noncompliance more costly than investment in pollution control

68. H.R. REP. No. 294, 95th Cong., 1st Sess., 70-71, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1148-49.

69. *E.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Flemming v. Nestor, 363 U.S. 603 (1959); Trop v. Dulles, 356 U.S. 86 (1957). These decisions are discussed in Kovel, *supra* note 22, at 159-62.

70. *One Lot Emerald Cut Stones*, 409 U.S. at 236; *Helvering*, 303 U.S. at 404-05; Kovel, *supra* note 22, at 159-62.

71. *Helvering*, 303 U.S. at 402.

technology.[72] In this regard, the new "noncompliance penalty" under the Air Act is most clearly remedial inasmuch as it is calculated on the basis of the cost of compliance and is intended to remedy any alleged competitive disadvantage suffered by sources which promptly comply with the Act.

However, the civil penalty provisions of the Air and Water Acts differ in several relevant respects from those approved by the Supreme Court in other contexts. Unlike the 50% tax fraud penalty or the forfeiture and double damages for customs violations, the civil penalties under the Air and Water Acts are not directly based on the magnitude of the violation and hence cannot be characterized as remedial in that sense, nor are the penalties in any way linked to the cost of enforcement. In fact, the Water Act provides *no* guidance in the assessment of civil penalties, and the criteria set forth in the Air Act are not essentially remedial in nature.[73] The potential magnitude of these civil penalties—up to $10,000 or $25,000 per day—further suggests that they are essentially punitive, not remedial. It is also arguable that provision of civil penalties for violation of a compliance order is a punitive sanction.[74] There are, in short, substantial arguments that the civil sanctions contained in the Air and Water Acts are, in fact, criminal, but in light of existing precedent, it is by no means certain that these arguments will be adopted by the courts.[75]

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72. "Since the committee viewed the civil penalty as primarily remedial in purpose, the committee also intends that the penalty be assessed in amounts which are adequate to assure compliance will result, rather than permitting continued noncompliance to be economically profitable." H.R. REP. No. 294, 95th Cong., 1st Sess. 70, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1148 (regarding the amendment of the Air Act which added civil penalty provisions).

73. Under the Air Act, the penalty is to take into account "the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." Even the third factor is not truly remedial in that it is supposed to reflect "the degree to which any emission limit was exceeded and the duration and frequency of any such violation, rather than its air quality impact or its direct adverse health effects." H.R. REP. No. 294, 95th Cong., 1st Sess. 69-70, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1147-48.

74. However, the recipient of a compliance order faced with the prospect of a daily penalty for disobedience is in a position comparable to that of a litigant under a civil contempt order which provides a daily fine for noncompliance, and it is well settled that a prospective daily fine for contempt is civil/remedial, not criminal/punitive. Shillitani v. United States, 384 U.S. 364 (1966); United States v. United Mine Workers, 330 U.S. 258, 302-04 (1947); United States v. Spectro Foods Corp., 544 F.2d 1175, 1178 (3d Cir. 1976).

75. The manner in which these penalties are assessed may influence a court's decision as to whether they serve a punitive rather than a remedial function. The EPA has announced that in settling enforcement actions it will request civil penalties calculated on the basis of

Assuming, arguendo, that the civil penalties under the Air and Water Acts will not be considered criminal sanctions, there remains the question of the situations in which such penalties would be appropriate. In discussing the civil penalty provisions which were added to the Air Act in 1977, the House Interstate and Foreign Commerce Committee cited several Supreme Court authorities upholding strict *criminal* liability, stating that the rationale of those cases was intended to apply to enforcement of the Air Act.[76] Quoting from *United States v. Park,* the Report declared that the Air Act civil penalties should apply in cases of neglect where the law requires care, or inaction where it imposes a duty,[77] explaining:

