

Pace Environmental Law Review

Volume 8
Issue 1 Fall 1990

Article 2

September 1990

Enhancing Criminal Penalties for Catastrophic Discharges: Closing a Clean Water Act Loophole That a Leaking Supertanker Can Sail Through

Robert W. Vinal

Follow this and additional works at: <http://digitalcommons.pace.edu/pelr>

Recommended Citation

Robert W. Vinal, *Enhancing Criminal Penalties for Catastrophic Discharges: Closing a Clean Water Act Loophole That a Leaking Supertanker Can Sail Through*, 8 Pace Env'tl. L. Rev. 23 (1990)

Available at: <http://digitalcommons.pace.edu/pelr/vol8/iss1/2>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

Enhancing Criminal Penalties for Catastrophic Discharges: Closing a Clean Water Act Loophole that a Leaking Supertanker Can Sail Through

Robert W. Vinal*

The Exxon Valdez incident in Alaska has greatly increased public awareness of the amount of environmental damage which can result from a large discharge of pollutants. This disaster has lead Congress to consider toughening penalties for a variety of environmental violations. The author discusses proposed "environmental catastrophe" legislation which would empower federal judges to impose criminal sentences of up to thirty years for certain environmental crimes. Aside from the severity of the proposed penalties, the most controversial aspect of the bill is that it focuses on the resulting environmental damage rather than the polluting act itself.

I. Introduction

The recent indictment returned against the Exxon Corporation, in connection with the Exxon Valdez oil tanker spill in Alaska,¹ has revealed the inadequacy of the present criminal provisions of the Federal Water Pollution Control Act of

* The author is the Inspector General of New York City's Department of Environmental Protection and has served as a Special Assistant United States Attorney for the Eastern District of New York. He was formerly Chief of the Kings County District Attorney's Environmental Crimes Bureau. B.A., S.U.N.Y. at Cortland; M.A., S.U.N.Y. at Albany; J.D., St. John's University School of Law. Member, Committee on Criminal Litigation, Environmental Law Section, New York State Bar Association. The views expressed in this article are those of the author and do not represent the views or policies of any agencies or organizations with which the author is, or has been, associated.

1. United States v. Exxon Corp., No. A90-015 (D. Alaska Feb. 27, 1990).

1972² which penalize illegal dischargers. Despite the environmentally catastrophic results³ of Exxon's release of over ten million gallons of crude oil, Exxon's allegedly negligent conduct⁴ constitutes only a misdemeanor offense⁵ under the Clean Water Act's (CWA) criminal penalty provisions. In order to bring felony charges against Exxon, federal prosecutors were forced to utilize two obscure provisions of federal acts regulating the fitness and competence of a vessel's crew members.⁶

The purpose of this article is to: (1) critically analyze the present criminal provisions of the CWA which deal with illegal discharges; (2) review pending legislation which is designed to enhance present criminal penalties by creating the new crime of "endangering life or causing environmental catastrophe" (Environmental Crimes Act);⁷ and (3) propose that the quantity of pollutants discharged be utilized as the standard aggravating factor in the gradation of CWA criminal offenses.

II. Analysis of the Discharge Provisions of the CWA

Although Congress has enacted a number of laws to protect various waterways and their inhabitants,⁸ the CWA was

2. 33 U.S.C. §§ 1251-1387 (1988), as amended by Water Quality Act of 1987, 33 U.S.C. §§ 1281-1285, 1311-1387 (1988).

3. The spill covered over 1,000 square miles of Alaska's Prince William Sound with oil, fouled over 1,000 miles of beaches, and, according to wildlife officials, killed more than 1,000 sea otters, 140 bald eagles, and 250,000 seabirds. N.Y. Times, Mar. 1, 1990, at D25, col. 3.

4. One count of the indictment charged Exxon with negligently discharging 10 million gallons of crude oil in violation of the Clean Water Act. *United States v. Exxon Corp.*, No. A90-015 (D. Alaska Feb. 27, 1990).

5. 33 U.S.C. § 1319(c)(1).

6. Exxon was charged with one count of violating the Dangerous Cargo Act, 46 U.S.C. § 3718(b) (1988), and one count of violating the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1236 (1988).

