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The Toxic Crusaders: Exploring the History of the Criminal Enforcement of the Toxic Substances Control Act

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THE TOXIC CRUSADERS: EXPLORING THE HISTORY OF THE CRIMINAL ENFORCEMENT
OF THE TOXIC SUBSTANCES CONTROL ACT

Dr. Joshua Ozmy & Dr. Melissa L. Jarrell***

TABLE OF CONTENTS

| | |
|--|-----|
| ABSTRACT | 182 |
| INTRODUCTION | 183 |
| OVERVIEW OF TSCA | 185 |
| OVERVIEW OF CRIMINAL ENFORCEMENT | 189 |
| DATA | 195 |
| RESULTS | 196 |
| CONCLUSION..... | 214 |

ABSTRACT

The criminal prosecution of defendants who violated federal laws governing chemical substances has been ongoing for roughly four decades. Yet we continue to have a poor understanding of how federal prosecutors use the U.S. Toxic Substances Control Act (TSCA) to charge and prosecute environmental criminals. Through content analysis of all the Environmental Protection Agency's (EPA) criminal prosecution case summaries from 1983 to 2019, we analyze all TSCA-focused prosecutions for two purposes. First, to gain a better historical understanding of how federal prosecutors have used TSCA as a prosecutorial tool. Second, to understand outcomes of those prosecutions. Results show that 38% of prosecutions focus on PCB-related crimes, 34% on asbestos crimes, 24% on lead-based paint crimes, and 4% on chemical crimes. Cumulatively, defendants were assessed over \$170 million in penalties, 3,200 months' probation, and 1,900 months incarceration. We conclude with forward-facing solutions for improving the criminal enforcement of TSCA including enhanced public salience, resources, and community policing.

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INTRODUCTION

Benjamin Franklin Pass was the owner of P&W Waste Oil Services in North Carolina, a company in the business of collecting and blending used oil for industrial use.¹ The large operation included a tank farm for collecting material in amounts ranging from 20,000 gallons to 500,000 gallons.² In July 2009, an employee of P&W collected and transported oil that was contaminated with polychlorinated biphenyls (PCBs) and, with the knowledge of Pass, who had obtained testing results that the oil was contaminated, continued to sell the polluted oil to companies and mishandled the material, causing significant contamination to both the company's tank farm and companies that accepted the product.³ A customer, Colonial Oil, had to transport and incinerate some three million gallons of contaminated oil at a cost of \$17 million, and EPA declared P&W a Superfund site and incurred over \$3.4 million in remediation costs.⁴ An investigative unit including EPA's Criminal Investigation Division (EPA-CID), typically in charge of investigating federal environmental crimes, along with investigators from the U.S. Internal Revenue Service's (IRS) Office of Criminal Investigations (CI) and the U.S. Coast Guard's Investigative Services (CGIS) found Pass had knowledge of the contaminated oil, employees had illegally discharged the oil near the tank farm, the company falsely certified its employees had taken required hazardous waste training, and between 2002–2011, Pass also

1 Mark Hibbs, *Navassa: From Guano to Creosote*, COSTAL REV. ONLINE (July 13, 2016), <https://www.coastalreview.org/2016/07/15413/>.

2 *Id.* The company operated in the area between 1993–2013. *Id.*

3 *Prosecution of Federal Environmental Crimes*, U.S. DEP'T JUST., <https://www.justice.gov/enrd/prosecution-federal-pollution-crimes> (last updated May 13, 2015).

4 Larry Sackett, *EPA to Clean Up Navassa Superfund Site*, STARNEWS ONLINE (Sept. 13, 2013), <https://www.starnewsonline.com/article/NC/20130913/News/605045007/WM>. Restitution was ordered to two companies impacted by P&W's illegal actions including Colonial Oil and International Paper, as well as to EPA for cleanup and remediation costs at P&W's facility; *Waste Oil Co. Will Pay \$19M After Copping to TSCA Breach*, LAW360 (July 15, 2013), <https://www.law360.com/articles/457350/waste-oil-co-will-pay-19m-after-copping-to-tsca-breach>.

failed to pay federal income taxes.⁵ In *United States v. Pass*, Benjamin Franklin Pass and P&W were charged with giving false material statements, unlawful handling of PCBs under the Toxic Substances Control Act (TSCA), and failing to pay income taxes.⁶ The defendants were charged by the U.S. Attorney's Office and the U.S. Department of Justice's (DOJ) Environmental Crimes Section (DOJ-ECS), which are the typical entities that work with EPA-CID to bring criminal charges and prosecute offenders in federal environmental crime prosecutions.⁷ On July 16, 2014, Pass was sentenced to serve forty-two months in prison, pay restitution in the amount of \$21,373,143.38, and pay \$538,857 in back taxes to the IRS, while P&W was sentenced to serve five years of probation, and ordered to remediate environmental contamination at its facility.⁸

Investigating and prosecuting environmental crimes involving significant harm and culpable conduct, such as those committed by Benjamin Franklin Pass and P&W Oil Company, demonstrate the value and necessity of criminal enforcement to punish serious violations of environmental law and deter future offenders.⁹ Investigating and prosecuting these crimes also demonstrates the importance of coordination between federal law enforcement agencies to

5 *United States v. Pass*, 7:12-cr-00085-D-1 (E.D.N.C., 2014). *See also* *United States v. Pass*, 610 Fed. Appx. 332 (4th Cir. 2015) (mem.).

6 Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003 (codified at 15 U.S.C. § 2601 et seq.). TSCA allows EPA to regulate PCBs, which were used as lubricants and coolants in a variety of applications. DTSC, *Polychlorinated Biphenyl (PCB) Evaluation Quick Reference Guide*, CA.GOV (Dec. 5, 2018), <https://dtsc.ca.gov/brownfields/polychlorinated-biphenyl-pcb-evaluation-quick-reference-guide/> (owing to their toxic nature to humans and persistence in the environment, they were banned in most applications by the late 1970s. They still exist in electrical transformers and some other applications.).

7 *Environmental Crimes Section: Prosecutors Protecting Our Nation's Ecological Heritage*, U.S. DEP'T OF JUST., <https://www.justice.gov/enrd/environmental-crimes-section> (last updated Jan. 21, 2021); *see also* 5-11.000—*Environmental Crimes*, U.S. DEP'T JUST., <https://www.justice.gov/jm/jm-5-11000-environmental-crimes> ([last updated](#) May 2018).

8 Office of Public Affairs, *North Carolina Recycling Business and Owner Sentenced to Unlawful Handling of PCB-Contaminated Oil, Tax Violations, and False Statements*, U.S. DEP'T JUST. (July 16, 2014), <https://www.justice.gov/opa/pr/north-carolina-recycling-business-and-owner-sentenced-unlawful-handling-pcb-contaminated-oil>.

9 Memorandum from Office of Crim. Enforcement to the Env't. Protection Agency 3 (Jan. 12, 1994), <https://www.epa.gov/sites/production/files/documents/exercise.pdf>.

pursue cases against chronic and serious violations of environmental law.¹⁰ While the application of criminal enforcement tools is decidedly valuable for enforcing TSCA, very little is known about how EPA-CID criminal investigators and DOJ prosecutors have pursued such cases historically.¹¹ We work to fill this gap through analysis of all TSCA criminal prosecutions stemming from EPA-CID criminal investigations, 1983–2019. Through content analysis of EPA-CID criminal prosecution summaries, we are able to select for analysis all prosecutions where defendants were charged under TSCA and explore charging and sentencing patterns in these prosecutions over thirty-seven years. We are also able to draw out the broader themes in TSCA prosecutions. We provide an overview of TSCA below, followed by a discussion of the history of federal environmental criminal enforcement, criminal provisions of TSCA, and then our method and analysis.

OVERVIEW OF TSCA

The year 2020 represents the 50th anniversary of the founding of the U.S. Environmental Protection Agency (EPA). Significant legislative achievements followed the creation of the agency including: The National Environmental Policy Act (NEPA), the Clean Air Act (CAA), the Clean Water Act (CWA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Endangered Species Act (ESA), the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Toxic Substance Control Act (TSCA).¹² The

¹⁰ *Id.*

¹¹ Few studies examine the sentencing and punishment of environmental offenders. For examples, see Michael J. Lynch et al., *The Weak Probability of Punishment for Environmental Offenses and Deterrence of Environmental Offenders: A Discussion Based on USEPA Criminal Cases, 1983–2013*, 37 *DEVIANT BEHAV.* 1095, 1096–99 (2016); Michael J. Lynch, *The Sentencing/Punishment of Federal Environmental/Green Offenders, 2000–2013*, 38 *DEVIANT BEHAV.*, 991, 991–95 (2017) [hereinafter Lynch, *The Sentencing/Punishment*]; Matthew J. Greife et al., *Corporate Environmental Crime and Environmental Justice*, 28 *CRIM. JUST. POL'Y REV.* 327 (2017).

¹² National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321); Clean Air Act Extension of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Water Act of 1972, 33 U.S.C. § 1251; Federal Insecticide, Fungicide, and Rodenticide Act of 1910, 7 U.S.C. § 136 et seq.; Endangered Species Act of

creation of the EPA and these sweeping legislative actions by Congress ushered in the modern era of environmental regulation, as well as representing the country's farthest reaching legislative commitment to protecting human and animal health and the natural environment.

TSCA is a far-reaching piece of federal legislation that empowers the EPA to regulate chemical substances. TSCA was enacted in 1976 to create comprehensive federal legislation to regulate chemical substances prior to their introduction into commerce in the United States.¹³ When passing TSCA, Congress was focusing on emerging research demonstrating the cumulative hazards posed by exposure to various toxic chemicals not covered in laws governing other media, such as the CAA and CWA.¹⁴ Dissatisfaction in Congress, environmental groups, and the regulated community resulted in the passage of the Frank R. Lautenberg Chemical Safety for the 21st Century Act in 2016.¹⁵ This Act changed the nature of TSCA implementation, forcing EPA to develop protocols and time limits for testing substances against a public health or risk-based standard with appropriate review times for new introductions and required them to target ten substances with the most potential health risks to be subjected to risk assessments.¹⁶ Prior to the Act's passage there was no strict obligation on EPA to assess the risk of any particular chemical substance.¹⁷ This was a major flaw in the original Act, as it did not require manufacturers to

1973, 16 U.S.C. § 1531 et seq.; Safe Drinking Water Act of 1974, 42 U.S.C. § 300f; Resource Conservation and Recovery Act of 1976, 42 U.S.C. ch. 82 § 6901 et seq.