> In cases like assembly line errors in production of automobiles, the accidental contamination of unleaded gasoline, the malfunction of a pollution control device, violations of emission limitations or other pollution control requirements may occur. The result is some increase in the risk to the public's health or well-being, even if the degree of the increase in risk is unquantifiable or unable to be proved. It matters not whether the violation was knowing as far as its effect on the public is concerned. In many instances, proper quality control, maintenance, inspection, monitoring, repair, personnel tests, or other measures can prevent or minimize the likelihood of such accidental violations. The omission or inadequate execution of such prophylactic measures would be a proper basis for enforcement

four factors: the economic benefit from delayed compliance, the harm to the environment, the degree of the violator's recalcitrance and the amount of extraordinary enforcement costs. Only the recalcitrance element is punitive in nature; the other three factors are properly remedial. *See* text accompanying notes 103-109 *infra.* Moreover, courts which have considered the penalty provision of the Water Act applicable to oil spills, § 311, 33 U.S.C.A. § 1321 (Supp. 1978), have thus far rejected arguments that it is in effect a criminal sanction to which criminal procedural safeguards apply. United States v. Le Beouf Bros. Towing Co., 537 F.2d 149, 152 (5th Cir. 1976), *cert. denied,* 430 U.S. 987 (1977); Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907, 924-25 (S.D.N.Y. 1977); United States v. Atlantic Richfield Co., 429 F. Supp. 830, 834-38 (E.D. Pa. 1977); United States v. General Motors Corp., 403 F. Supp. 1151, 1157-63 (D. Conn. 1975). *But see* Rosenthal, *supra* note 53, at 237, who remarks, "Nevertheless, there can never be assurance that a sanction so nearly criminal in all but name will not be so regarded by the Courts."

76. H.R. REP. No. 294, 95th Cong., 1st Sess. 71, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1149. This portion of the legislative history gives support to the contention that the Acts' civil penalties are in reality criminal, because Congress admittedly was applying established criminal principles with punitive overtones to penalties which it labeled as "civil."

77. *Id.*

> under Title I or Title II of the act (as appropriate) just as surely as an intentional violation.[78]

The Report thus suggests that although a purely accidental violation could provide a basis for imposition of civil penalties, enforcement would only be appropriate where the violation could be attributed to some identifiable omission or mistake. It would appear that civil liability can only be imposed on a person who was in a position to prevent or abate the violation, and not where the violation was the result of actions by third parties or an "act of God."[79]

C. Liability of the Corporation and Its Employees

1. Civil and Criminal Corporate Liability

Corporations may be held liable under the Air and Water Acts for both civil and criminal penalties. Since a corporation is an artificial legal entity which can act only through its agents, the question arises as to whose acts may provide a basis for corporate liability. In particular, where criminal liability is conditioned on negligent (Water Act) or knowing (Air Act) conduct, it is unclear under what circumstances a corporation may be held liable.

Civil penalties present no such problems of attribution, since consciousness of wrongdoing is not a prerequisite to their imposition. Strict civil liability appears to be particularly appropriate in the case of a corporate defendant precisely because it is a nonsentient entity. As with strict tort liability, the corporation is held accountable to the public for its injurious conduct regardless of the state of mind of the employees involved.

The Acts' criminal sanctions do, however, raise the question of whose culpability will be attributed to a corporate defendant, for the corporation itself cannot act "negligently" or "knowingly." In interpreting federal regulatory statutes imposing corporate criminal

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78. *Id.*

79. *See* United States v. Georgetown University, 331 F. Supp. 69 (D.D.C. 1971), where the university was found not guilty of a criminal violation of the Refuse Act where the violation was caused by the actions of a subcontractor and could not have been prevented by the University. *But see* two cases in which courts held that inability to prevent an oil spill caused by a third party was not a defense to civil penalties under the Water Act, but merely provided a basis for mitigation of those penalties: Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907 (S.D.N.Y. 1977) (remand to Coast Guard to reconsider penalty for barge owner where oil spill caused by towing tugboat); General Motors Corp. v. United States, 403 F. Supp. 1151 (D. Conn. 1975) ($1 penalty imposed where oil spill caused by vandals).