7. H.R. 3641, 101st Cong., 1st Sess. (1989) [hereinafter H.R. 3641].

8. See, e.g., Refuse Act of 1899, 33 U.S.C. § 407 (1988); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 (1988); Ocean Dumping Ban Act of 1988, 33 U.S.C. §§ 1401-1445 (1988); Farmington Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1988); Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1988); Deep Water Port Act of 1974, 33 U.S.C. §§ 1501-1524 (1988); Endangered Species Act of 1973, 16

designed to be the statutory centerpiece of the effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁹ Under the CWA, it is illegal to discharge a pollutant from a point source into the navigable waters of the United States unless the discharger possesses a permit which authorizes the discharge.¹⁰ To enforce this permitting system, the CWA contains criminal penalties,¹¹ as well as civil¹² and administrative¹³ penalties.

The elements to be proved in establishing an illegal discharge are broadly defined under the statute. The term "pollutant" has been broadly defined under the CWA¹⁴ and interpretive case law,¹⁵ to encompass virtually every substance which is not naturally found in the water, or specifically exempted under the statute. Also, most identifiable methods of discharge which introduce a pollutant into navigable waters

U.S.C. §§ 1531-1544 (1988); Migratory Bird Treaty Act, 16 U.S.C. §§ 701-718 (1988); Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1445 (1988); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1988); Ports and Waterways Safety Act, 33 U.S.C. §§ 1221-1236 (1988); Dangerous Cargo Act, 46 U.S.C. §§ 3701-3718 (1988).

9. 33 U.S.C. § 1251; *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988).

10. 33 U.S.C. §§ 1311(a), 1342.

11. *Id.* § 1319(c).

12. *Id.* § 1319(d). Special civil penalties are available for oil and hazardous substance spills. *See id.* § 1321(b)(6).

13. 33 U.S.C. § 1319(g).

14. The CWA defines "pollutant" as:

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

33 U.S.C. § 1362(6).

15. *See, e.g., United States Steel Corp. v. Train*, 556 F.2d 822, 852-53 (7th Cir. 1977); *National Wildlife Fed'n v. Consumers Power Co.*, 657 F. Supp. 989, 1006-07 (W.D. Mich. 1987), *rev'd on other grounds*, 862 F.2d 580 (6th Cir. 1988); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980).

constitute a "point source."¹⁶ Further, the statutory definition of "navigable waters"¹⁷ has been interpreted to cover not just rivers, harbors, and ocean waters within territorial limits, but also non-navigable streams, ponds, creeks, and even some land areas which drain into such bodies of water.¹⁸

It is clear that a point source discharge constitutes a violation of the CWA unless the discharge specifically conforms to the effluent limitations and standards applicable under the discharger's permit.¹⁹ Where a discharger violates a permit condition, or the discharger has no permit,²⁰ the discharge constitutes a crime if either the negligent or knowing *mens rea* requirement of the criminal penalties section of the CWA is met.²¹

16. The CWA defines a "point source" as:

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

33 U.S.C. § 1362(14).

See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 373-74 (10th Cir. 1979); Sierra Club v. Abston Constr. Co., 620 F.2d 41, 45 (5th Cir. 1980); Trustees for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984); O'Leary v. Moyer's Landfill Inc., 523 F. Supp. 642 (E.D. Pa. 1981); *Weisman*, 489 F. Supp. at 1337.

17. The CWA defines the term "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The term "territorial seas" is defined as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." *Id.* § 1362(8).

18. *See, e.g.,* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Leslie Salt Co. v. Froehlike, 578 F.2d 742, 749 (9th Cir. 1978); *Earth Sciences, Inc.*, 599 F.2d at 374-75; United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979); Ward v. Coleman, 598 F.2d 1187, 1188 n.1 (10th Cir. 1979); *Weisman*, 489 F. Supp. at 1337-39; United States v. Holland, 373 F. Supp. 665, 668-73 (M.D. Fla. 1974); *See S. CONF. REP. NO. 1236*, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3776; 118 CONG. REC. 33,756-57 (1972).

19. *See* Student Pub. Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc., 602 F. Supp. 1394 (D.N.J. 1985); Sierra Club v. Simkins Indus., Inc., 617 F. Supp. 1120 (D. Md. 1985).

20. *See* United States v. Tom-Cat Dev., Inc., 614 F. Supp. 613, 614 (D. Alaska 1985).