13 Colin P. Eichenberger, *Improving the Toxic Substances Control Act: A Precautionary Approach to Toxic Chemical Regulation*, 72 AIR FORCE L. REV. 123, 125 (2015).

14 John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 ECOLOGY L. Q. 721, 723 (2008).

15 Frank R. Lautenberg Chemical Safety for the 21st Century Act of 1976, Pub. L. No. 114-182, 130 Stat. 448.

16 *Frank R. Lautenberg Chemical Safety for the 21st Century Act*, EPA.GOV, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act> (last updated Aug. 14, 2019);

Richard A. Denison, *A Primer on the New Toxic Substances Control Act (TSCA) and What Led to It*, ENV'T. DEF. FUND (Apr. 2017), <https://www.edf.org/sites/default/files/denison-primer-on-lautenberg-act.pdf>.

17 Denison, *supra* note 16.

provide information on the environmental and health effects of their chemicals unless EPA passes a rule requiring such action.¹⁸

The Office of Pollution Prevention and Toxics (OPPT) oversees programs related to the TSCA. This general authority authorizes the agency to regulate many key aspects of the manufacturing, use, and importation of chemical substances.¹⁹ TSCA defines “chemical substance” as, “any organic or inorganic substance of a particular molecular identity, including any combination of these substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and any element or uncombined radical . . . these include organics, inorganics, polymers, and chemical substances of unknown or variable composition, complex reaction products, and biological materials (UVCBs).” Pesticides, food additives, drugs, cosmetics, tobacco and tobacco products, nuclear materials, and munitions are not covered by TSCA.²⁰

All chemical substances regulated by EPA under TSCA are housed in the Toxic Substances Control Act Chemical Substance Inventory (TSCA Inventory) that contains some 86,557 chemicals, 41,864 of which are currently active.²¹ Timely reporting is required by any responsible party to report to the agency any knowledge that a chemical substance or mixture represents a

18 Mitchell L. Guc, *TSCA and the Lautenberg Act: Bloated Regulation, or Effective Legislation?*, 49 *Univ. Tol. L. Rev.* 461, 465 (2018). REACH, the European Union counterpart to TSCA, requires manufacturers to provide information on environmental and health effects. A U.S. GAO comparative study of TSCA and REACH for the latter lacking on this and other fronts. *See U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-825, CHEMICAL REGULATION: COMPARISON OF U.S. AND RECENTLY ENACTED EUROPEAN UNION APPROACHES TO PROTECT AGAINST THE RISK OF TOXIC CHEMICALS (2007)*, <https://www.gao.gov/assets/gao-07-825.pdf>.

19 *About the Office of Chemical Safety and Pollution Prevention (OCSPP)*, EPA, <https://www.epa.gov/aboutepa/about-office-chemical-safety-and-pollution-prevention-ocspp#oppt> (last updated Apr. 14, 2021).

20 *About the TSCA Chemical Substance Inventory*, EPA, <https://www.epa.gov/tsca-inventory/about-tsca-chemical-substance-inventory#chemicalsubstancedefined> (last updated Mar. 2, 2021).

21 *How to Access the TSCA Inventory*, EPA, <https://www.epa.gov/tsca-inventory/how-access-tsca-inventory#download> (last updated Feb. 25, 2021).

substantial risk of injury to human health or the environment.²² TSCA gives the EPA authority to require industry to test chemical substances and mixtures if EPA risk assessors are unable to determine whether a substance presents an unreasonable risk to human health and the environment.²³ A search of the database reveals this mandate was uncommon, as historically only 266 chemical substances have historically been subject to testing rules.²⁴ TSCA empowers the agency to determine whether to require pre-manufacture notation for “new chemical substances” or determine if a chemical substance is a “significant new use” and be subjected to Significant New Use Rules (SNURs), which requires a responsible party to give notice to the agency before a chemical substance meeting these guidelines is imported, manufactured, or processed for the intended new use.²⁵ TSCA has primarily been used as a vehicle to manage chemical substances that have historically been seen as a broader public health problem, rather than used to determine the risk of specific chemical substances used in commerce. For example, PCBs, asbestos, radon, lead, formaldehyde, and mercury have been the historical focus of using TSCA to manage greater societal exposures to harmful substances, but most toxic petrochemicals, plastics, and other potentially harmful substances remain easily available.²⁶

22 *Summary of the Toxic Substances Control Act*, EPA, <https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act> (last updated Sept. 9, 2020).

23 *Industry Testing Requirements under TSCA Section 4*, EPA, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/industry-testing-requirements-under-tsca-section-4> (last updated Dec. 14, 2017).

24 *Sunset Dates of Chemicals Subject to Final TSCA Section 4: Test Requirements and Related Section 12(b) Actions*, EPA, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/sunset-dates-chemicals-subject-final-tsca-section-4-test> (last updated Feb. 18, 2021).

25 *Significant New Use Rules on Certain Chemical Substances*, EPA (Mar. 27, 2017), https://www.epa.gov/sites/production/files/2019-03/documents/9991-19_19t-0039_prepubcopy_2019-03-27.pdf [hereinafter EPA SNURs].

26 *Toxic Substances Control Act (TSCA) and Federal Facilities*, EPA, <https://www.epa.gov/enforcement/toxic-substances-control-act-tsca-and-federal-facilities> (last updated Feb. 9, 2021). A mercury export ban was passed in 2008.

TSCA contains six primary sub-chapters. Subchapter I authorizes the agency to define and control chemical substances.²⁷ Subchapter II focuses on the Asbestos Hazard Emergency Response Act (AHERA), which requires schools to inspect their buildings for asbestos, develop management plans, and develop standards for removal if the asbestos is disturbed.²⁸ Subchapter III centers on the problem of radon gas in homes and provides grant funding for indoor radon abatement.²⁹ Subchapter IV focuses on the passage of the Residential Lead-Based Paint Hazard Reduction Act in 1992 that gives EPA authority to set standards for lead-paint in residential buildings and those buildings occupied for children.³⁰ Subchapter V develops a state grant program for schools and Subchapter VI authorizes EPA to set standards for formaldehyde in composite wood products.³¹

OVERVIEW OF CRIMINAL ENFORCEMENT

Developing criminal enforcement tools for the environment requires the creation of criminal provisions in federal environmental law, as well as institutionalizing policing, and

27 EPA *SNURs*, *supra* note 25.

28 AHERA requires schools and government buildings to investigate potential asbestos hazards and develop asbestos management plans. *See Asbestos and School Buildings*, EPA, <https://www.epa.gov/asbestos/asbestos-and-school-buildings> (last updated Feb. 23, 2021).

29 Radon is the second leading cause of lung cancer in the United States and occurs primarily from breathing radon gas inside schools, homes, or the workplace. *See What is Radon Gas? Is it Dangerous*, EPA, <https://www.epa.gov/radiation/what-radon-gas-it-dangerous> (last updated Aug. 21, 2019).

30 Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. 102-550, Title X, 106 Stat. 3897 (codified at 42 U.S.C. § 4851). Lead-based paint rules are focused on preventing children in homes rented or owned prior to 1978 from ingesting lead-based paint that flakes and peels off the walls and can be extremely toxic. The basis for lead-based paint disclosures when selling or renting a dwelling has its genesis in this concern. *See Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/sites/documents/DOC_12345.PDF; *Lead in Paint*, U.S. CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nceh/lead/prevention/sources/paint.htm> (last updated Nov. 24, 2020). *TSCA Section 404(g) Lead-Based Paint Programs*, EPA (Oct. 2016), <https://19january2017snapshot.epa.gov/sites/production/files/2016-12/documents/2017tscagrantsag.pdf>.

31 *Formaldehyde Emission Standards for Composite Wood Products*, EPA, <https://www.epa.gov/formaldehyde/formaldehyde-emission-standards-composite-wood-products> (last updated Mar. 14, 2021); *Summary of the Toxic Substances Control Act*, EPA, <https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act> (last updated Sept. 9, 2020).

prosecutorial resources.³² Misdemeanor provisions in federal environmental law began with the Rivers and Harbors and Lacey Acts in 1899 and 1900.³³ These Acts prohibited altering, obstructing, or discharging into the waterways of the United States and made illegal the unpermitted interstate trade in wildlife.³⁴ Additional misdemeanor provisions were included over time in major environmental statutes such as the CWA, CAA, RCRA, and TSCA through the 1970s. It was not until the passage of the Hazardous and Solid Waste amendments to RCRA in the 1980s that felony provisions made their way into federal environmental law.³⁵ Felony provisions expanded in the 1980s and 1990s under the CWA and CAA and now most federal environmental statutes contain felony provisions.³⁶

EPA's policing resources became institutionalized with the creation of the Office of Enforcement in 1981, later changed to the current Office of Enforcement and Compliance

32 The idea that EPA criminal investigators and DOJ prosecutors should have dedicated resources to prosecute criminal behaviors that negatively affect human health, animals, and the natural environment has always been a politically contentious issue. Many argue that prosecutors have abused their discretion, are overzealous in their approach, and that the manner in which they use criminal provisions stretch the intent and purpose of environmental statutes. Studies of criminal prosecution, however, have shown prosecutors almost always pursue violations with a series of aggregating factors including chronic offenders, significant harm, deceptive or misleading conduct, or operating outside the regulatory system. See Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 900–10 (1991); Theodora Galacatos, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 FORDHAM L. REV. 587, 590–95 (1995); WASH. LEGAL FOUND., SPECIAL REPORT: FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES ch. 2 (2008), https://lawprofessors.typepad.com/whitecollarcrime_blog/files/wlf_timeline.pdf; David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T. L. REV. 159 (2014).

33 Rivers and Harbors Act, 33 U.S.C. § 403 (2012); Lacey Act, 16 U.S.C § 3371 (2012).

34 Rivers and Harbors Act, 33 U.S.C. § 403; Lacey Act, 16 U.S.C § 3371.

35 *Historical Development of Environmental Criminal Law*, U.S. DEP'T OF JUST., <https://www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law> (last updated May 13, 2015).