liability for "knowing" violations, the weight of modern authority holds it to be sufficient that the requisite knowledge was possessed by *any* corporate employee or agent acting within the scope of his employment.[80] As Judge Magruder, concurring in *St. Johnsbury Trucking Co. v. United States,* explained:

> In other words, in applying to a corporation an Act of Congress punishing 'whoever knowingly' does something, it is usually held to be enough to charge the corporation with guilt if any agent or servant of the corporation, acting for the corporation in the scope of his employment, has the guilty knowledge, in accordance with the general principles of the law of agency as applied in determining civil liability. . . . On this view, it would not be enough to absolve the corporation from liability for a criminal offense of the sort here in question, that no member of the board of directors, or no one of the higher executives, knew that a dangerous commodity was being transported by the company truck in a forbidden quantity without the markings required by the regulation. Nor would it be enough that the higher executives of the corporation, as the defendant sought to show here, took the utmost care to lay down for the guidance of the subordinate employees procedures designed to assure compliance with the regulation.[81]

The rule attributing the *mens rea* to the employee of the corporate employer leads to harsh, and perhaps unjustifiable, results. Thus, for example, in *United States v. Harry L. Young & Sons, Inc.,* the corporation was found guilty of leaving unattended a truck containing certain explosives, even though the driver of the truck had specifically been instructed to remain with the vehicle at all times. The knowing act by the employee was sufficient to have the corporation convicted of a knowing violation. So, also, in *United States v. Little Rock Sewer Committee,*[82] the Sewer Committee was convicted of

80. *See, e.g.,* United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958); United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295 (10th Cir. 1972); United States v. Chicago Express, Inc., 273 F.2d 751, 753 (7th Cir. 1960); United States v. Armour & Co., 168 F.2d 342, 343 (3d Cir. 1948); United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir.), *cert. denied,* 328 U.S. 869 (1946); Boston & Maine R.R. v. United States, 117 F.2d 428, 431 (1st Cir. 1941).

81. 220 F.2d 393, 398 (1st Cir. 1955) (Magruder, J., concurring).

82. 11 ERC 1376 (E.D. Ark. 1978). The plant superintendent who submitted the falsified report was also convicted of this offense. United States v. Ouelette, 11 ERC 1350 (E.D. Ark. 1978).

"knowingly" submitting false information to the EPA despite the absence of any allegation that the members of the Committee had knowledge that the plant superintendent had falsified the report in question.

When applied to a corporate defendant, the "knowing" or "negligent" standards of criminal liability under the Air and Water Acts will thus depend upon the mental state of any of the employees in any way associated with the conduct in question. To hold the corporation liable even where the directors and manager made a good faith effort to comply and even where the misconduct was committed by a nonmanagerial employee, in violation of company policy would, in effect, subject a corporation to strict criminal liability despite the statutory indication that a defendant's knowledge or negligence is an element of the offense. Inasmuch as the individual employees can be criminally punished, and the corporation is subject to civil penalties on a strict liability basis, it is neither necessary nor equitable to impose the additional criminal stigma and penalties on a nonculpable corporate employer.

2. *Civil and Criminal Liability of Corporate Employees*

The civil and criminal penalty provisions of the Air and Water Acts apply to "any person" who commits a violation, and this would include individual corporate employees.[83] Accordingly, individuals as well as corporations may be subject to civil and criminal liability under the Acts.

The criminal penalty provision of the Air Act was amended in 1977 to provide expressly that the term "person" includes any "responsible corporate officer."[84] The amendment, incorporating identical language from the criminal penalty provision of the Water Act, reflects a special concern with prosecution of the individuals responsible for violations, but it does not restrict the general definition of the word "person" which still includes any "individual."

The express designation of corporate officers as persons who could be subject to criminal penalties was not a prerequisite to their being held liable under the Air and Water Acts. For example, despite the absence of a similar phrase in the Federal Food, Drug and Cosmetic

83. *See* Air Act, § 302(e), 42 U.S.C.A. § 7602(e) (Supp. 1978); Water Act, § 352(e), 33 U.S.C.A. § 1362(5) (Supp. 1978).