21. *See* United States v. Distler, 671 F.2d 954 (6th Cir. 1981); United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975); United States v. Oxford Royal

Since the statutory definition of the term "pollutant" does not specifically refer to oil or petroleum products, the question of whether an unpermitted discharge of oil into navigable waters constituted a prosecutable offense under the CWA was, until recently, open to judicial interpretation.²² However, Congress recently settled this issue²³ by including language in the Oil Pollution Act of 1990 (OPA)²⁴ which explicitly provides that illegal discharges of oil and other hazardous substances²⁵ are subject to the CWA's criminal penalties provisions.²⁶

III. Criminal Penalties for Illegal Discharges Under the CWA: A Lack of Aggravating Provisions

Where an illegal discharge is knowingly made, the discharger is guilty of a three-year felony offense.²⁷ A knowing discharge is aggravated (i.e. upgraded) to become a more serious fifteen-year offense²⁸ only if the discharger knows at the time of the discharge that the discharge "places another per-

Mushroom Prods., Inc., 487 F. Supp. 852 (E.D. Pa. 1980); *United States v. Frezzo Bros.*, 546 F. Supp. 713, 720 (E.D. Pa. 1982), *aff'd*, 703 F.2d 62 (3d Cir. 1983).

22. See *United States v. Hamel*, 551 F.2d 107, 109-12 (6th Cir. 1977).

23. See S. REP. No. 94, 101st Cong., 2d Sess. 23, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 745.

24. Pub. L. No. 101-380, 104 Stat. 484-575 (1990).

25. As defined in section 1321(b)(3) of the CWA.

26. The OPA amended section 1319(c) of the CWA to include section 1321(b)(3) violations. See Pub. L. No. 101-380, 104 Stat. 537. See H.R. CONF. REP. No. 653, 101st Cong., 2d Sess. 154, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 833.

27. 33 U.S.C. § 1319(c)(2). A knowing discharge is punishable:

by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person . . . punishment shall be by a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

Id.

28. *Id.* § 1319(c)(3)(A). This aggravated offense is punishable by: a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

Id.

son in imminent danger of death or serious bodily injury"²⁹ Thus, even if an unscrupulous discharger intentionally dumps millions of gallons of toxic pollutants into pristine, geographically isolated waters, thereby causing severe and perhaps irreparable environmental damage, the discharger would only face prosecution for the less serious three-year felony charge unless the government could prove that the discharger's action placed at least one human being in imminent danger³⁰ of serious bodily injury.³¹

Where a discharge is made negligently, but not know-

29. *Id.* The felony crime of "knowing endangerment" was added to the CWA's criminal penalties provisions by the Water Quality Act of 1987, 33 U.S.C. §§ 1281-1285, 1311-1387. To date, two "knowing endangerment" convictions have been obtained. In *United States v. Borjohn Optical Technology, Inc.*, Cr. 89-0256 (D. Mass. May 23, 1990), reported in 5 NAT'L ENVTL. ENFORCEMENT J. 28 (July 1990), defendants were convicted of "knowing endangerment" as a result of having exposed their employees to toxic levels of nickel, nitric acid, and nitrogen dioxide during the course of illegally discharging these substances into a public sewer system; see also 21 Env't Rep. (BNA) No. 29, at 1363 (Nov. 16, 1990). In *United States v. Plaza Health Laboratories, Inc.*, No. Cr. 89-0338 (E.D.N.Y. May 17, 1989), a medical laboratory and its vice president were convicted of "knowing endangerment" for having discharged into New York Bay and the Hudson River vials of human blood which were infected with a highly contagious hepatitis virus. N.Y.L.J. Feb. 1, 1991, at 1, col. 2; see also 4 NAT'L ENVTL. ENFORCEMENT J. 20 (July 1989).

At least one other indictment charging "knowing endangerment" has been brought. See *United States v. Finishing Corp. of America*, No. Cr. 89-0158 (N.D. Ohio May 31, 1989), reported in 4 NAT'L ENVTL. ENFORCEMENT J. 20 (July 1989).

30. The issue of what degree of human exposure is sufficient to satisfy the imminent danger element of the CWA crime of "knowing endangerment" has yet to be raised at the appellate level. However, this issue was considered by the Tenth Circuit in *United States v. Protex Indus. Inc.*, 874 F.2d 740 (10th Cir. 1989) in the context of an appeal from a conviction for "knowing endangerment" under the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(e) (1988), which contains the same "imminent danger" language as the CWA. In *Protex Industries*, the Tenth Circuit affirmed a district court decision and held that the crime of "knowing endangerment" is not unconstitutionally vague. The circuit court also held that the "imminent danger" and "serious bodily injury" standards had been met at trial by the government's introduction of evidence that company employees had suffered psycho-organic syndrome as a result of exposure to hazardous wastes that the company was illegally storing, transporting, and disposing. See also Harris, Cavanaugh & Zisk, *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203 (1988).