36 For examples of criminal provisions in federal environmental law see *Criminal Provisions of the Clean Air Act*, EPA, <https://www.epa.gov/enforcement/criminal-provisions-clean-air-act> (last updated Mar. 12, 2018); *Criminal Provisions of Water Pollution*, EPA, <https://www.epa.gov/enforcement/criminal-provisions-water-pollution> (last updated Aug. 21, 2020); *Criminal Provisions of the Resource Conservation and Recovery Act (RCRA)*, EPA, <https://www.epa.gov/enforcement/criminal-provisions-resource-conservation-and-recovery-act-rcra> (last updated Mar. 12, 2018).

Assurance (OECA).³⁷ The following year criminal investigators, also called special agents, or 1811s, were hired and deputized as Special Deputy U.S. Marshalls from 1984 until 1988 when Congress granted them full law enforcement authority.³⁸ EPA's Criminal Investigation Division (EPA-CID) employs roughly 145 special agents to police environmental crimes throughout the country.³⁹ The Office of Criminal Enforcement, Forensics, and Training (OCEFT) was founded in 1995 to house enforcement work and provide forensics support for investigations.⁴⁰

What is now the DOJ's Environmental and Natural Resources Division (ENRD) began in 1909 as the Public Lands Division.⁴¹ The Environmental Crimes Section (DOJ-ECS) was founded in 1982 and became its own unit within ENRD in 1987.⁴² Its civil counterpart, the Environmental Enforcement Section (EES), oversees civil-judicial cases.⁴³ DOJ-ECS currently employs some forty-three prosecutors and a dozen support staff with expertise in environmental crime.⁴⁴ ENRD organizes its work into four categories of litigation including pollution crimes, wildlife crimes,

37 *About the Office of Enforcement and Compliance Assurance (OECA)*, EPA, <https://www.epa.gov/aboutepa/about-office-enforcement-and-compliance-assurance-oeca> (last updated Apr. 14, 2021) [hereinafter *EPA About OECA*].

38 EPA, MANAGEMENT REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS AND TRAINING (OCEFT) (Nov. 2003), <https://www.epa.gov/sites/production/files/documents/oceft-review03.pdf>.

39 The number of investigative staff for EPA-CID differs based on source. This difference is often based on whether the measure is the number of special agents that perform only investigative work or those that are also administrators and support staff. For example, the Bureau of Justice Studies gives a figure of 214 full-time staff in EPA-CID in 2016. Public Employees for Environmental Responsibility (PEER) requests of EPA in 2016 lists the number of special agents at 157. See *U.S. Environmental Protection Agency Criminal Enforcement Program: America's Environmental Crime Fighters*, EPA, <https://www.epa.gov/sites/production/files/documents/oceftbrochure.pdf>; *Federal Law Enforcement Officers, 2016—Statistical Tables*, U.S. DEP'T OF JUST. (Oct. 2019), <https://www.bjs.gov/content/pub/pdf/fleo16st.pdf>; *EPA CID Agent Count*, PUB. EMP. FOR ENV'L RESP. (Nov. 21, 2019), https://www.peer.org/wp-content/uploads/2019/11/11_21_19-Federal_Pollution_EPA_CID_Agent_Count.pdf.

40 *EPA About OECA*, *supra* note 37.

41 *History*, U.S. DEP'T OF JUST., ENV'L. & NAT. RES. DIV., <https://www.justice.gov/enrd/history> (last updated June 19, 2019).

42 *Historical Development of Environmental Criminal Law*, U.S. DEP'T OF JUST., ENV'L. & NAT. RES. DIV., <https://www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law> (last updated May 13, 2015).

43 *An Overview of Our Practice*, U.S. DEP'T OF JUST., ENV'L. & NAT. RES. DIV., <https://www.justice.gov/enrd/overview-our-practice> (last updated May 14, 2015).

44 *Environmental Crimes Section*, *supra* note 7.

animal welfare crimes, and worker safety crimes with TSCA violations falling under the category of pollution crimes.⁴⁵

When individuals or companies break the law, EPA must engage in investigations of the infractions and undertake decisions of whether to take enforcement actions. The more typical enforcement action relies on a variety of civil remedies, these civil remedies include: monetary penalties, injunctive relief settlements, Administrative Orders on Consent (AOCs), mandated mitigation plans, or Supplemental Environmental Projects (SEPs) that require the violator to perform an agreed upon action.⁴⁶ EPA investigations typically involve cooperation and collaboration with state and local agencies, law enforcement, and other agencies.⁴⁷ Criminal investigators tend to be tipped-off to a particular crime due to a few primary sources, such as self-reported documents, former employees, and civil investigators from various agencies.⁴⁸ Once special agents build sufficient evidence that a crime has occurred, the most typical scenario is to approach prosecutors in DOJ-ECS or the U.S. Attorney's Office to file an information in District Court or convene a grand jury.⁴⁹

Criminal actions are reserved for willful or knowing violations that involve intent, as well as negligent violations of the law. EPA criminal investigators must consider if evidence suggests that the potential crime can be proven beyond a reasonable doubt, versus a standard of a

45 5-11.000—*Environmental Crimes*, U.S. DEP'T OF JUST. ENV'T. & NAT. RES. DIV., <https://www.justice.gov/jm/jm-5-11000-environmental-crimes> (last updated May 2018).

46 *Basic Information on Enforcement*, EPA, <https://www.epa.gov/enforcement/basic-information-enforcement> (last updated Jan. 13, 2021).

47 Theodore M. Hammett & Joel Epstein, *Local Prosecution of Environmental Crime*, U.S. DEP'T OF JUST., at xiv (June 1993), <https://www.ojp.gov/pdffiles1/Digitization/143270NCJRS.pdf>.

48 Joel A. Mintz, *Some Thoughts on the Interdisciplinary Aspects of Environmental Enforcement*, 36 ENV'T. L. REP. 10495, 10497 (2006), <https://elr.info/sites/default/files/articles/36.10495.pdf> [hereinafter Mintz, *Some Thoughts*].

49 JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES*, (Univ. of Tex. Press 2012); Mintz, *Some Thoughts*, *supra* note 48, at 10497.

preponderance of the evidence. They generally pursue criminal cases if they involve significant environmental harm and culpable conduct. Given the nature of most environmental crimes and the costs of criminal prosecution, civil remedies are more typical if the agency decides an enforcement action is warranted.⁵⁰

The EPA must engage in compliance monitoring with the help of state environmental agencies to ensure regulated entities obey the law. This monitoring comes in the form of ensuring that companies hold proper permits and follow appropriate rules and regulations. Unlike other federal environmental statutes, TSCA permitting an enforcement is not heavily devolved to the states like the CAA or CWA but is primarily administered at the federal level. The agency maintains a compliance monitoring strategy for the TSCA that focuses on four key areas: new and existing chemicals, PCBs, asbestos, and lead-based paint.⁵¹ Criminal provisions of TSCA are used by federal prosecutors to prosecute environmental crimes. They focus on knowing violations in the following categories: general knowing or willful violations of TSCA; failure to comply with

50 David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 4 UTAH L. REV. 1223, 1244 (2009); Memorandum from Earl E. Devaney, Off. of Crim. Enf't on the Exercise of Investigative Discretion to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994), <https://www.epa.gov/sites/production/files/documents/exercise.pdf>; Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L. J. 1077 (2001), https://kb.osu.edu/bitstream/handle/1811/70461/OSLJ_V62N3_1077.pdf.

51 *Compliance Monitoring Strategy for the Toxic Substances Control Act (TSCA)*, EPA (2016), <https://www.epa.gov/sites/production/files/2014-01/documents/tsca-cms.pdf>; 15 U.S.C. § 2651. This compliance monitoring focus under the banner of asbestos includes the Asbestos Hazard Emergency Response Act (AHERA), which is the primary mechanism for requiring schools (public and private) and other public facilities to inspect, monitor, and properly abate asbestos-containing materials (ACM) if they build or renovate facilities. Public agencies need not abate ACM if the materials are not removed or severely damaged and stay “in-place,” not posing a threat to public health. PCBs, like lead-based paint and asbestos were all in very widespread commercial, industrial, and residential use in the United States and still pose significant hazards to human and animal health and the natural environment. PCBs are no longer manufactured in the United States, but still in use, given their ubiquity in many sectors of the economy. Lead-based paint and asbestos still have limited uses. PCBs are still found in electrical transformers and asbestos in pipe coatings, floor and ceiling tiles, acoustic ceiling texture, and other applications in commercial and residential buildings. Lead-based paint can also be found in residential facilities. The “in-place” rule still applies, where if they are not disturbed and pose no risk to human health they can remain in use, but if a responsible party has knowledge of these materials they must use proper procedures to remove and dispose of the regulated materials.

an order or inspection; PCB violations; violation pre-manufacture notice requirements; knowing reporting violations; and knowing denial of entry. All crimes carry penalties of up to one year in prison and \$50,000 per day, maximum sentence. General knowing or willful violations carry up to fifteen years of incarceration and a \$250,000 fine; fines for corporations can extend up to \$1 million.⁵²

Many studies have examined how the EPA uses its civil enforcement tools but we still have a relatively poor understanding of how the agency uses its criminal enforcement tools.⁵³ How TSCA has been interpreted and utilized by federal prosecutors and the outcomes of those prosecutions is mostly unknown. Our primary goal in this article is to fill this gap through an exploration of the charging and sentencing patterns in TSCA prosecutions, 1983–2019. Through analysis of all TSCA-focused federal prosecutions we are able to study how prosecutors used the TSCA in various criminal enforcement scenarios exclusively and in conjunction with other statutes and explore the punishments meted out to offenders. Findings will help scholars better comprehend how these criminal enforcement tools are used and understand the universe of TSCA prosecutions since the creation of the modern criminal enforcement process, as well as whether it reflects the EPA's Compliance Monitoring Strategy for the TSCA.

52 *Criminal Provisions of the Toxic Substances Control Act (TSCA)*, EPA, <https://www.epa.gov/enforcement/criminal-provisions-toxic-substances-control-act-tsca> (last updated May 7, 2020); 15 U.S.C. §§ 2615(b), 2615(b)(2)(A).