84. Pub. L. No. 95-95, § 111(d)(3), 91 Stat. 685 (1977).

Act, the Supreme Court held that a corporate officer could be prosecuted thereunder for introduction of misbranded drugs into interstate commerce.[85] In a later case the Court explained that the statute imposed liability on any corporate officer who had a "responsible relationship" or a "responsible share" in the violation if he "had by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation."[86] In declaring that criminal liability under the Air and Water Acts extends to a "responsible corporate officer," Congress simply codified current case law, eliminating any doubt that corporate officers could be prosecuted for violations in which they did not physically participate.

Unlike the corporations they serve, corporate officials cannot be deemed vicariously liable under the doctrine of *respondeat superior* for the acts of subordinate employees. Accordingly, corporate employees can only be convicted of a criminal violation where they themselves possess the requisite *mens rea:* knowledge or negligence. Thus, neither the president nor the plant manager of a company can be held responsible for the criminal conduct of other employees unless they themselves approved of the unlawful conduct or knowingly or negligently failed to prevent it.

Consciousness of wrongdoing is not a prerequisite to imposition of civil penalties, but is unclear under what circumstances civil penalties would apply to individuals. Congress apparently intended that the penalties be imposed primarily upon "pollution sources" but it also indicated that they would apply to "persons who own or operate pollution sources."[87] Neither the statutes nor their legislative histories suggest that "responsible corporate officers" should be subjected to civil liability for violations committed by persons under their control. Inasmuch as the civil penalties are supposed to be remedial rather than punitive, they presumably should be assessed against the business entities responsible for the violation rather than against their employees. Nevertheless, there is nothing in the Air and Water Acts which explicitly precludes imposition of civil

85. United States v. Dotterweich, 320 U.S. 277 (1943). *Compare* the majority and dissenting opinions.

86. United States v. Park, 421 U.S. 658, 673-74 (1975). This definition presents no clear guideline as to who is "responsible" in terms of liability, and it gives no clear guidelines as to which officer is "more" responsible if more than one are arguably responsible.

87. H.R.REP. No. 294, 95th Cong., 1st Sess. 69-70, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1147-48.

penalties against corporate employees who were personally involved in corporate activity which violated those Acts.

IV. The Role of Civil and Criminal Penalties In Enforcement Strategy

A. The Need for a Comprehensive Enforcement Strategy

As is apparent from the foregoing discussion, both the EPA and state enforcement agencies possess broad discretion in enforcing the Air and Water Acts. When confronted with evidence of a violation these agencies will be required to decide whether to seek civil or criminal penalties and whether to proceed against the corporation or its employees. The fact that each State may have a different scheme of available civil and criminal penalties and may adopt its own approach to enforcement increases the difficulty of developing a consistent nationwide enforcement strategy under the Air and Water Acts.

In addition to the uncertainty inherently associated with the existence of prosecutorial discretion, there is the confusion created by ambiguity in the Air and Water Acts themselves. For example, the Acts would seem to permit a corporation to be held criminally liable on the basis of a negligent or knowing violation by a non-managerial employee in situations where common sense would dictate that only the employee and not the corporation merited punishment. Likewise, the Acts would seem to authorize imposition of civil penalties on any corporate employees whose acts were related to, or who had direct authority over, the events which were the basis of the alleged violations.

More generally, given the "technology-forcing" deadlines and limitations established by the Air and Water Acts,[88] many compa-