31. "[T]he term 'serious bodily injury' means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 33 U.S.C. § 1319(c)(3)(B)(iv).

ingly, the discharge constitutes only a misdemeanor offense and at present the CWA contains no aggravating provisions which could upgrade a first time offense to a felony-level crime.³² Thus, in *United States v. Exxon Corp.*,³³ since the federal prosecutors determined that they could only prove a negligent discharge by Exxon, instead of a knowing discharge, the misdemeanor offense was the only available charge under the CWA to present to the grand jury.³⁴

IV. "Causing Environmental Catastrophe" as a Criminal Penalty Aggravator

In enacting the OPA,³⁵ Congress passed up the opportunity to increase CWA criminal penalties for illegal discharges. However, legislation has been introduced in Congress³⁶ that creates three new crimes³⁷ which are intended to increase the criminal penalties that could be imposed on a defendant charged with one or more presently existing environmental

32. 33 U.S.C. § 1319(c)(1). A negligent discharge is punishable by: a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person . . . punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

Id.

33. No. A90-015 (D. Alaska Feb. 27, 1990).

34. See 33 U.S.C. § 1319(c).

35. Pub. L. No. 101-380, 104 Stat. 484-575 (1990).

36. H.R. 3641. This legislation would create a new chapter entitled, "Chapter 34 - Environmental Crimes" within Title 18 of the U.S. Code. Presently, all existing environmental crimes are only contained within the criminal penalties sections of various environmental statutes and have not been consolidated within one statute. See, e.g., Federal Water Pollution Control Act § 309(c), 33 U.S.C. § 1319(c); Solid Waste Disposal Act § 11005, 42 U.S.C. § 6992d(b) (1988); Safe Drinking Water Act § 1423(b), 42 U.S.C. § 300h-2(b).

37. The three new crimes created by this legislation are knowingly or recklessly endangering life or causing environmental crimes, endangering life or causing environmental catastrophe by a course of illegal conduct, and negligently endangering life or causing environmental catastrophe. H.R. 3641, §§ 731-733. These crimes are also contained within the criminal penalties provisions of other environmental statutes. See, e.g., Federal Water Pollution Control Act § 309(c), 33 U.S.C. § 1319(c); Solid Waste Disposal Act § 11005, 42 U.S.C. § 6992d(b); Safe Drinking Water Act § 1423(b), 42 U.S.C. § 300h-2(b).

crimes.³⁸ If this proposed Environmental Crimes Act is enacted into law, illegal discharges under the CWA³⁹ would be more severely penalized if the government could prove that a defendant, in committing the discharge, knowingly or recklessly,⁴⁰ negligently,⁴¹ or by a course of illegal conduct,⁴² endangered human life, caused serious injury to another, or caused environmental catastrophe.

With the exception of criminal negligence (which will be discussed *infra*), each of the other two new crimes is punishable by substantial prison terms and "mega" fines. These penalties vary according to both the type of risk caused by the defendant and whether the defendant has previously been convicted of a violation under the section.⁴³

The proposed legislation also contains a provision requiring mandatory, court-ordered environmental audits where an organization has been convicted of any of the new felony offenses.⁴⁴

38. H.R. 3641, § 735(1) defines "environmental offense" as a criminal violation of any one of 23 environmental statutes.

39. 33 U.S.C. § 1319(c). This section provides criminal penalties for negligent violations, knowing violations, knowing endangerment, false statements, and treatment of single operational upset. *Id.*

40. H.R. 3641, § 731(a). A person who knowingly or recklessly endangers life or causes environmental catastrophe is one who commits an environmental offense and thereby knowingly or recklessly causes a risk of (1) imminent death of a human being, (2) serious bodily injury to a human being, or (3) environmental catastrophe, and shall be punished as set forth in subsection (b) of section 731. *Id.*

41. *Id.* § 733. A person who negligently endangers life or causes environmental catastrophe is one who commits an environmental offense and thereby negligently causes a risk of (1) imminent death of a human being, (2) serious bodily injury to a human being, or (3) environmental catastrophe, and shall be imprisoned not more than one year or fined not more than \$125,000 in the case of an individual or \$500,000 in the case of an organization, or both. *Id.*