53 Lynch, *The Sentencing/Punishment*, *supra* note 11, at 1008; Joshua Ozmy & Melissa L. Jarrell, *Why do Regulatory Agencies Punish? The Impact of Political Principals, Agency Culture, and Transaction Costs in Predicting Environmental Criminal Prosecution Outcomes in the United States*, 33 REV. OF POL'Y RSCH. 71, 72 (2016); Wayne B. Gray & Jay P. Shimshack, *The Effectiveness of Environmental Monitoring and Enforcement: A Review of the Empirical Evidence*, 5 REV. OF ENV'L, ECON. & POL'Y 1, 1–3 (2011).

DATA

We collect data from the EPA's *Summary of Criminal Prosecutions* database.⁵⁴ The EPA database captures all federal and state prosecutions resulting from EPA criminal investigations. We searched the database by EPA fiscal year beginning with the first case in the dataset in 1983 through the last case as of January 1, 2020. We coded the following categories in the data using content analysis of each prosecution summary: summary data on the crime, year, docket number, state, major environmental and non-environmental charging statutes used, number of defendants in the case, whether the defendants were companies or individuals, cumulative penalties assessed to all individual and company defendants, and whether each case involved a death or injury to humans that was clearly discussed in the summary. If the case was prosecuted under the TSCA, we included it in the analysis below. We analyzed 2,588 total cases, which yielded seventy-two TSCA prosecutions. The OECA and ECS were founded in 1981 and 1982 respectively making this dataset fairly representative of the history of TSCA criminal prosecutions.

We are only able to analyze cases the EPA entered into the database, which is the primary limitation of our approach. If the agency failed to include a case those prosecutions are unknown to us and cannot be included in the analysis. Other agencies may also pursue criminal prosecution of environmental crimes. The role of key players, such as investigators, prosecutors, other agencies, defendants, or judges, is unknown in most cases unless any of this information is included in the prosecution summaries. The U.S. Government's fiscal year runs October-September, so we lack data from the remainder of FY 2019. We concluded the analysis on January 1, 2020. One can use various search criteria to explore the database, including state,

⁵⁴ Prosecution summaries for the cases that follow can be accessed via the following database. Cases can be searched by the name of the primary defendant in the case noted after each case is mentioned in the text. *Summary of Criminal Prosecutions*, EPA, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm (last updated Feb. 20, 2021).

charging statute, year, etc. We found searching by fiscal year going case-by-case was the most accurate method to catalog all the TSCA cases. A search of the database using statute (TSCA) at the time of writing revealed sixty cases through 2019. When the database was analyzed using our method, going case-by-case, we found an additional twelve prosecutions.

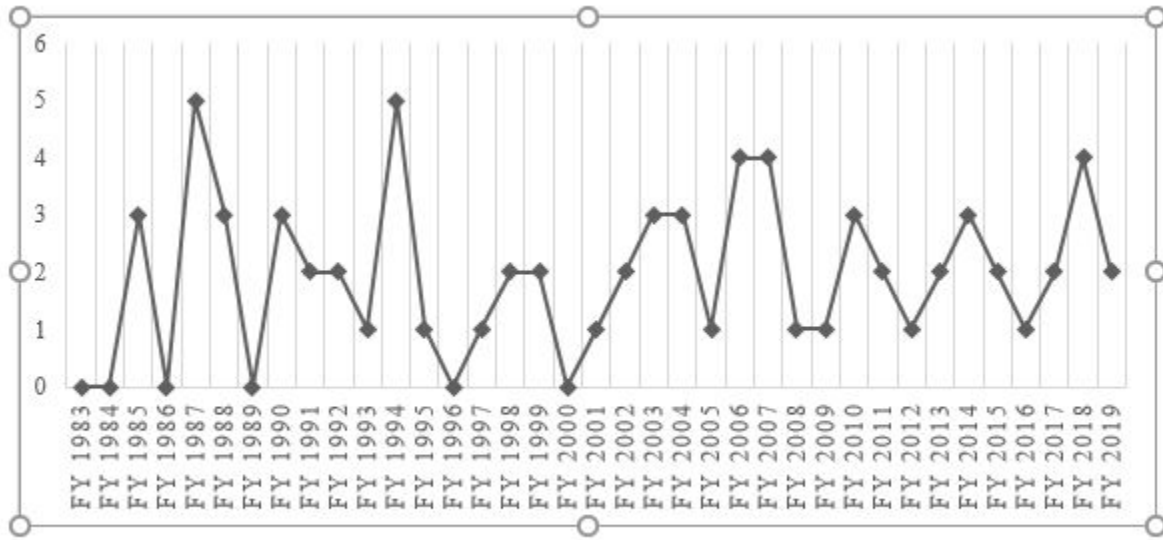
We developed our coding protocols by examining criminal prosecutions through FY 2005. We piloted protocols with two coders for four weeks until inter-coder reliability reached above 90%. Two individuals coded cases and one of the authors reviewed for discrepancies. These were discussed among the group to find consensus. Complex sentences represented the most common scenario of disagreement. The level of agreement for the overall analysis was approximately 95% by dividing the agreed upon items by total items coded in the dataset.⁵⁵

RESULTS

Figure 1 displays the total number of TSCA criminal prosecutions adjudicated per EPA fiscal year, 1983–2019. The indictment and final sentencing can take multiple years, so the number of annual cases is not itself wholly indicative of prosecutorial efforts on a particular year. It is more interesting to explore these as a trend over time. The first adjudicated prosecution occurs in 1985, which rises to five prosecutions in 1987. Annual prosecutions do not equal this number until 1994 and then trend between zero and four prosecutions until 2019. Eleven prosecutions were adjudicated in the 1980s, nineteen in the 1990s, twenty from 2000–2009, and twenty-two from 2010–2019. Cumulative prosecutions equaled seventy-two for this time-period, with an average of about two per fiscal year.

⁵⁵ OLE R. HOLSTI, *CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES* (1969); EARL R. BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* (2012).

Figure 1. Total TSCA Criminal Prosecutions by EPA Fiscal Year, 1983–2019.

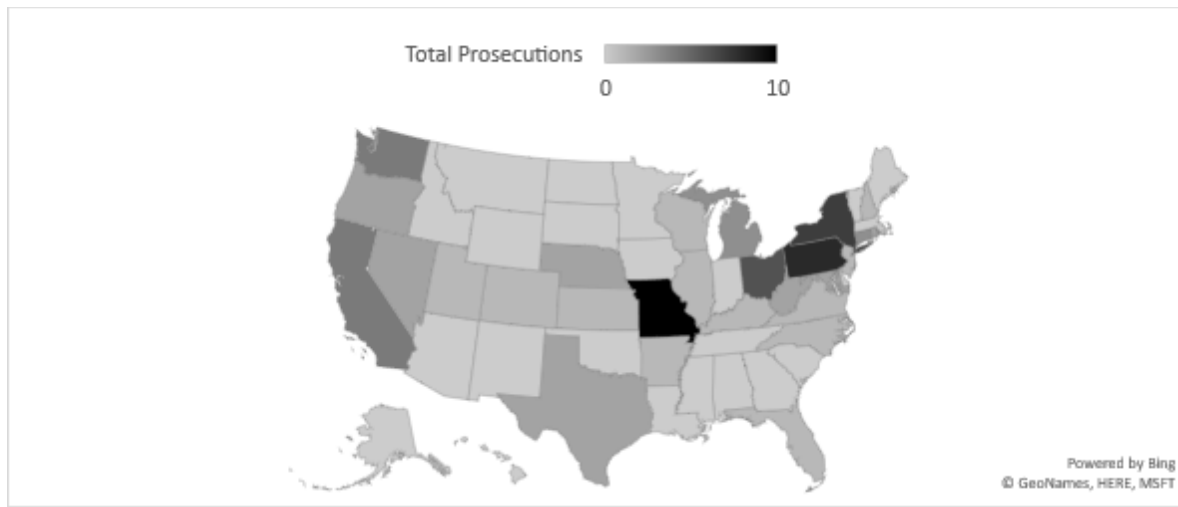


Source: EPA Summary of Criminal Prosecutions Database

Source: EPA Summary of Criminal Prosecutions Database

Figure 2 provides a graphical representation of total prosecutions adjudicated per U.S. state, 1983–2019. Alaska, Alabama, Arizona, Delaware, Georgia, Hawaii, Iowa, Idaho, Indiana, Louisiana, Massachusetts, Maine, Minnesota, Mississippi, Montana, North Dakota, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, and Wyoming have no prosecutions settled over the past thirty-seven years. More cases were settled in Missouri (10) than in any other state, followed by Pennsylvania (8), New York (7), and Ohio (6). No cases are settled in Washington D.C. or U.S. Territories in the data. The average number of prosecutions adjudicated was 1.4 across the data.

Figure 2. Total TSCA Criminal Prosecutions by U.S. State, 1983–2019.



Source: EPA Summary of Criminal Prosecutions Database

In Table 1 we explore total prosecutions adjudicated within and across U.S. states, 1983–2019, as well as other charging statutes used by prosecutors in conjunction with the TSCA in the dataset. We explore prosecuted prosecutions across TSCA plus CAA, RCRA, CWA, CERCLA, and FIFRA. There were no FIFRA prosecutions, so this category is eliminated from the table. In one case against Coast-to-Coast, Inc., the state cannot be determined, and that case is not represented in the table.⁵⁶

Table 1. Total TSCA Criminal Prosecutions by U.S. State and Territory Plus Additional Charging Statutes, 1983–2019.

| <u>State</u> | <u>TOTAL TSCA</u> | <u>CAA</u> | <u>RCRA</u> | <u>CWA</u> | <u>CERCLA</u> |
|--------------|-------------------|------------|-------------|------------|---------------|
| AK | 0 | 0 | 0 | 0 | 0 |
| AL | 0 | 0 | 0 | 0 | 0 |
| AR | 1 | 0 | 1 | 1 | 1 |

⁵⁶ No. 3:03M330. The case against Coast-to-Coast, Inc. and Manuel Cedeno were for the illegal removal of 10,000 linear feet of ACM from four apartment buildings of which the defendants were charged under the TSCA for the illegal removal. Coast-to-Coast pled guilty and was sentenced to pay a \$10,000 fine. Cedeno was sentenced to 2 months of incarceration, 12 months of probation, and a \$25,000 fine. In this case and in other TSCA + CAA, prosecutors may charge under either or both for illegal asbestos abatement. In a typical CAA prosecution for illegal removal of ACM, defendants can be charged with improper removal and disposal, and failure to notify, but the later can also be prosecuted under CERCLA as well.