88. The Air Act is "technology-forcing" in that economic and technological infeasibility may not be considered by the Administrator or the courts in evaluating a state implementation plan; sources unable to comply with the plan are, theoretically, expected to cease operations. Union Electric Co. v. EPA, 427 U.S. 246, 265 (1976). The Water Act is "technology-forcing" in that the July 1, 1977 deadline for achieving effluent limitations is inflexible and may not be extended even when compliance is not feasible. State Water Control Board v. Train, 559 F.2d 921, 924-27 (4th Cir. 1977); United States Steel Corp. v. Train, 559 F.2d 921, 924-27 (4th Cir. 1977); United States Steel Corp. v. Train, 556 F.2d 822, 854-55 (7th Cir. 1977); Bethlehem Steel Corp. v. Train, 544 F.2d 657, 660-63 (3d Cir. 1976), *cert. denied,* 430 U.S. 975 (1977). Although the 1977 amendments to the Air and Water Acts have provided increased flexibility under certain special circumstances, there will still be many situations in which a corporation will be unable to obtain a variance or extension.

nies will not be in complete compliance with the applicable emission and effluent limitations, and given the Acts' reporting requirements, the companies will often know that they are in violation. Theoretically, each of these companies and their employees would be liable for daily civil and criminal penalties once they became aware of the noncompliance. Furthermore, the civil penalty provisions invite abuse in that they could be used punitively as substitutes for criminal penalties whenever the enforcement agency wishes to circumvent the procedural safeguards of a criminal trial or to avoid the necessity of proving knowledge or negligence.

The uncertainty engendered by the range of possible sanctions will be most acutely experienced by the corporate employee whose company is technologically, economically or physically incapable of attaining a mandated level of emissions or effluents by the applicable deadline—a situation which may frequently arise. Indeed, as a practical matter, those corporations which are most diligent in their abatement programs but which cannot yet achieve abatement, may be the ones most exposed to the gamut of civil and criminal sanctions. Since "knowing" violations are subject to criminal sanctions under both acts, a corporate officer aware of the noncompliance of his plant would thus confront the unpleasant dilemma of ceasing operations or risking criminal as well as civil penalties for himself as well as for the corporation and other employees.[89]

Unless a uniform enforcement strategy is developed, it is likely that the government's broad discretion under the Acts will generate a great deal of uncertainty, which will result in both unfairness to the parties and delay in attainment of the desired levels of air and water quality. A particular violation of an emission or effluent limitation might be dealt with by a compliance order in one jurisdiction, civil penalties in a second and criminal prosecution in a third. In one case the corporation may be the target while in another jurisdiction, on similar facts, the enforcement agency may proceed against

89. It is unclear whether economic or technical infeasibility will even be available as defenses in criminal prosecutions. *See* Union Electric Co. v. EPA, 427 U.S. at 268 n.18, which, though not addressing the question, cited two cases indicating that these defenses may be available in enforcement proceedings. *Cf.* Commonwealth of Pennsylania, Department of Environmental Resources v. Pennsylvania Power Co., 461 Pa. 675, 337 A.2d 823 (1975), upholding denial of a petition for contempt because, given the technological impossibility of compliance with the court-ordered abatement schedule, there was no willful disobedience of the court's order. *But see* H.R. REP. No. 294, 95th Cong., 1st Sess. 68, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1146.

corporate employees. The unfairness of nonuniformity would be exacerbated by the possible competitive advantage obtained by sources subject to less vigorous enforcement. Moreover, one may expect that unevenness in enforcement will produce unevenness in compliance, retarding the attainment of the environmental standards in some regions while producing unnecessary and economically devastating plant closing in others.

B. Current Enforcement Policy

Although no single comprehensive enforcement policy statement has been issued by the EPA, the broad outlines of such a policy have been set forth in a series of speeches and memoranda emanating from upper-echelon EPA enforcement personnel. If properly implemented, this policy should generally achieve some degree of uniformity, although it leaves several questions unresolved and ultimately relies on the good sense and good faith of the enforcement personnel.[90]

All indications are that the EPA will use the criminal sanctions sparingly and only in exceptional cases. The chief of the Justice Department's land and natural resources division has stated that criminal convictions will be sought for "willful, substantial violations of the pollution laws of a criminal nature," with special emphasis on surreptitious dumpings and false reporting.[91] An Assistant Attorney General likewise has stated that criminal enforcement will focus on disposal and reporting violations,[92] and has emphasized that the government will not adopt "a frivolous attitude toward the criminal law, nor one that strains to press the law to the outer limits." The primary targets will be willful or repeated offenders who substantialy exceed effluent or emission standards.[93]

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90. Uniform implementation is more easily proposed than effected. *See, e.g.*, note 27 *supra*.