42. *Id.* § 732. A person who endangers life or causes environmental catastrophe by a course of illegal conduct is one who knowingly engages in a course of illegal conduct and thereby causes a risk of (1) imminent death of a human being, (2) serious bodily injury to a human being, or (3) environmental catastrophe, and shall be punished as set forth in subsection (c) of section 732. *Id.*

43. *Id.* §§ 731(b)(1)(B), 732(c)(1)(B). The most severe penalty available under the proposed legislation is a maximum of 30 years imprisonment, a fine of up to \$500,000 in the case of an individual and \$2,000,000 in the case of an organization, or both. *Id.* § 732(c)(1)(B).

44. *See id.* § 734.

This article will focus on the bill's use of the concept of "environmental catastrophe" as a penalty enhancer. The bill defines "environmental catastrophe" to mean:

(A) death or injury to a member of a threatened or endangered species of fish, wildlife, plant, or other natural resources;

(B) death or injury to 20 percent or more of the known population of any species of fish, wildlife, or plant within a defined ecosystem;

(C) death or injury to 5 percent of the known population of any species of fish, wildlife, or plant within the United States or the waters of the United States; or

(D) destruction or alteration of habitat, or release of any amount in an amount or a location that causes-

(i) serious disruption of any ecosystem or food chain;

(ii) environmental contamination of any species of fish, wildlife, or plant that cannot be remedied, cannot be remedied without causing significant environmental damage, or cannot be remedied within one generation;

(iii) serious genetic or toxicological effects on any species of fish, wildlife, or plant;

(iv) serious disruption or alteration of local, regional, or global climate; or

(v) significant waste or misuse of public natural resources⁴⁵

As the length and breadth of the preceding excerpt indicates, any attempt to develop an all-encompassing definition of an "environmental catastrophe" is a most difficult, and perhaps impossible, undertaking. In trying to ensure that all possible catastrophes are covered, such a result-oriented standard will inevitably encompass conduct which would otherwise merit a lesser criminal penalty. For example, one need not be an anti-environmentalist to question whether a discharge of a minimal amount of a pollutant which causes a nonlife-threatening "injury to a member of a threatened or endangered species of fish, wildlife, plant, or other natural resources,"⁴⁶ really

45. *Id.* § 735(5).

46. *Id.* § 735(5)(A).

constitutes an environmental catastrophe.

Thus, although the bill's goal of establishing aggravating factors is laudable, the legislation's utilization of a broadly defined catastrophe standard to upgrade present penalties may lead to an unfair application. For example, a first-time offender could be prosecuted for a "ten year" felony crime for a single, minor, reckless discharge⁴⁷ which does not actually cause substantial damage to the environment.

From a prosecutorial viewpoint, proving that a discharge constitutes an environmental catastrophe, as defined by the bill, may be more difficult than it initially appears. Such proof could require the analytical and testimonial services of an ecology expert whose results would, no doubt, be contradicted by the defendant's ecology expert, thereby leading to an expensive and often inconclusive "battle of the experts."

Also, in its attempt to upgrade the penalties for *all* presently existing environmental crimes, the proposed legislation may fail to accomplish its goal with regard to certain offenses. For example, as previously discussed,⁴⁸ a conviction for a negligent, unpermitted discharge of pollutants under the CWA carries a potential prison sentence of up to one year and a potential fine of up to \$25,000 *per day* of violation.⁴⁹ Under the proposed legislation, even if the government can prove that a negligent discharge under the CWA caused a risk of death, serious bodily injury, or environmental catastrophe, an individual can still only be sentenced up to one year of imprisonment and fined not more than a *total* of \$125,000.⁵⁰ Thus, if the government can prove that an individual illegally discharged for six days, the potential fine will be higher under the CWA than under the proposed crime of negligently endangering life or causing environmental catastrophe.

47. *Id.* § 731(b)(2)(A).

48. *See supra* note 32 and accompanying text.

49. 33 U.S.C. § 1319(c)(1)(B).