| | | | | | |
|----|----|---|---|---|---|
| AZ | 0 | 0 | 0 | 0 | 0 |
| CA | 4 | 0 | 1 | 0 | 0 |
| CO | 1 | 0 | 0 | 0 | 0 |
| CT | 3 | 0 | 0 | 0 | 0 |
| DE | 0 | 0 | 0 | 0 | 0 |
| FL | 1 | 0 | 0 | 0 | 0 |
| GA | 0 | 0 | 0 | 0 | 0 |
| HI | 0 | 0 | 0 | 0 | 0 |
| IA | 0 | 0 | 0 | 0 | 0 |
| ID | 0 | 0 | 0 | 0 | 0 |
| IL | 1 | 1 | 0 | 0 | 0 |
| IN | 0 | 0 | 0 | 0 | 0 |
| KS | 1 | 0 | 0 | 0 | 1 |
| KY | 1 | 1 | 0 | 0 | 0 |
| LA | 0 | 0 | 0 | 0 | 0 |
| MA | 0 | 0 | 0 | 0 | 0 |
| MD | 2 | 1 | 0 | 0 | 0 |
| ME | 0 | 0 | 0 | 0 | 0 |
| MI | 3 | 0 | 0 | 0 | 0 |
| MN | 0 | 0 | 0 | 0 | 0 |
| MO | 10 | 1 | 1 | 0 | 0 |
| MS | 0 | 0 | 0 | 0 | 0 |
| MT | 0 | 0 | 0 | 0 | 0 |
| NC | 1 | 0 | 0 | 0 | 0 |
| ND | 0 | 0 | 0 | 0 | 0 |
| NE | 2 | 0 | 0 | 0 | 0 |
| NH | 1 | 0 | 0 | 0 | 0 |
| NJ | 1 | 0 | 0 | 0 | 0 |
| NM | 0 | 0 | 0 | 0 | 0 |
| NV | 2 | 0 | 0 | 0 | 0 |
| NY | 7 | 2 | 0 | 0 | 0 |
| OH | 6 | 0 | 0 | 0 | 0 |
| OK | 0 | 0 | 0 | 0 | 0 |
| OR | 2 | 0 | 0 | 0 | 1 |
| PA | 8 | 3 | 0 | 0 | 1 |
| RI | 2 | 1 | 1 | 1 | 2 |
| SC | 0 | 0 | 0 | 0 | 0 |
| SD | 0 | 0 | 0 | 0 | 0 |
| TN | 0 | 0 | 0 | 0 | 0 |
| TX | 2 | 0 | 1 | 0 | 1 |
| UT | 1 | 0 | 1 | 0 | 0 |

| | | | | | |
|---------|----------|----------|----------|----------|----------|
| VA | 1 | 0 | 0 | 0 | 0 |
| VT | 0 | 0 | 0 | 0 | 0 |
| WA | 4 | 0 | 1 | 0 | 1 |
| WI | 1 | 0 | 1 | 0 | 0 |
| WV | 2 | 1 | 0 | 0 | 0 |
| WY | 0 | 0 | 0 | 0 | 0 |
| Unknown | <u>1</u> | <u>0</u> | <u>0</u> | <u>0</u> | <u>0</u> |
| Total | 72 | 11 | 8 | 2 | 8 |

Source: EPA Summary of Criminal Prosecutions Database. Note: In one case against principal defendant Coast-to-Coast, Inc., it is not possible to determine the state or territory of the prosecution.

We find eleven examples of the TSCA + CAA prosecutorial combination in our dataset. A case example of this strategy is John D. Crededio sentenced in Illinois in 2004. Crededio was charged for illegal removal of ACM and failure to notify EPA in a timely manner of the removal. He was charged under the CAA and the TSCA for illegal removal of a hazardous substance and failure to notify.⁵⁷

A TSCA + RCRA case example was the prosecution against Merlyn Pollock in Missouri in 1987. Pollock owned the Posch Foundry and chemicals from the Foundry were found in a sanitary landfill and abandoned in an open field. He was charged with two counts under the TSCA and one count under RCRA for the illegal disposal of the regulated chemicals.⁵⁸ We coded eight TSCA + RCRA cases in the dataset.

We coded two TSCA + CWA cases in the dataset. Thompson Center Arms was prosecuted and sentenced in New Hampshire in 1985 for dumping hazardous waste in the

57 N.D. Illinois 03-CR0674. Crededio was sentenced to 120 days of home confinement, 60 days of community confinement, 36 months of probation, and a \$20,000 fine.

58 W.D. Missouri 87-00148-1-CR-W-8. Pollock was sentenced to 12 months of probation, on each count, to be served concurrently, a \$25 administrative fine on each count, and a \$35,000 fine.

Coheco River and improperly storing and labeling PCBs. The firearms manufacturer was indicted for the illegal discharge under the CWA, false statements, conspiracy, three counts of failing to maintain recordkeeping requirements for PCBs under the TSCA, illegal disposal of hazardous waste without a permit under RCRA, and failure to notify of the release of a toxic substance under CERCLA.⁵⁹

Robert E. Derecktor of Rhode Island, Inc., and its owner Robert Derecktor operated a shipyard for building and repairing ships in Middletown, Rhode Island. The defendant owned a farm in Portsmouth and was charged for illegal disposal of transformers containing PCBs on the property. The defendants were charged with the illegal disposal of PCBs under the TSCA, failure to report the release under CERCLA, illegal disposal without a permit under RCRA, conspiracy, and violation of NESHAPS workplace standards under the CAA for illegal asbestos removal.⁶⁰

We coded eight cases where TSCA was used in conjunction with CERCLA to prosecute defendants. Bert Michael Willard had been hired to clean out a warehouse and dumped asbestos and other toxic materials near a dirt road in Maple Valley, Washington. Willard was charged with failure to provide proper notice of the release of a hazardous substance and the illegal disposal of PCBs and asbestos without a permit, violations of the TSCA, RCRA, and CERCLA.⁶¹

In addition to using major environmental statutes to charge defendants, prosecutors also used a variety of Title 18 and other criminal charging statutes in these TSCA cases. We catalog

59 W.D. Arkansas CR-92-200014. The defendant was sentenced to pay a \$4,000 fine on each Clean Water Act count (15 counts) plus \$7,500 on each CERCLA count (2 counts) for total of \$75,000.

60 D. Rhode Island 86-022. Derecktor, Inc., was sentenced to pay a \$600,000 fine. Robert Derecktor was sentenced to a \$75,000 fine and to 60 months of probation.

61 W.D. Washington 90-407M and CR-90-196. Willard was sentenced to 6 months of home detention, 60 months of probation, 200 hours of community service, \$15,000 restitution, and order to pay \$50 to the Crime Victim Fund.

these in Table 2. The most prevalent example is charging defendants with false statements generally or under the TSCA or another environmental statute. In these cases, charging defendants with false statements typically came from lying to prosecutors about a crime during the investigation, of false reporting. We find that 19% of cases involve charging at least one defendant with false statements in the dataset. Defendants can be charged with multiple Title 18 violations in the same case.

Table 2. Common Criminal Charges in TSCA Criminal Prosecutions, 1983–2019.

| <u>Statute</u> | <u>Number of Cases</u> | <u>Percentage of Total</u> |
|-------------------|------------------------|----------------------------|
| False Statements* | 14 | 19% |
| Conspiracy | 12 | 17% |
| Fraud** | 8 | 11% |
| RICO | 2 | 3% |

Source: EPA Summary of Criminal Prosecutions Database. Note: Percentages are rounded. Defendants in a case may be charged with multiple violations. *Include false statements and falsification of records **Includes mail, wire, and tax fraud.

Bryan Fabian was the owner of Americlean. The company sold used oil to clients without determining whether the oil met regulatory specifications, in an attempt to defraud his customers and falsifying analytical reports in the commission of the fraudulent business dealings. The defendants were charged in 1999 with wire fraud, false statements, and then in 2000 under the TSCA for shipping a misbranded hazardous substance.⁶²

In 17% of the cases defendants were charged with conspiracy. Dennis W. Nix was president of AmerEco Environmental Services, Inc., Kingsville, Missouri. And was in the

⁶² D. Nevada CRN-99-0163-HDM-RAM. Fabian was sentenced to 72 months of probation, a \$2,000 fine, and \$1,800 in restitution to Chemical Lime Company. Americlean was sentenced to a pay a \$2,000 fine and ordered to pay \$1,800 in restitution to Chemical Lime Company.

business of disposing of PCBs. AmerEco contracted with the U.S. Department of Defense to dispose of electrical transformers containing PCBs but engaged in illegal disposal of the transformers. Nix was charged with conspiracy and illegal disposal under the TSCA, given the transformers contained PCBs.⁶³ In 11% of cases defendants were charged with fraud in conjunction with charges under the TSCA. Indoor Air Quality, Inc. and Wallace Heidelberg illegally removed asbestos during a renovation project at a church in Redhill, PA. They were charged in 2005 with mail fraud, false statements, and the CAA and TSCA for the illegal abatement.⁶⁴

In two cases defendants are charged under Racketeer Influenced and Corrupt Organizations Act (RICO).⁶⁵ Both of these cases involve using RICO, CAA and TSCA to prosecute organizations for extensive asbestos abatement fraud schemes. One is against principal defendant Eric C. Farbert and five other co-defendants in New York. The case ties to another against Alexander Salvagno and Analytical Laboratories of Albany (ALA), who engaged in a ten-year conspiracy to illegally remove and dispose of ACM at hundreds of buildings in New York and submit false air monitoring reports for AAR Contractor, Inc., owned by Salvagno. In

63 W.D. Missouri 92-00004-01-CR-W. Nix was sentenced to four months of house arrest for each count to run concurrently (2 counts), 36 months of probation for each count to run concurrently, and a \$50 special assessment. PCBs were common in many applications, but their toxic effects became apparent, and the new manufacture was banned by 1979. PCBs were used in many enclosed applications, such as vacuum pumps and hydraulic fluids, but one of the more ubiquitous applications was the use in electric power transformers. A clear trend in the cases is the illegal disposal of power transformers by contractors that saved money by burying them rather than paying the cost for proper disposal. PCBs act on living creatures in the same manner, demonstrate clear carcinogenic effects, and had analogous applications in commerce.