91. 8 ENVIR. REP.—Current Dev. (BNA) 1649, 1650 (Feb. 24, 1978), reporting a speech by Assistant Attorney General James W. Moorman to the District of Columbia Bar Association on February 21, 1978.

92. 8 ENVIR. REP.—Current Dev. (BNA) 2052 (Apr. 28, 1978), reporting a speech by Assistant Attorney General Angus MacBeth to the ABA National Conference on the Environment on April 22, 1978.

93. Reserving criminal sanctions for substantial violations should reduce the incentive for either party to alter date in a marginal case and lessen the chances of a conviction being based upon inaccurate or falsified data. *Cf., e.g.*, United States v. Moss-American, Inc., 11 ERC 1470 (E.D. Wisc. 1978), wherein the court dismissed the government's abatement action because an EPA employee had intentionally falsified evidence.

A memorandum from the assistant administrator for enforcement concerning priorities for enforcement of the Water Act's July 1, 1977 deadlines stated that criminal prosecutions should be initiated "where the authority of the Agency has been intentionally and deliberately flouted, and in other cases as appropriate."[94] This memorandum also recommended that prosecution of individual corporate officers "should be pursued only where the evidence demonstrates that intentional corporate noncompliance with the law is the result of an informed policy decision made by such corporate officials."[95] Likewise, under the Air Act, a draft memorandum sent last year to Regional Enforcement Division Directors advised that criminal action should be undertaken "where criminal conduct *(i.e.,* knowing and willful violation) can *readily* be proven" (emphasis added).[96] Thus, although criminal liability can be imposed for a "knowing" violation of the Water Act, the EPA has indicated its intent to reserve sanctions for deliberate and "purposeful" violations.

The current pattern of criminal prosecutions is consistent with the announced policy of restraint. As of April, 1978 the Justice Department had pending only five or six criminal cases under the Air Act and ten to twelve cases under the Water Act with another one hundred possible Water Act cases under consideration pursuant to referral from the Corps of Engineers.[97] It thus appears that criminal sanctions are being reserved for exceptional cases and will not play a major role in the day-to-day policing of the emission and effluent limitations of the Air and Water Acts.

In contrast to the limited use of criminal sanctions, the EPA

94. 8 ENVIR. REP.—Current Dev. (BNA) 247-48 (June 10, 1977).

95. *Id.* The memorandum does not indicate whether criminal sanctions against corporations will likewise be limited to situations in which a violation was the result of an informed policy decision. Although a corporation can theoretically be held criminally liable for violations caused by the knowing misconduct of lower-echelon employees, the tenor of the EPA's enforcement memoranda suggests that it will not pursue criminal penalties unless managerial personnel are directly responsible for the violation.

96. 8 ENVIR. REP.—Current Dev. (BNA) 764, 766 (Sept. 16, 1977).

97. 8 ENVIR. REP.—Current Dev. (BNA) 2052 (Apr. 28, 1978). One recent example of the type of case in which criminal charges have been brought was the March 23, 1978 indictment of Olin Corporation and three former officials on charges of filing false reports which allegedly grossly understated the amount of the company's mercury discharges. 8 ENVIR. REP.—Current Dev. (BNA) 1861 (March 31, 1978). *Cf.* the 28-½ to 58-½ month jail term given to the president of a firm by a Pennsylvania court for dumping highly flammable solvents into a sewer line, discussed in 8 ENVIR. REP.—Current Dev. (BNA) 2058 (Apr. 28, 1978). It is not known whether charges will be brought against the government employee who falsified data in the case of United States v. Moss-American, Inc. *See* note 82 *supra.*