50. H.R. 3641, § 733.

V. Utilizing the Amount of Pollutant Discharged as a Criminal Penalty Aggravator

Under the present criminal provisions of the CWA, the quantity of pollutants discharged by the offender is irrelevant.⁵¹ Consequently, a person discharging one gallon of a pollutant can be charged with the same criminal penalty as a person discharging millions of gallons. However, the utilization of a quantity-based standard for penalty enhancement has been used in nonenvironmental, federal-criminal statutes such as those statutes penalizing the manufacture and distribution of controlled substances.⁵²

Furthermore, quantity-based aggravating standards have been included in some state environmental criminal laws. Under the statutory framework established by the State of New York to criminally penalize the illegal release⁵³ of hazardous substances⁵⁴ to the environment,⁵⁵ the amount of the hazardous substance released is utilized to determine the criminal penalty to be assessed.⁵⁶ Thus, a knowing or reckless release of any amount of a hazardous substance constitutes a class A misdemeanor,⁵⁷ but a knowing release to the state's

51. See *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1979); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). *United States v. Ashland Oil*, 364 F. Supp. 349, 351 (E.D. Ky. 1973);

52. For example, a person who manufactures, distributes, or dispenses 100 grams of heroin (or 500 grams of cocaine) faces a prison term of between 5 to 40 years, whereas the same person faces a term of 10 years to life if he manufactures, distributes, or dispenses one kilogram of heroin (or five kilograms of cocaine). 21 U.S.C. § 841(b) (1988).

53. A "release" is defined as "any pumping, pouring, emitting, emptying, or leaching, directly or indirectly, of a substance so that the substance or any related constituent thereof, or any degradation product of such a substance or of a related constituent thereof, may enter the environment, or the disposal of any substance." N.Y. ENVTL. CONSERV. LAW § 71-2702(13) (McKinney 1984 & Supp. 1989) [hereinafter E.C.L.].

54. Hazardous substances are defined by E.C.L. § 71-2702(10) and listed in N.Y. COMP. CODES R. & REGS. tit. 6, § 597 (1988).

55. New York's criminal release statute regarding hazardous substances is multi-media in nature and encompasses all releases regardless of whether the substance enters the air, water, or land. E.C.L. § 71-2702(12).

56. *Id.* §§ 71-2710 to -2714.

57. *Id.* § 71-2711(3).

waters⁵⁸ of more than one hundred gallons or one thousand pounds of a hazardous substance, whichever is less, constitutes a class D felony.⁵⁹ Similarly, reckless conduct which causes the release of more than two hundred gallons or two thousand pounds, whichever is less, of a hazardous substance constitutes a class E felony.⁶⁰

Emphasizing the quantity of a discharge as the standard, but not necessarily exclusive,⁶¹ aggravating factor for enhancing CWA criminal penalties is sensible from a fairness standpoint. Obviously, the larger the amount of a pollutant discharged, the greater the chance for catastrophic environmental impact. But to focus *only* on the resulting environmental impact, as the proposed Environmental Crimes Act does, ignores the discharge and examines only the injury it causes. Thus, if two independent point sources, A and B, each recklessly discharge the same quantity of a pollutant, but A's discharge is contained and cleaned up by the Coast Guard before it can cause the "environmental catastrophe" that B's discharge causes, only B will face the enhanced criminal penalties under the proposed act.

Clearly, a quantity-based penalty aggravator constitutes a more definitive enhancement measure than a "catastrophe" standard. Also, proving the quantity of the pollutants released in a specific discharge would not, generally, require the services of an expert since the amount discharged can often be established through purchase, storage, and transport records, or through a physical examination of the point source.⁶²

58. Such waters include lakes, rivers, bays, sounds, ponds, wells, streams, canals, marshes, reservoirs, the Atlantic Ocean within the territorial limits of the State of New York, and all other bodies of surface or underground water. *Id.* §§ 71-2702(7), 17-0105(2).

59. *Id.* § 71-2713(5).

60. *Id.* § 71-2712(2).

61. New York State's criminal statutes allow consideration of other factors when penalizing illegal releases of hazardous substances. These penalty-aggravating factors include a determination of whether a substantial risk of physical injury was created and whether physical injury to a person actually occurred. *See, e.g.*, E.C.L. §§ 71-2712 to -2714; *See also* E.C.L. § 71-1933.

62. 33 U.S.C. § 1318; Solid Waste Disposal Act § 3007, 42 U.S.C. § 6927.