64 E.D. Pennsylvania 05-CR-00472. In July of 2006 the company was sentenced to 24 months of probation, a \$1,200 special assessment fee, restitution in the amount of \$20,771 in joint and several with Heidelberg, to the homeowners and workers affected by the illegal abatement, and a fine of \$100,000. Heidelberg was sentenced to 24 months of incarceration, 36 months of probation, a \$300 special assessment fee, \$20,770 in joint and several with Indoor Air Quality, Inc. restitution to the affect homeowners and workers, and a \$5,000 fine.

65 Racketeer Influenced and Corrupt Organizations Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-3 (codified at 18 U.S.C. § 1962).

these cases, defendants were charged under RICO, for conspiracy, false statements, CAA, TSCA, and income tax fraud.⁶⁶

Table 3 provides supplemental data on the cases. We find five cases in the dataset where individuals are killed or injured during the commission of an environmental crime. All of these cases involve children being exposed to lead-based paint. Total defendants prosecuted equaled 133 or about 1.8 per case. We catalog 35% of cases as having a company as the principal defendant and in 36% of cases defendants were charged with a non-environmental criminal charge.

Table 3. Supplementary Data in TSCA Criminal Prosecutions, 1983-2019.

| <u>Case Description</u> | <u>Total</u> | <u>Percentage of Total</u> |
|---|--------------|----------------------------|
| Cases with Individuals Killed or Injured | 5 | 7% |
| Defendants Prosecuted | 133 | - |
| Cases with Companies as Primary Defendant | 25 | 35% |
| Cases with Non-Environmental Criminal Charges | 26 | 36% |

Source: EPA Summary of Criminal Prosecutions Database

JTA Real Estate Brokerage and Property managed an apartment unit in New Hampshire where a two-and-a-half-year-old boy died of lead poisoning. The company did not notify or obtain signed disclosure forms from parents regarding the presence of lead paint in the property.

⁶⁶ N.D. New York 5:02-CR-51 (both cases are listed under the above designation in the dataset but occurred within two separate cases. The first is prosecuted under the principal defendant Eric C. Farbent, and the case against Salvagno is prosecuted under principal defendant AAR Contractor, Inc. The cases can be found separately by searching the database case by case for each fiscal year. The case was mentioned in the New York Times.); Michelle York, *Father and Son Faked Removal of Asbestos, Workers Say*, N.Y. TIMES (Feb. 3, 2014), <https://www.nytimes.com/2004/02/03/nyregion/father-and-son-faked-removal-of-asbestos-workers-say.html>.

The defendant was charged under TSCA for the lead paint violation and obstruction.⁶⁷ Bruce C. Zauf was prosecuted under similar circumstances for failing to disclose the presence of lead-based paint to tenants in his eleven rental properties. At least four cases of children testing positive for lead poisoning were confirmed. Zauf was sentenced in Missouri in 2006 under the TSCA.⁶⁸ Three other cases were related to injuries from lead-based paint.⁶⁹

In Table 4 we catalog total punishments assessed to individual and company defendants in TSCA prosecutions, 1983–2019. Individuals were assessed fines, or other monetary penalties in fifty-six cases in our data or 78% of cases. Total fines exceeded \$113 million with an average penalty of about \$2 million. In fifty cases, individuals were assessed probation at sentencing totaling 2,616 months or fifty-two months of probation on average per case. In twenty-five cases individuals were sentenced to incarceration totally 1,932 months or an average of seventy-seven months per case. In eleven cases individual defendants were sentenced to home confinement totaling fifty-nine months, three cases of community corrections totaling fifty months, and thirteen cases of community service totaling 3,070 hours. Companies were sentenced to both monetary penalties and probation in our dataset. In twenty-three cases or 32% of total cases

67 D. New Hampshire 01-123-02-M. The company was sentenced to 36 months of probation and to pay a \$40,000 fine. Lead paint is another example of the “in place” regulatory strategy applied to other toxic substances such as asbestos. As long as it is not disturbed it need not be removed, but knowledge of its presence requires responsible parties to issue the appropriate disclosures. Children are particularly susceptible to lead-based paint poisoning by ingesting paint flakes or inhaling disturbed particles.

68 E.D. Missouri 4:05CR530 RWS. Zauf was a sentenced to 36 months of probation, ordered to perform 100 hours of community service, pay a \$25 special assessment fee, and a \$500 fine.

69 E.D. Michigan 10CR20247. Donald Mickey Patterson was a lead inspector. He demanded bribes from individuals for falsified abatement certificates that he would issue without actually removing the paint. His actions injured a child that was exposed to lead-based paint. D. Maryland L-11-03330. Cephus Moses Murrell had been cited numerous times by the Maryland Department of the Environment, Lead Enforcement Division and the Baltimore City Health Department due to children living in his rental units that were tested and presented elevated blood lead levels. W.D. New York 17-MJ-1103. Maureen Walck was a realtor that falsified lead-based paint disclosure forms to close on a residential property on April 11, 2014. In September 2015, the new owners’ child was diagnosed with lead poisoning. The investigation revealed the defendant had knowledge of the disclosure from the previous owner, but having failed to close on the property previously, did not provide that disclosure to the current owners that purchased the home.

companies were penalized over \$56 million or an average of about \$2.4 million per case.

Companies received probation in fifteen cases totaling 588 months. This represents an average of thirty-nine months per prosecution.⁷⁰

Table 4. Total Penalties Assessed in TSCA Criminal Prosecutions, 1983-2019.

| <u>Penalty</u> | <u>Number of Cases</u> | <u>Total</u> | <u>Average</u> |
|--------------------------------|------------------------|--------------|----------------|
| Individual Fines (\$) | 56 | 113,715,663 | 2,030,637 |
| Individual Probation (Months) | 50 | 2,616 | 52 |
| Incarceration (Months) | 25 | 1,932 | 77 |
| Company Fines (\$) | 23 | 56,209,504 | 2,443,891 |
| Company Probation (Months) | 15 | 588 | 39 |
| Home Confinement (Months) | 11 | 59 | 5 |
| Community Corrections (Months) | 3 | 50 | 17 |
| Community Service (Hours) | 13 | 3,070 | 236 |

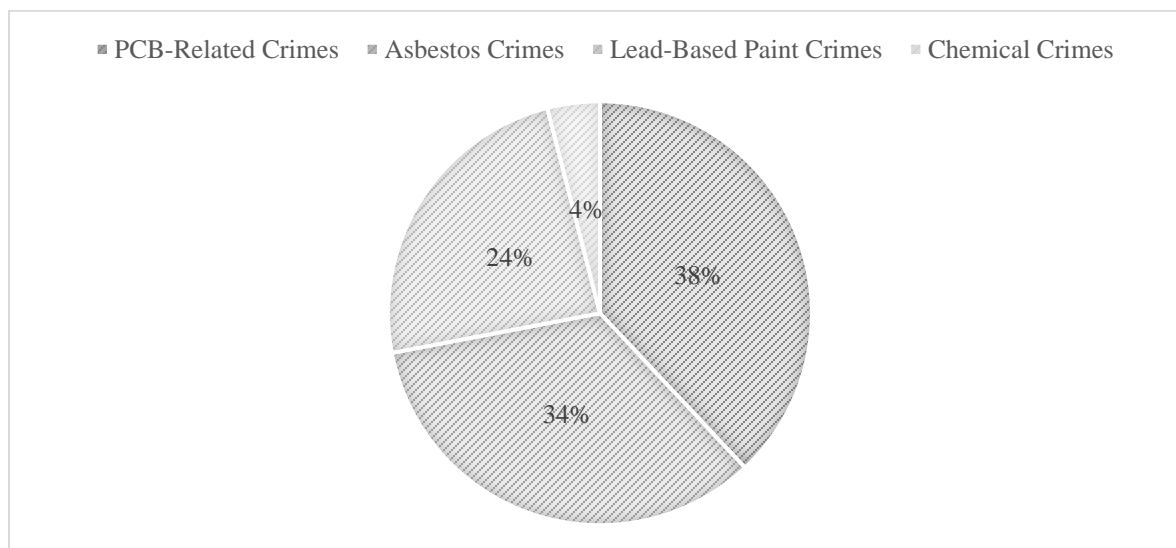
Source: EPA Summary of Criminal Prosecutions Database.

70 The case against AAR Contractor, Inc. and the Salvagnos (N.D. New York 5:02-CR-51), as well as Eric C. Farbent were cumulatively the largest penalty cases in the data. AAR Contractor was sentenced to pay a \$4,400 special assessment fee, forfeit \$2,033,457.70, and pay \$22,875,575.46 in restitution (jointly and severally with both Alexander Salvagno and Raul Salvagno). Alexander Salvagno was sentenced to 300 months incarceration, 36 months of probation, ordered to pay a \$1,400 special assessment fee, forfeit \$2,033,457.70, and pay \$22,875,575.46 in restitution. Raul Salvagno was sentenced to 235 months incarceration, 36 months of probation, ordered to pay a \$400 special assessment fee, forfeit \$2,033,457.70, and pay \$22,875,575.46 in restitution. Co-defendant Michael Shanahan was sentenced to 24 months incarceration, 24 months of probation, and ordered to pay a \$200 special assessment fee. Co-defendant Thomas Reed was sentenced to 60 months incarceration, 36 months of probation, a \$1,400 special assessment fee, and \$22,875,575.46 in restitution.

The case against Eric C. Farbent and five other co-defendants is cross-referenced in the EPA's *Summary of Criminal Prosecutions* and given the same case number but appears separately in the database. Farbent was sentenced to 8 months incarceration, 24 months of probation, and to perform 200 hours of community service. Robert O' Brey was sentenced to 15 months incarceration, 24 months of probation, and ordered to perform 200 hours of community service. Gary Alvord was sentenced to 15 months incarceration, 24 months of probation, and ordered to perform 200 hours of community service. Timothy Carroll was sentenced to 26 months incarceration, 24 months of probation, and ordered to perform 200 hours of community service. Alison Gardner was sentenced to 36 months of probation and ordered to perform 300 hours of community service. Philippe Goyeau was sentenced to 8 months incarceration and 24 months of probation.