appears to be placing increasing reliance on "civil" penalties in the enforcement of the Air and Water Acts.[98] In a 1977 memorandum concerning enforcement priorities under the Water Act, the EPA's assistant administrator for enforcement indicated that three remedies would be sought in actions based on violation of the July 1, 1977 deadlines: "Substantial penalties for noncompliance, a court-imposed compliance schedule, and even more severe penalties if the court's schedule is violated . . . . [P]enalties can be an effective counterweight to make delayed compliance a less economically attractive alternative than timely compliance."[99] Shortly thereafter, the deputy administrator for enforcement stated that the key feature of enforcement would be penalty structure "based on the economic benefit of non-compliance."[100] On April 11, 1978 the EPA's assistant administrator for enforcement issued a lengthy memorandum entitled "Civil Penalty Policy—Certain Air and Water Act Violators,"[101] the preamble of which declares: "The objective of this civil penalty policy is to assist in accomplishing the goals of environmental laws by deterring violations and encouraging voluntary compliance."[102] The April 11 memorandum recites that the civil penalty policy "is based primarily upon four considerations—the harm done to the public health or the environment; the economic benefit gained by the violator; the degree of recalcitrance of the violator; and any unusual or extraordinary enforcement costs thrust upon the public."[103] Among these four factors, the memorandum places primary emphasis on the economic benefit gained by the violator, in effect incorporating the Air Act's mandatory administrative noncompliance penalty under the civil penalty provisions of both the Air and Water Acts.[104] The civil penalty applies to violations after

98. The EPA's recent policy statements regarding civil enforcement actions assume that the civil sanctions are truly civil and are not criminal in nature. As suggested above, this assumption may not be warranted.

99. 8 ENVIR. REP.—Current Dev. (BNA) 247, 248 (June 10, 1977).

100. 8 ENVIR. REP.—Current Dev. (BNA) 308 (June 24, 1977).

101. 8 ENVIR. REP.—Current Dev. (BNA) 2011 (April 21, 1978). The policy is intended for use by federal, state and local officials in furtherance of the goal of national consistency.

102. *Id.* at 2012.

103. *Id.* Mitigating factors which may reduce the penalty include delays caused by the government and impossibility "attributable to causes absolutely beyond the control of the violator (such as floods, fires or other acts of nature.)" *Id.* at 2015-16. Since good faith efforts to obey the law are expected of all, "good faith" is not a mitigating circumstance.

104. The Administrator is thus circumventing a Congressional decision not to impose a noncompliance fee under the Water Act. Such a provision had been included in the Senate version of the 1977 amendments to the Water Act, S. 1952, 95th Cong., 1st Sess., § 319 (1977),

August 7, 1977 under the Air Act and after July 1, 1977 under the Water Act.[105] Calculations of the economic benefits attributable to delayed capital expenditures and avoided operation and maintenance expenses are to be combined in a single formula which will be "forwarded shortly."

The memorandum gives little guidance on the calculation of the other three elements of the civil penalty. With regard to the harm to health and the environment, it simply suggests that "estimated costs of environmental restoration," "traditional personal injury damage concepts" and "recreational values developed by various public agencies" may be helpful, but none of these will be of much use in computing the marginal costs associated with one among many polluters. The memorandum provides no guidance as to the size of the sum which should reflect a given degree of recalcitrance.[106] And the element of extraordinary enforcement costs, while straightforward, may not have widespread applicability. In sum, the computation of civil penalties under the Air and Water Acts will essentially involve a calculation of the economic benefit/noncompliance penalty factors, increased by arbitrarily determined amounts reflecting the magnitude of the violation and the recalcitrance of the polluter.

The April 11 memo further states that the goal of an enforcement action should be both compliance and penalties, but declares that these two goals "should not be in any way traded off against each other . . . . [E]nforcement officials should not bargain for compli-

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but not in the House of Representatives version. H.R. 3199, 95th Cong., 1st Sess. (1977). No comparable provision emerged from the Conference Committee. *See* 1977 U.S. CODE CONG. & AD. NEWS 4470-71.