VI. Conclusion

The basic rationale for including criminal penalties as part of the available enforcement weapons in environmental statutes is to compel compliance with the law by those who might otherwise be tempted to commit violations if they only faced a cost-of-doing-business administrative civil fine.⁶³ As the Exxon oil spill in Alaska and other recent major spills⁶⁴ have clearly demonstrated, large chemical and petroleum storage facilities and supertanker-type vessels possess the most potent capacity to inflict severe damage to our waters through massive discharges. However, it is the companies that operate such facilities and vessels, and that produce, store, and transport vast quantities of potential pollutants, that are most susceptible to "writing off" the expense of administrative, civil, and even criminal fines. Such "write-offs" will be exacerbated if the costs of regulatory compliance are far more expensive than potential statutory fines.⁶⁵ To insure that such companies and their executives comply with the law, the deterrent effect of a criminal conviction must be augmented by the threat of large criminal fines and substantial periods of incarceration. The need for increased criminal fines under the CWA may be somewhat obviated if present alternative sentencing provisions⁶⁶ are held to be available.⁶⁷ However, to re-

63. See *Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws*, 20 Env't Rep. (BNA) No. 6, at 337, 346 (June 9, 1989).

64. See, e.g., *United States v. Ashland Oil*, No. Cr. 88-146 (D.W. Pa. 1989), reported in 19 Env't Rep. (BNA) No. 46, at 2473 (Mar. 17, 1989) (the defendant pleaded *nolo contendere* to a CWA negligent discharge and other charges regarding the release of 750,000 gallons of diesel fuel when a storage tank collapsed. The fuel contaminated three rivers, forcing authorities to cut off drinking water supplies to one million people.); *United States v. Ballard Shipping Co.*, No. Cr. 89-051 (D.R.I. 1989), reported in 20 Env't Rep. (BNA) No. 20, at 831 (Sept. 15, 1989) (CWA convictions of both the company and the ship master for the negligent discharge of 290,000 gallons of heating oil into the Narragansett Bay).

65. See generally *Criminal Prosecutions in Environmental Law: A Study of the "Kepone" Case*, 12 COLUM. J. ENVTL. L. 291 (1987).

66. 18 U.S.C. § 3571(d) (1982) provides that if the offense the defendant is convicted of resulted in pecuniary loss to a person, e.g., the cost of containment or cleanup incurred by the government, the defendant can be fined double the amount of such loss.

67. The alternative sentencing provision authorized by 18 U.S.C.A. § 3571(d) was

ally insure that executives, facility managers, and tanker captains personally oversee that pollutants under their control do not accidentally or otherwise spill into our waters, the threat of certain,⁶⁸ and potentially substantial, incarceration must be present even for negligent discharges of large quantities of pollutants.

To provide the strongest possible deterrent, the CWA should contain "mega discharge" criminal provisions for both knowing and negligent discharges. Negligent, unpermitted pollutant discharges of more than 100,000 gallons⁶⁹ should be punishable by up to a three year prison term. Negligent discharges of over one million gallons should be punishable by both imprisonment and fines within the ranges enumerated by the proposed Environmental Crimes Act.⁷⁰

Such enhanced and graduated criminal penalty provisions will establish a balanced, comprehensive array of legal weapons for criminal enforcement of the CWA's illegal discharge provisions.

utilized by the sentencing judge in *United States v. Ashland Oil*, No. Cr. 88-146 (D.W. Pa. 1989), reported in 19 *Env't Rep.* (BNA) No. 46, at 2473 (Mar. 17, 1989). Ashland was fined \$2.25 million after pleading *nolo contendere* to misdemeanor counts initiated under the CWA and the Refuse Act. *Id.* The Justice Department has announced that it intends to utilize these alternative fine provisions in the Exxon prosecution. *N.Y. Times*, Mar. 1, 1990, at D25, col. 2.

68. Mandatory incarceration for certain convicted defendants who have committed specified offenses is one of the goals of the federal sentencing guidelines prepared by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(a) (1988). A judge who is sentencing a convicted defendant must select a sentence from within a guideline range which is based on the offense level and the defendant's criminal history. The Clean Water Act offenses are covered under UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL, §§ 2Q1.1-2Q1.3 (Nov. 1989).

These guidelines were recently used by a judge in imposing incarceration for a conviction of a knowing discharge under the CWA. *United States v. Mills*, No. Cr. 88-03100-WEA (D.N. Fla. 1989), reported in 19 *Env't Rep.* (BNA) No. 51, at 2633 (Apr. 21, 1989).

69. The discharge of 100,000 gallons or more of oil in a coastal waterway is considered by the United States Coast Guard to be a major spill. *N.Y. Times*, Mar. 8, 1990, at B1, col. 4.

70. H.R. 3641, § 733.