In Figure 3 we develop a typology of TSCA criminal prosecutions in order to identify common characteristics across the cases and general themes that emerge in the data. We focus on developing this typology based on the central offense and offenders in each case and aggregate those characteristics until we came upon four key themes that explain the types of cases prosecuted over the last thirty-five years under the TSCA. These include illegal use of PCBs, asbestos crimes, lead-based paint crimes, and chemical crimes. All four of these areas correspond directly to the agency’s Compliance Monitoring Strategy for the TSCA, particularly the first three categories as the last is very general. This typology helps to show how prosecutors enforced this strategy in a variety of ways within these areas over time.

Figure 3. Typology of TSCA Criminal Prosecutions.



Source: EPA Summary of Criminal Prosecutions Database. Note: In a 2015 case against Aurelio Rafael (Raffi) Martinez it is unclear exactly how he violated the TSCA and the case is not included in the figure.

In Quadrant I we categorize twenty-seven prosecutions or approximately 38% of the total cases from 1983–2019 as PCBs Crimes. As PCBs were widely used in a number of applications in the United States until their carcinogenic effects were recognized by the U.S. Congress, which

banned their manufacture in 1979, there are a number of crimes federal prosecutors pursued related to managing PCBs. This prosecutorial strategy stemmed from the legal availability or grandfathering of PCBs in many industrial and commercial applications as long as they were not disturbed or kept “in place” as a remediation strategy. We define this category as illegal individual actions related to the recordkeeping, storage, transportation, and disposal of PCBs. For company defendants we include illegal distribution of PCBs, as well as these categories. These areas represent the universe of PCB-related crime we found prosecutors pursuing in the data since 1983. In fifteen cases individuals were the principal defendants in these crimes and in seventeen cases companies were the principal defendants.

One of the primary commercial uses of PCBs that were ubiquitous in the environment and still exist today are electrical transformers. Given the sheer number and size we found that the most prevalent crime in this Quadrant dealt with the illegal disposal of electrical transformers to avoid the high costs of proper disposal in a specialized landfill. In twenty-two cases illegal disposal was the central crime in the prosecution and many of these involved electrical transformers containing PCBs. Custom Food Machinery was sentenced in California in 1987 along with co-defendants Ronald McNeil, and employee Eugene Welch for the illegal burial of a transformer that was leaking PCBs. They were charged under the TSCA for illegal disposal.⁷¹ Cambridge Mill Products, Inc. and co-defendant Charles LeBeau, Jr. were prosecuted in Ohio

71 N.D. California 87-20002. The company was fined \$15,000 and sentenced to 36 months of probation. McNeil was fined \$5,000 and sentenced to 24 months of probation and Welch was sentenced to 24 months of probation. Other case examples of illegal transformer disposal include Frank Krum (M.D. Pennsylvania 87-0071), John Pizzuto (S.D. Ohio CR 190-014), and Dennis Nix (W.D. Missouri 92-00004-01-CR-W).

and sentenced in 1986 for dumping truckloads of drummed waste containing PCBs. They were charged under the TSCA for the illegal disposal.⁷²

Failure to notify was often a CERCLA provision used by prosecutors in conjunction with an illegal disposal charge under TSCA. Inman & Associates and Vice President John McMichen were co-defendants in a case related to contracting with the U.S. Department of the Navy to replace an electrical switching station at the Naval Air Station, in Corpus Christi, Texas. The job included the removal and replacement of PCB capacitor parts of the switching station. McMichen was charged with illegal disposal of the capacitors of the grounds of the Naval Air Station and the company was charged under CERCLA for failure to notify of the release of a hazardous substance.⁷³

Illegal storage or improper recordkeeping related to the storage of PCBs was another prosecutorial strategy in the data. Spirtas Wrecking Company was sentenced in Missouri in 1992 for improperly labeling drums that contained PCBs, operating a facility containing PCBs without maintaining proper records, and giving false statements to investigators.⁷⁴ Harold Rockaway was the owner of a mobile PCB decontamination machine. He illegally stored hazardous wastes in a warehouse and transported them via railroad from Pine Bluff, Tennessee to Houston, Texas. He was charged under RCRA for the illegal storage and TSCA for the illegal transport. Rockaway passed away prior to sentencing.⁷⁵ In a singular case related to the illegal importation and

72 N.D. Ohio 85-5089L. Both defendants were each sentenced to joint and several liability for a \$25,000 fine, cleanup costs totaling \$23,000, and LeBeau was sentenced to serve 90 days probation.

73 S.D. Texas C-90-29. Defendant McMichen was sentenced to a fine of \$5,000, plus \$25 special assessment. The company was fined \$80,000 (\$40,000 suspended), 36 months supervised probation, and fined a \$200 special assessment.

74 E.D. Missouri 4-92CR00708. The company was sentenced to a fine of \$200,000 suspended to \$125,000, restitution of \$75,580, a \$700 special assessment, and 36 months of probation on each count to run concurrently.

75 S.D. Texas H-92-282.

distribution of capacitors containing PCBs, CSI technologies was charged with smuggling and illegal distribution of the capacitors they obtained from Columbia.⁷⁶

Quadrant II categorizes 24 prosecutions (34% of cases) as Asbestos Crimes. These are actions related to illegal certification, notification, storage, removal, and disposal of ACM. We find seventeen cases where individuals are the principal defendant and in seven cases where companies are the principal defendant. Typically, illegal abatement or disposal are prosecuted under the CAA, but they can also be prosecuted in conjunction with the TSCA in the above situations.

The prosecution of Isaac Cole in Washington is a case example of companies providing asbestos training courses for workers and supervisors in exchange for a course fee. Cole, owner of Cole & Associates, Inc. Cole's company falsified documents stating individuals had gone through their course between 2013–2016, when in fact they did not attend nor complete the training. Cole was prosecuted under the AHERA for the false certification.⁷⁷ In a similar case, John Bruce owned Environmental Training and Consulting, Inc. of Vernon and Wallingford, Connecticut. The company performed post-asbestos remedial clearance monitoring and training for individuals that wanted to be certified to perform asbestos remediation work. Bruce sold fraudulent certifications as was prosecuted under the TSCA for violations of AHERA.⁷⁸ John Crededio was sentenced in Illinois in 2004 for illegal asbestos abatement and failure to notify

76 S.D. California 85-0325. The company was sentenced in California to pay a \$30,000 fine in 1985 and ordered to destroy all seized capacitors.

77 W.D. Washington CR16-270-JCC. The defendant was sentenced to five years of probation, 90 days home confinement, and to not work in the asbestos training industry during his probation period.

78 D. Connecticut 309-CR00218-HBF. Bruce was sentenced to 24 months of probation and a \$800 fine. Guido A Cortes-Rodriguez (D. Connecticut 3:16-CR-234-RNC) was prosecuted in Connecticut and sentenced in 2017 for selling both asbestos remediation certifications and lead abatement certifications to individuals that did not complete the course in exchange for cash payments. An undercover FBI sting uncovered the fraud.

authorities in advance of the removal. He was prosecuted under the CAA for the abatement and TSCA for an AHERA violation related to the notification and abatement with untrained workers.⁷⁹ Leeds Industrial Park was charged under the TSCA for the illegal storage of bags of ACM in Leeds, Kansas.⁸⁰

Common scenarios in asbestos disposal include James Clemensen, who was prosecuted in Washington for the illegal removal of ACM at the Agape School for Boys on a converted military base in Othello, Washington. The defendant buried the ACM on-site between 1993 and 1995 when he operated the school. In July 1995 he paid a contractor to exhume and properly dispose of the ACM. He was charged under the TSCA for the illegal abatement.⁸¹ Eugene A. Carcone and Michael J. Cofini were prosecuted in New York for falsifying reports to conceal the illegal removal and disposal of eight bags of asbestos waste removed from an elementary school in Rome, New York.⁸²

In Quadrant III we coded seventeen cases that centered on lead-based paint crimes. Title IV of the TSCA gives the EPA authority to regulate lead-based paint as does Title IV the Residential Lead-Based Paint Hazard Reduction Act of 1992.⁸³ We find that in fourteen cases

79 N.D. Illinois 03-CR0674. The defendant was sentenced to 120 days home confinement, 60 days community confinement, 36 months of probation, and a \$20,000 fine.

80 W.D. Missouri 01-00229-01/01CR-W-2. In 2002, Leeds Industrial Park was sentenced to 12 months of probation, a \$125 special assessment fee, and a \$5,000 fine.

81 E.D. Washington CR 98-6006-RHW. In this particular case, Clemensen was cited for not developing an asbestos management plan as required under AHERA (section II of the TSCA). Clemensen was sentenced to 36 months of probation and ordered to pay \$1,500 in federal fines.

82 Carcone (N.D. New York 5:06-CR-339); Cofini (N.D. New York 5:06-CR-340). In 2007, Carcone was sentenced to pay a \$3,000 fine and a \$25 special assessment fee. Cofini was sentenced to pay a \$3,000 and a \$25 special assessment fee. Both defendants were required to surrender their New York State asbestos license. EPA Region 2 closed a significant number of illegal asbestos removal and disposal cases, including major operations run by organized crime. Two cases previously mentioned were against principal defendants Eric Farbert and AAR Contractors and owners Alexander and Raul Salvagno, both RICO prosecutions. Salvagno (N.D. New York 5:02-CR-51).

83 Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3897 o 3926 (codified at 42 U.S.C. § 4851). Congress passed the Act in response to estimates that as many as three million

individuals were prosecuted for illegal inspection, certification, or removal of lead-based paint. In three cases, companies were the principal defendants in cases related to notification and/or removal of lead-based paint. In eleven cases, failure to notify was the central crime, in four cases fraudulent certification or inspection, and in two cases improper removal was the central crime.

Martin Graves Kuna advertised himself as a certified lead-based paint inspector.⁸⁴ He conducted more than ten inspections, including one where he provided the homeowner a false negative test for lead.⁸⁵ At trial it was found that in at least one instance where he misrepresented himself and failed to perform a proper test a child was tested and found to have elevated blood lead levels.⁸⁶ John Higuera the owner of the home where the child lived admitted he provided the EPA falsified documents.⁸⁷ The defendant was charged with wire fraud in the case.⁸⁸ Ira Eisenstein was prosecuted in New Jersey for performing lead inspections on houses in the state without proper certification. He was charged under the TSCA and sentenced in 2013 to twenty-four months probation, ordered to pay a \$75 special assessment, and a \$1,500 fine.⁸⁹ Bitner Brothers Construction was prosecuted in Pennsylvania and sentenced in 2018 under the TSCA. The company conducted power grinding without a shroud or containment system to control particles from lead-based paint during construction.⁹⁰

children were estimated to have low-level lead poisoning at the time and this was disproportionate to low-income and minority children living in older buildings, who were exposed to chipped or deteriorating lead paint. *Id.*

84 *Summary of Criminal Prosecutions: (1) Martin Graves Kuna, (2) John Higuera, EPA*, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2482 (last updated Feb. 21, 2021).