The civil penalties differ from mandatory noncompliance penalties in that they are assessed by the court at the request of the Administrator, rather than by the Administrator in the first stance. Since Congress provided no guidance in the calculation of regular civil penalties, the Administrator appears to be justified in requesting penalties based on the economic benefit of noncompliance.

105. To avoid double-counting, the economic benefit element of the civil penalty will, according to the April 11 memorandum, cease to be applied under the Air Act once the mandatory administrative noncompliance penalties go into effect in 1979. 8 ENVIR. REP.—Current Dev. (BNA) 2013 (April 11, 1978).

106. Although the memorandum states that good faith challenges to administrative action will not be deemed evidence of recalcitrance, it also notes that litigation will not extend any deadlines or toll the penalties. Thus, where a deadline has passed during proceedings concerning the validity of a particular provision, the litigant will be liable for civil penalties if it either does not prevail on its challenge or fails to obtain a supercedes or stay. Train v. National Resources Defense Council, 421 U.S. 60, 92 (1975) (Air Act); United States Steel Corp. v. Train, 556 F.2d 822, 847-48 (7th Cir. 1977) (Water Act).

ance (or interim controls) by offering any reduction in penalties."[107] The memorandum does, however, authorize enforcement officials to give a "credit against penalty" where the violator agrees to make "expenditures for environmentally beneficial purposes *above and beyond* expenditures made to comply with all existing legal requirements"[108] (emphasis added). This creative innovation may alleviate the concern that economic penalties could deprive companies or municipalities of the funds necessary for investment in pollution control equipment.[109]

One question not addressed by the EPA is the appropriateness of civil penalties for corporate employees; indeed, the EPA has given no indication whether it will seek civil penalties from individuals. Thus, there are no guidelines for individuals in this important area.

Another question which is not directly addressed in the EPA's current enforcement policy is what sanctions will be applied in the case of a corporation which, for economic or technological reasons, is unable to comply with the applicable emission or effluent limitations. The EPA has indicated that under the Water Act it will proceed against violators of final permit limitations, and that even where a construction deadline has not been met a company which has proceeded expeditiously will probably not be subject to an enforcement action.[110] Such assurances provide little solace, however, to corporate officials who, recognizing that their company will never be able to comply, decide to forego installing control devices and to continue in operation until ordered to shut down entirely. These officials ought to be given guidance as to whether civil or criminal penalties will be assessed at the point they become aware that the operation is not in compliance, or only after they have received a notice of violation, or perhaps only after they have received an administrative compliance order.

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107. 8 ENVIR. REP.—Current Dev. (BNA) 2013 (April 21, 1978). Since the civil penalties are supposedly remedial, rather than punitive, it seems inconsistent for the EPA to forego the bargaining leverage presented by the possibility of reducing past penalties. The EPA apparently believes that the prospect of accumulating further penalties is a sufficient incentive for prompt compliance and that an insistence of full payment of past penalties increases the *in terrorem* effect of the penalty system.

108. 8 ENVIR. REP.—Current Dev. (BNA) 2016 (April 21, 1978).

109. *See* Manaster, *Perspective—Early Thoughts on Prosecuting Polluters*, 2 ECOL. L.Q. 471, 481 (1972).

110. 8 ENVIR. REP.—Current Dev. (BNA) 247-48 (June 10, 1977).

V. Conclusion

The recent public pronouncements by the EPA regarding its future enforcement strategies are welcome. Up to this time there had been no consistent or comprehensive enforcement guidelines, thus there had been no predictability for those who were directly effected by the Air and Water Laws. While these new guidelines are still limited, and while they are in some places vague and in other places nonexistent, they at least begin to attempt to formulate a needed comprehensive policy. Assuming that the EPA follows the new guidelines, the goals of that Agency should be well served without any serious erosion of the rights of entities affected by environmental laws.

It must be emphasized, however, that these guidelines are only a first step toward a comprehensive enforcement policy. The guidelines should be expanded and refined until the EPA has fully explicated its position regarding all possible sanctions contained in the Air and Water Acts to permit attainment of a uniform, effective and fair enforcement policy.