85 *Id.*

86 *Id.*

87 *Id.*

88 Kuna (D. Oregon 313-CR-0050 SI) (holding defendant sentenced to 14 months incarceration and ordered to pay \$2,372 in restitution to the victims); Higuera (D. Oregon 313-CR-377-MO) (charging Higuera under the TSCA and sentenced to 12 months probation).

89 *See Mercer County N.J. Man Admits Performing Illegal Lead Inspections in Homes*, U.S. ATT'YS OFF. (Dec. 12, 2012), <https://www.justice.gov/archive/usao/nj/Press/files/Eisenstein,%20Ira%20Plea%20News%20Release.html>.

90 M.D. Pennsylvania 1:18-CR-00157 (sentencing the defendant to 2 years probation and \$10,000 fine).

Section 1018 of the Residential Lead-Based Hazard Reduction Act gives the EPA authority to require the disclosure of lead-based paint to potential tenants and buyers.⁹¹ The previously mentioned case against JTA Real Estate is the case in the data focused on failure to notify.⁹² American Mortgage Company was prosecuted in Missouri for fraudulently disclosing no knowledge of lead-based paint in an apartment building the defendant sold, although they had tested it for lead-based paint and had knowledge of the hazard.⁹³

In three cases we catalog prosecutions of chemical crimes not related to the other three quadrants. We define these in Quadrant IV as illegal individual actions related to the importation, shipping, and disposal of chemicals. All three of these cases are discussed above against Merlyn Pollock, Bryan Fabian, and Peiwen Zhou. The United States prosecuted Pollock for disposing of chemicals at a sanitary landfill and an abandoned field.⁹⁴ The United States prosecuted Bryan Fabian and his company, Americlean, for falsifying lab reports and shipping a misbranded hazardous substance in interstate commerce to defraud customers.⁹⁵ Zhou imported chemicals regulated under the TSCA but instructed employees not to file import certifications.⁹⁶

91 42 U.S.C. § 4852d.

92 D. New Hampshire 01-123-02-M.

93 E.D. Missouri 4:05-CR-00613-RWS. EPA and the U.S. Department of Housing and Urban Development (HUD) promulgated disclosure provisions routinely encountered when buying or selling residential real estate. *See* Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9064, 9064-65 (Mar. 6, 1996). These disclosure rules require that: “(1) Sellers and lessors must provide purchasers and lessees with a lead hazard information pamphlet, as developed under section 406(a) of TSCA; (2) sellers and lessors must disclose the presence of known lead-based paint and/or lead-based paint hazards in such housing and provide purchasers and lessees with any lead hazard evaluation report available to the seller or lessor; (3) sellers must permit purchasers a 10-day opportunity to conduct a risk assessment or inspection for the presence of lead-based paint hazards; and (4) sales contracts must include an attached Lead Warning Statement and acknowledgment, signed by the purchaser.” *Id.*

94 W.D. Missouri 87-00148-1-CR-W-8.

95 D. Nevada CRN-99-0163-HDM-RAM.

96 N.D. California CR17-00091-JD.

CONCLUSION

The EPA's Compliance Monitoring Strategy for the TSCA focuses on PCBs, asbestos, lead-based paint, and new and existing chemicals. When analyzing the last thirty-seven years of prosecutions, we found that prosecutors used a variety of strategies to pursue crimes related to these areas, but primarily the first three categories. In our analysis we were able to categorize all TSCA prosecutions within these areas and the following primary themes emerged in the analysis.

The first theme is that TSCA prosecutions were infrequent. Annual prosecutions peaked in fiscal year 1994 at five prosecutions and never reached that number again. In many states not a single TSCA prosecution occurred since 1983. At ten, eight, and seven total prosecutions, Missouri, Pennsylvania, and New York, respectively, contained the most prosecutions and even then, these states averaged less than one prosecution per year.

The second theme we uncovered is that PCB-related prosecutions were the most frequent crime prosecuted under the TSCA. In about 38% of cases across thirty-seven years, prosecutors pursued crimes related to illegal recordkeeping, notification, storage, transport, disposal, and distribution of PCBs. The most common offense was the illegal disposal of PCBs, particularly electrical transformers and capacitors that contained PCBs prior to the ban on manufacture by Congress in 1979.

The third theme we found in the data is that a third of TSCA prosecutions revolve around asbestos crimes. While federal prosecutors often use the CAA to prosecute such crimes, AHERA gives the EPA authority under the TSCA to prosecute similar crimes as well. We found a variety of asbestos crimes in the data related to notification, certification, storage, removal, and disposal of ACM. While providing false asbestos certification or failure to notify cases appeared in the

data, the illegal disposal of ACM from schools, buildings, and other commercial and industrial applications was the most common category of offense in the data.

The fourth theme we uncovered was that about 24% of prosecutions were related to illegal actions related to lead-based paint. We found cases of illegal inspections, certifications, notification, and removal of lead-based paint in the data. In 65% of these cases failure to notify of lead-based paint hazards was the central crime in the prosecution, followed by fraudulent certification or operating without a proper certification, and in only two cases was improper removal at the center of the prosecution.

The final finding of note is that the four categories of crimes prosecutors pursued mostly match the EPA's Compliance Monitoring Strategy for the TSCA. The regulation of new and existing chemicals as a compliance monitoring strategy under the TSCA was the only category that very uncommon. We find three cases related to the illegal importation, shipping, or disposal of chemicals. More generally, that strategy was greatly reflected in the pursuit of crimes related to PCBs, asbestos, and lead-based paint.

We conclude with suggestions for improving the criminal enforcement of TSCA. The first is additional resources for policing and prosecuting federal environmental crimes. EPA-CID employs only about 145 criminal investigators and DOJ-ECS employs roughly forty-three environmental crime prosecutors.⁹⁷ Without added resources, the reach of these agencies will be limited. The statutory minimum for criminal enforcement agents is 200 as set in 1990.⁹⁸ A good

⁹⁷ *Environmental Crimes Section*, *supra* note 7; *EPA CID Agent Count*, *supra* note 39.

⁹⁸ Pollution Prosecution Act of 1990, Pub. L. No. 101-593, 104 Stat. 2954 (codified at 42 U.S.C. § 4321).

start towards greater resources for policing environmental crimes would be to meet this minimum. Hiring additional prosecutors to support these efforts is warranted.

A second suggestion for improving enforcement is to involve the community. The likelihood of significant resources for enforcement materializing is low. Helping to develop community policing programs near large stationary sources of pollution may help increase an environmental police presence. Given communities bear the greatest environmental burden in the country and many are politically active, enjoining environmental justice communities through the EPA's Office of Environmental Justice (OEJ) is a good starting point to enhance a police presence.⁹⁹ OEJ could provide additional small grants for training and EPA could take seriously complaints by citizens and expand its efforts to respond to such complaints.¹⁰⁰ This approach is less germane to TSCA enforcement than the CAA or CWA, but it would provide a meaningful path towards engaging these communities in environmental policing work in an area with very limited resources.

A final suggestion for improving enforcement is to generate greater public salience for the activities of environmental law enforcement agencies. The mass media rarely reports on environmental crime unless there is a major accident or explosion and the public often fails to see the real impacts of environmental crime on society as severe as street crime.¹⁰¹ Until the efforts of these agencies are widely disseminated and perceptions changed about the terrible

99 *Environmental Justice Small Grants Program*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-small-grants-program> (last updated Oct. 22, 2020).

100 *Criminal Enforcement Program Overview*, EPA 6–7 (Oct. 2011), <https://19january2017snapshot.epa.gov/sites/production/files/documents/oceft-overview-2011.pdf>. EPA's "Report a Violation" website resulted in thirty-five cases being opened and six referred for successful prosecution in the first decade of the site's existence. *Id.* This program could be expanded.

101 Melissa L. Jarrell, *Environmental Crime and Injustice: Media Coverage of a Landmark Environmental Crime Case*, 6 SW. J. OF CRIM. JUST. 25, 27–28 (2009).

impacts of environmental crime on society, it will be easy for Congress to dismiss the need to better fund these important agencies.

Improving resources, community policing, and salience will help to improve the criminal enforcement environmental law broadly. None of these factors will address the greater failings of TSCA. TSCA was meant to be a wide-reaching and comprehensive attempt by Congress to regulate chemicals before coming to market.¹⁰² The Act was meant to address failings in other federal laws passed in the 1970s to measure cumulative risk from ever-expanding chemical exposures.¹⁰³ TSCA in its original form had mostly failed to achieve these goals. The Lautenberg Amendments forced EPA to prioritize a list of chemical substances to undergo comprehensive review, but much of this process has been marred in controversy and conflict, with few chemical substances being banned historically in commerce.¹⁰⁴ With some 85,000 chemicals approved for distribution in the United States, there are still no routine assessments for public health risks or multiple exposures.¹⁰⁵ Improved criminal enforcement is thus one of many problems involved in reforming TSCA to protect public health and the environment. While the Lautenberg Act is step in the proper direction, EPA has done better historically to manage broader public health concerns, such as air pollution, asbestos, and wastewater, than the politics of banning a specific company's chemicals in commerce. Whether it has the organizational will and political support to do so, given its history as a regulatory organization caught between these forces, seems suspect.

102 Eichenberger, *supra* note 13, at 125–27.

103 Applegate, *supra* note 14, at 723–27.

104 *Problems with Current Law and the Lautenberg Act Fix*, ENV'T DEF. FUND (Apr. 29, 2015), https://www.edf.org/sites/default/files/tsca_vs._lautenberg_act_4-29-15.pdf.

105 Sanne H. Knudsen, *Regulating Cumulative Risk*, 101 MINN. L. REV. 2313, 2313–14 (2017).

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